

BRB No. 98-1210 BLA

ETHEL F. HOPKINS	)	
(o/b/o and Widow of WILLIAM R.	)	
HOPKINS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Ethel F. Hopkins, Charleston, West Virginia, *pro se*.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order on Modification - Denying Benefits (97-BLA-1539) of Administrative Law Judge Daniel L. Leland on a claim filed pursuant to the provisions of Title IV of the Federal

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<sup>1</sup> Claimant, Ethel F. Hopkins, is the widow of William R. Hopkins, the miner, who died on July 8, 1982. Director's Exhibit 7. The miner filed his application for benefits on November 12, 1980. Director's Exhibit 1. The widow filed her application for benefits on July 26, 1982. Director's Exhibit 2. Both claims are presently pending.

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The procedural posture of this case is set forth as follows. In the initial Decision and Order, Administrative Law Judge George A. Fath refused to adjudicate the miner's claim because there was no personal representative to pursue the deceased miner's claim. Instead, Administrative Law Judge Fath adjudicated the survivor's claim pursuant to 20 C.F.R. Part 718, found that there was no persuasive evidence to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and accordingly, denied benefits on the survivor's claim. Claimant appealed and the Board affirmed the finding, relevant to the survivor's claim, that claimant failed to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c), but remanded the case for reconsideration because Administrative Law Judge Fath erroneously failed to adjudicate the miner's claim. *Hopkins v. U.S. Steel Mine Co., Inc.*, BRB No. 88-4333 BLA (Jul. 25, 1991, J. Neusner dissenting) (unpub.); Director's Exhibit 51.

On remand, Administrative Law Judge Fath adjudicated the miner's claim pursuant to 20 C.F.R. Part 718 and credited the miner with "at least 26 years" of qualifying coal mine employment. Next, he found that, although claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2), and 718.203(b), she failed to demonstrate that the miner was totally disabled at 20 C.F.R. §718.204(c)(1)-(4), and consequently, Administrative Law Judge Fath denied benefits. Director's Exhibit 53. Thereafter, claimant appealed this decision to the Board, but while the appeal was pending, claimant filed a petition for modification with supporting medical evidence. Accordingly, the Board remanded the case to the district director for modification proceedings set forth at 20 C.F.R. §725.310. *Hopkins v. U.S. Steel Mine Co., Inc.*, BRB No. 92-1006 BLA (Sep. 15, 1992) (unpub. Order); Director's Exhibit 61.

On modification, Administrative Law Judge Edward Terhune Miller initially found that because the miner died ten years before claimant filed the modification petition, the only basis upon which to establish modification under Section 725.310 was a mistake in a determination of fact. Administrative Law Judge Miller examined the entire evidentiary record and concluded that, although claimant established the presence of pneumoconiosis arising out of coal mine employment, she failed to demonstrate total disability or death due to pneumoconiosis at Sections 718.204(c) and 718.205(c). Therefore, Administrative Law Judge Miller found no basis for modifying the prior denials in either the miner's or survivor's claims, and accordingly, denied benefits on both claims. Director's Exhibit 78. Claimant subsequently appealed, and the Board granted claimant's request to have her prior appeal of Administrative Law Judge Fath's decision reinstated and consolidated with her pending appeal of Administrative Law Judge Miller's decision (BRB Nos. 92-1006

BLA and 94-3882 BLA). With respect to Administrative Law Judge Fath's decision, the Board affirmed his total disability findings pursuant to Section 718.204(c)(1)-(3) as unchallenged on appeal, and also affirmed his Section 718.204(c)(4) finding as rational and supported by substantial evidence. With respect to Administrative Law Judge Miller's decision, the Board affirmed his determination that, because the evidence of record fails to establish total disability at Section 718.204(c) or death due to pneumoconiosis at Section 718.205(c), claimant failed to demonstrate either a change in conditions or a mistake in a determination of fact under Section 725.310. Accordingly, the Board affirmed both administrative law judges' decisions denying benefits on the miner's and the survivor's claims. *Hopkins v. U.S. Steel Mining Co., Inc.*, BRB Nos. 94-3882 BLA and 92-1006 BLA (Jun. 28, 1995) (unpub.); Director's Exhibit 85.

Subsequently, claimant requested reconsideration and modification of the Board's decision, and filed the medical report of Dr. Cohen. Director's Exhibits 86, 87. The Board again remanded the case for modification proceedings. *Hopkins v. U.S. Steel Mining Co., Inc.*, BRB Nos. 94-3882 BLA and 92-1006 BLA (Sep. 23, 1996) (unpub. Order); Director's Exhibit 89. On modification, Administrative Law Judge Leland (administrative law judge) found that the evidence of record failed to establish either that the miner was totally disabled pursuant to Section 718.204(c)(1)-(4) or that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and that therefore, claimant failed to demonstrate a mistake in a determination of fact at Section 725.310. Accordingly, the administrative law judge denied benefits on both claims.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to this *pro se* appeal, urging affirmance of the denial of modification on both claims. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, the administrative law judge found that there was no basis on which to demonstrate a change in conditions because the miner died on July 8, 1982, before his claim had been denied, and because claimant was not eligible to file a survivor's

claim until after the miner's death. [1998] Decision and Order at 2. We affirm the administrative law judge's determination inasmuch as, in some Black Lung cases, such as the case at bar, modification may not be sustained based upon a change in conditions because it is not possible for the adjudicated condition to change. See *generally Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); see also *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996). Hence, we affirm the administrative law judge's determination that modification on the basis of a change in conditions cannot be demonstrated in this case.

With respect to the miner's claim, we address the issue of whether there was a mistake in a determination of fact regarding total disability pursuant to Section 718.204(c). The administrative law judge properly found that the two pulmonary function studies of record produced non-qualifying values,<sup>2</sup> therefore, we affirm his finding that total disability was not demonstrated under Section 718.204(c)(1). 20 C.F.R. §718.204(c)(1); see *Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986); [1998] Decision and Order at 3; Director's Exhibits 12, 29, 32, 40. Similarly, the administrative law judge properly found that the two blood gas studies of record yielded non-qualifying results, therefore, we affirm his finding that total disability is not demonstrated under Section 718.204(c)(2). 20 C.F.R. §718.204(c)(2); [1998] Decision and Order at 3; Director's Exhibit 12. Likewise, we affirm the administrative law judge's finding that total disability cannot be demonstrated under Section 718.204(c)(3) inasmuch as the record is devoid of evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(c)(3); [1998] Decision and Order at 3.

Pursuant to Section 718.204(c)(4), we affirm the administrative law judge's determination that the medical opinion evidence failed to demonstrate total disability. A review of the record reveals the opinions of four physicians that are relevant to Section 718.204(c)(4). Dr. Lewis, the miner's treating physician, and Dr. Cohen opined that the miner was totally disabled. Director's Exhibits 12, 29, 32, 58, 70, 74, 86. Dr. Castle opined that the miner was not totally disabled during his lifetime due to a pulmonary condition. Director's Exhibit 73. Dr. Hales reviewed the autopsy

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<sup>2</sup> A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed the table values. 20 C.F.R. §718.204(c)(1), (c)(2).

slides of the miner's chest organs and opined that the changes in the miner's lungs were too mild to have caused any respiratory symptoms or impairment. Director's Exhibits 27, 31. The administrative law judge, within a proper exercise of his discretion, found that Dr. Lewis' opinion was unsupported by the objective medical tests and contained an inadequate explanation as to how the miner's subjective complaints were caused by a respiratory impairment rather than coronary artery disease. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); [1998] Decision and Order at 3. Furthermore, the administrative law judge permissibly discounted the opinion of Dr. Cohen because Dr. Cohen was unable to examine the miner and the only basis for his opinion, that the miner was totally disabled, were diagnostic tests that were non-qualifying. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); [1998] Decision and Order at 3. The administrative law judge properly noted the respective medical expertise of Drs. Hales and Castle and reasonably found their opinions of no total disability entitled to dispositive weight inasmuch as these opinions were well reasoned and supported by objective evidence. See *Trumbo, supra*; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); see also *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998). Inasmuch as the administrative law judge properly found that total disability was not demonstrated under Section 718.204(c)(1)-(4), we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact under Section 725.310. See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26, (4th Cir. 1993); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994) (*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

With respect to the survivor's claim, we address the issue of whether there was a mistake in a determination of fact regarding death due to pneumoconiosis pursuant to Section 718.205(c). Relevant to Section 718.205(c), a review of the record reveals the opinions of seven physicians. Dr. Derboven authored the death certificate and listed the primary cause of death as cardiac arrest due to, or a consequence of arteriosclerotic heart disease, due to or a consequence of chronic obstructive pulmonary disease pneumonia. Director's Exhibit 7. Dr. Cencana, the autopsy prosector, diagnosed cardiomegaly, severe coronary arteriosclerosis, moderate atherosclerosis of thoracic aorta, pulmonary congestion, chronic emphysema, pneumoconiosis of the lungs, and anthracosis of hilar lymph nodes. Director's Exhibit 8. Drs. Hales and Hansbarger each reviewed the autopsy slides and additional medical records and both physicians opined that the miner's coal workers' pneumoconiosis did not contribute to his demise. Director's Exhibits 26, 27, 31. Similarly, Dr. Castle opined that the miner's pneumoconiosis played no role in

his death and did not contribute to his cardiac arrest or coronary artery disease. Director's Exhibit 73. Drs. Lewis and Cohen each found that pneumoconiosis played a significant role in the miner's sudden death. Director's Exhibits 58, 70, 74, 86. We affirm the administrative law judge's finding that there was no medical opinion of record sufficient to affirmatively establish that the miner's demise was contributed to or hastened by coal workers' pneumoconiosis. See *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The administrative law judge permissibly found the opinions of Drs. Lewis, Cohen and Cencana inadequate to outweigh the more reasoned opinions of Drs. Hansbarger, Hales, and Castle inasmuch as Dr. Lewis's opinion was not well reasoned, Dr. Cohen's opinion was equivocal and, therefore, not well reasoned, and Dr. Cencana's autopsy report did not offer an opinion as to whether pneumoconiosis in fact hastened the miner's death. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); [1998] Decision and Order at 4-5. The administrative law judge, within a proper exercise of his discretion, accorded greater weight to the opinions of Drs. Castle, Hales, and Hansbarger, who opined that while the miner had pneumoconiosis, it neither hastened his death nor contributed to complications of his severe coronary artery disease, inasmuch as these physicians' opinions were well reasoned, well documented, and rendered by physicians with superior medical expertise. See *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Trumbo, supra*; *Lucostic, supra*; [1998] Decision and Order at 4. Hence, we affirm the administrative law judge's Section 718.205(c) finding. Inasmuch as the administrative law judge's Section 718.205(c) is rational and supported by substantial evidence, we additionally affirm the administrative law judge's finding that there is no mistake in a determination of fact under Section 725.310.

Accordingly, the Decision and Order on Modification - Denying Benefits of the administrative law judge on both the miner's and survivor's claims is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge