

BRB No. 01-0589 BLA

RUDELL MULLINS	)	
(Widow of WILLIAM J. MULLINS)	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
ALLIED COAL, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Mary Forrest-Doyle (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.  
PER CURIAM:

Claimant appeals the Decision and Order (2000-BLA-0452) of Administrative Law Judge Rudolf L. Jansen denying benefits on the miner's duplicate claim and her survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>1</sup> After accepting the parties' stipulation of seven years and six months of coal mine employment, the administrative law judge found that the miner's claim, filed in 1988, was denied by the district director because the evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis. The administrative law judge further found that the new evidence submitted with the current duplicate claim did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2)(i)-(iv).<sup>2</sup>

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<sup>1</sup>The deceased miner, William J. Mullins, filed his first application for black lung benefits in 1973. Although this claim file is missing, the record contains a note that this file was lost and that the claim was denied in 1974. Director's Exhibit 42; Decision and Order at 4. Subsequently, the miner filed several claims. Administrative Law Judge Robert S. Amery denied benefits and the Board remanded the case for reconsideration of the evidence under 20 C.F.R. Parts 727 and 410. *Mullins v. Director, OWCP*, BRB No. 83-2087 BLA (Mar. 27, 1986) (unpub.). Upon remand, Judge Amery issued a Decision and Order denying benefits on May 28, 1987. Director's Exhibit 42. The miner filed another duplicate claim on September 23, 1988 that was denied by the district director on March 30, 1989 because the miner failed to establish any element of entitlement. Director's Exhibit 43. The miner filed his last duplicate claim on November 27, 1998. Director's Exhibit 1. While this last claim was pending, the miner died on December 18, 1998. Director's Exhibit 8. Claimant, Rudely Mullins, the surviving spouse of the deceased miner, filed her claim for survivor's benefits on January 13, 1999. Director's Exhibit 2. Both claims were consolidated and denied by the district director.

<sup>2</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after

Therefore, the administrative law judge found that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000).<sup>3</sup> With respect to the survivor's claim, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim. On appeal, claimant challenges the administrative law judge's weighing of the evidence under Sections 718.202(a)(1), (4) and 718.205(c). In response, employer argues that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, did not file a brief on the merits of this appeal.

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briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chad*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chad*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

<sup>3</sup>The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this, which were pending on January 19, 2001, rather, the version of this regulation as published in the 2000 Code of Federal Regulations is applicable. See 20 C.F.R. §725.2(c).

The Board 's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The administrative law judge correctly found that the miner's 1988 claim was denied because the miner failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Decision and Order at 6; Director's Exhibit 43. The administrative law judge determined that in order to establish a material change in conditions pursuant to Section 725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis or a finding of total disability before he may consider the entire record to determine entitlement. Decision and Order at 7. The administrative law judge found that the newly submitted evidence, consisting of x-rays, blood gas studies and medical opinions, had not established the existence of pneumoconiosis or a totally disabling respiratory impairment and thus failed to establish a material change in conditions pursuant to Section 725.309(d)(2000).

Claimant suggests that the 1976 medical reports of Drs. Stumbo, Martin, O'Neill, Penman, Powell and Anderson and the 1981 medical report of Dr. O'Neill diagnosing pneumoconiosis "are well reasoned and documented, therefore they should have been entitled to substantial weight" in the miner's claim. Claimant's Brief at 4. We disagree. The medical evidence that claimant refers to was submitted with the previously denied adjudicated claims and found insufficient to establish pneumoconiosis. Director's Exhibit 42; see 1987 Decision and Order-On Remand at 1-4. The administrative law judge may not consider this evidence because he rationally found, and we affirm as unchallenged, that the newly submitted evidence did not establish a material change in conditions pursuant to

Section 725.309(d) (2000).<sup>4</sup> *Ross, supra*; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 7-14. Thus, the Board has no basis upon which to review the previously submitted evidence that was considered by Administrative Law Judge Robert S. Amery and found insufficient to establish entitlement to benefits. See 1987 Decision and Order-On Remand at 1-4.

The Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to the law. See 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1987). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. See *Cox, supra*; *Sarf, supra*, *Fish, supra*. In the instant case, claimant has not identified an error in the administrative law judge's consideration of whether claimant established a material change in conditions since the prior denial. Consequently, we affirm the administrative law judge's denial of the miner's claim as it is supported by substantial evidence and is in accordance with law.

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<sup>4</sup>In determining that the newly submitted evidence did not establish the existence of pneumoconiosis, the administrative law judge correctly found that the record contains twenty-one newly submitted x-ray interpretations and that "not one" is positive for the existence of pneumoconiosis. Decision and Order at 11; Director's Exhibit 10; Employer's Exhibit 3. Further, the administrative law judge correctly found that the record is devoid of biopsy evidence, that claimant is not entitled to any of the presumption under 20 C.F.R. §718.202(a)(3), and that none of the newly submitted medical opinions, hospital records or the death certificate diagnosed pneumoconiosis. Decision and Order at 10-12; Director's Exhibits 10-12; Employer's Exhibits 1, 2, 5, 6. Finally, we affirm the administrative law judge's findings with respect to the length of the miner's coal mine employment and his finding that the new evidence submitted pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) did not establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), as these findings have not been challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With respect to the survivor's claim, in order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304; see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The administrative law judge correctly noted that the requirements of Section 718.205(c) are satisfied if claimant proves that pneumoconiosis hastened the miner's death. Decision and Order at 11; see 20 C.F.R. §718.205(c)(5); see also *Griffith [Myrtle] v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

Claimant asserts that Drs. Martin, O'Neill, Penman, Powell and Anderson opined that the miner suffered from pneumoconiosis and that Drs. Stumbo, Martin and Penman also opined that the miner suffered from a pulmonary impairment due to pneumoconiosis. Claimant argues that this evidence establishes that the miner "was suffering from a pulmonary impairment arising from his coal workers' pneumoconiosis at the time of his death, and therefore certainly would have been a contributing factor" in the miner's death. Claimant's Brief at 6. We disagree. The medical evidence relied on by claimant was submitted into the record prior to the miner's death, and therefore does not address the miner's cause of death in 1998, as required by Section 718.205(c).

Relevant to the cause of the miner's death, the administrative law judge considered the miner's death certificate and the opinions of Drs. Fino, Branscomb and Westerfield that the miner's death was "in no way related to his coal mine employment," and specifically, Dr. Fino opined that the "miner's past exposure to coal dust did not cause, contribute to or hasten the miner's death." Decision and Order at 16; Director's Exhibit 8; Employer's Exhibit 1, 2, 5, 6. The administrative law judge properly found that the miner's death certificate, prepared by Dr. Caudill, the miner's treating physician since 1980, lists the immediate cause of death as cardiovascular collapse "due to or as a consequence of" lung cancer and that "no other significant condition are listed or mentioned." Decision and Order at 9, 16; Director's Exhibit 8. Therefore, the administrative law judge reasonably found that claimant failed to establish that the miner's death was due to pneumoconiosis under Section 718.205(c), and we affirm this finding.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge