

BRB No. 98-0848 BLA

LULA S. CLOUD)	
(Widow of JAMES H. CLOUD))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Respondent)	

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lula S. Cloud, Pennington Gap, Virginia, *pro se*.

Jeffrey S. Goldberg (Henry L. Solano, 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, the United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order

¹ Claimant is Lula S. Cloud, widow of James H. Cloud, the miner. Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

on Remand (91-BLA-0649) of Administrative Law Judge Richard K. Malamphy denying benefits on claims 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). This case is before the Board for the third time. In our previous decision, we discussed fully the procedural history of the miner's claim. *Cloud v. Director, OWCP*, BRB No. 97-0362 BLA (Oct. 21, 1997)(unpub.). We now focus only on those procedural aspects relevant to the issues raised in this appeal, which now includes a survivor's claim consolidated with the miner's claim on remand.²

In a Decision and Order on Remand issued on September 23, 1996, Judge Malamphy, considering the miner's claim, found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4) but concluded that the evidence failed to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, he denied benefits.

Pursuant to claimant's *pro se* appeal, the Board affirmed the administrative law judge's finding at Section 718.202(a)(4), but vacated his finding at Section 718.204(c)(4) because he failed to consider all of the medical opinions before concluding that total disability was not established. [1997] *Cloud*, slip op. at 2-3. Accordingly, the Board remanded the case for the administrative law judge to consider all of the relevant evidence.

On remand, the administrative law judge again found that the medical opinion evidence did not establish total respiratory disability pursuant to Section 718.204(c)(4) and, accordingly, denied benefits on the miner's claim. Additionally, the administrative law judge considered the survivor's claim and concluded that there was no evidence that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). He therefore denied benefits on the survivor's claim.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of the survivor's claim, but requests remand of the miner's claim for the administrative law judge to consider more fully two medical reports at Section 718.204(c)(4).

² The miner died on April 13, 1990, and claimant filed her application for survivor's benefits on June 24, 1996. Director's Exhibit 1.

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). 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under 20 C.F.R. Part 718, a miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment, and a survivor must prove by a preponderance of the evidence that the miner's death was due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the opinions of Drs. Daly, Smiddy, Fulton, Taylor, Paranthaman, and Spagnolo. Drs. Daly, Smiddy, and Fulton examined the miner between 1979 and 1982 and opined that he was totally disabled. Director's Exhibit 11. In 1983, Dr. Taylor examined the miner but apparently did not administer objective tests; in 1985 however, he both examined the miner and administered pulmonary function and blood gas studies which were non-qualifying.³ *Id.* After both examinations Dr. Taylor diagnosed pneumoconiosis, but did not directly address the issue of respiratory disability. He did, however, complete a section of the Department of Labor examination form requesting an assessment of physical limitations by quantifying the miner's ability to walk, climb, lift, and carry. *Id.* Subsequently, in 1988 Dr. Paranthaman examined the miner and obtained pulmonary function and blood gas studies which were non-qualifying. *Id.* Dr. Paranthaman diagnosed chronic bronchitis due to smoking and coal dust exposure, and assessed a mild functional impairment which he opined left the miner with sufficient respiratory capacity to perform the work of a coal miner. *Id.* In 1992, Dr. Spagnolo reviewed the medical evidence of record and stated that the

³ A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

objective studies revealed “minimal evidence for mild airflow obstruction,” “minimal impairment of gas exchange” at rest, and “normal gas exchange upon exercise. . . .” *Id.* Dr. Spagnolo opined that, from a pulmonary standpoint, the miner could perform heavy labor. *Id.*

The administrative law judge found that although the early medical opinions from 1979 to 1982 diagnosed the miner as totally disabled, after 1982 physicians either did not address disability, as was the case with Dr. Taylor, or opined that the miner was not totally disabled. Decision and Order at 7-8. Focusing on the most recent medical evaluation of the miner, the administrative law judge found that “Dr. Paranthaman's examination was the last and was quite detailed. Based on the evaluation in 1988, I conclude that pulmonary disease did not prevent the miner from [performing his] previous coal mine employment.” Decision and Order on Remand at 8.

The Director contends that remand is required because the administrative law judge did not discuss Dr. Taylor's 1983 and 1985 assessments of physical limitations, which the Director argues should have been compared with the exertional requirements of the miner's job as a coal loader. Director's Brief at 17.

In weighing a physician's report, the administrative law judge may take into account the recency of the report and whether it is adequately documented. See *Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Here, the administrative law judge permissibly considered that Dr. Paranthaman's non-disability opinion was based upon the most recent examination and testing of the miner, see *Cooley, supra*; *Coffey, supra*, and that Dr. Paranthaman supported his opinion with a detailed discussion of the objective study and examination results. By contrast, Dr. Taylor's examinations predate Dr. Paranthaman's evaluation by three and five years, respectively, and Dr. Taylor's reports do not contain the sort of explanatory analysis that Dr. Paranthaman offered and which the administrative law judge found persuasive at Section 718.204(c)(4). In light of the administrative law judge's permissible credibility determination, see *Fife, supra*, we conclude that a remand for him to reweigh Dr. Taylor's reports is unnecessary.

Therefore, we reject the Director's contention and we affirm the administrative law judge's finding that total respiratory disability was not established by the medical opinion evidence pursuant to Section 718.204(c)(4).⁴ Because the administrative

⁴ Because the administrative law judge considered the opinions of Drs. Daly,

law judge previously found that total respiratory disability was not established pursuant to Section 718.204(c)(1)-(3), we affirm the denial of benefits on the miner's claim. See *Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We also affirm the administrative law judge's denial of the survivor's claim. Pursuant to Section 718.205(c)(1)-(3), the administrative law judge found that the record was devoid of any evidence that the miner's death was due to pneumoconiosis. Decision and Order on Remand at 8-9. For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). Pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

The death certificate, completed by Dr. Molony, lists the immediate cause of death as probable acute myocardial infarction with cardiac arrest, due to arteriosclerotic coronary vascular disease with history of myocardial infarction, due to transient ischemic attack. Director's Exhibit 4. The death certificate lists no other causes or conditions. *Id.* No autopsy was performed. Director's Exhibit 1. An emergency room report from the Lee County Community Hospital indicates that the miner died on April 13, 1990 due to "cardio respiratory arrest." Director's Exhibit 5. This report does not address whether pneumoconiosis caused or hastened the miner's death. Review of the record reveals no other evidence regarding the cause of the miner's death, nor any evidence relevant to the Section 718.304 presumption of death due to pneumoconiosis. See 20 C.F.R. §718.205(c)(3).

Because claimant has the burden to establish that the miner's death was due to or hastened by pneumoconiosis and submitted no such evidence, we affirm the administrative law judge's finding that claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Because claimant has failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), we affirm the denial of benefits on the survivor's claim. See *Trent*,

Smiddy, and Fulton, Decision and Order on Remand at 3-4, 7-8, we reject the Director's contention that the administrative law judge failed to consider them. Director's Brief at 16.

supra; Perry, supra.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits on both the miner's and the survivor's claims is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge