BRB No. 01-0830 BLA

JUNE MULLINS (Widow of JAMES MULLINS) Claimant-Petitioner v. MCI MINING CORPORATION and CYPRUS MINERALS COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

June Mullins, Bulan, Kentucky, *pro se*.

Bonnie J. Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, the miner's widow and without the assistance of counsel, appeals the Decision and Order (2000-BLA-1013 and 2001-BLA-0065) of Administrative Law Judge Joseph E. Kane denying benefits on claims[1] filed by the miner and survivor pursuant to the

[1]Claimant is June Mullins, the miner's widow. The miner, James Mullins, initially

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).[2] The administrative law judge found sixteen and one-half years of qualifying coal mine employment, and based on the date of filing, considered entitlement in both the miner's and survivor's claims pursuant to 20 C.F.R. Part 718. Decision and Order at 4, 6-7. After determining that the miner's claim was a modification request, the administrative law judge noted the proper standard and found that based on the newly submitted evidence and review of the prior evidence, claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000) as the evidence was insufficient to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202 and 718.204(b). Decision and Order at 6-10. The administrative law judge further found, with respect to the survivor's claim, that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2001). Decision and Order at 11-12. Accordingly, benefits were denied in both the miner's and survivor's claims. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance of the administrative law judge's Decision and Order as the denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that 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

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filed for benefits on September 1, 1988, which was finally denied on August 29, 1996. Director's Exhibit 24. The miner subsequently requested modification on September 20, 1996. Director's Exhibit 24. The miner died on February 28, 1997 and claimant filed a survivor's claim on March 31, 1997. Director's Exhibits 1, 8.

[2]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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 are 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).

In order to establish entitlement to benefits in the miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to prove any of these requisite elements compels a denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Additionally, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).[3]

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 24.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The United States Court of Appeals for the Sixth Circuit held in *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), with respect to modification, that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been asserted by claimant. Furthermore, in determining whether claimant has established a change in conditions pursuant to Section 725.310 (2000), the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge, in the instant case with respect to the miner's claim, rationally determined that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(b) and therefore insufficient to establish modification.[4] *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Worrell, supra*.

Considering the newly submitted and prior evidence to determine if a basis for modification was established, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2001). *Piccin, supra*. The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) (2001) based on the fact that the preponderance of x-ray readings by physicians with superior qualifications was negative. Director's Exhibit 24; Decision and Order at 8; *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) (2001) as the administrative law judge permissibly accorded greater weight to the

[4]The administrative law judge properly determined that claimant's prior claim was denied because the evidence of record was insufficient to establish the existence of pneumoconiosis and total disability. Decision and Order at 7; Director's Exhibit 24.

superior credentials of the physicians[5] who opined that the autopsy evidence did not indicate that the miner suffered from pneumoconiosis, the miner's claim was filed on September 1, 1988, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306 (2001); Director's Exhibit 24; Decision and Order at 8; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

The administrative law judge also properly considered the entirety of the medical opinion evidence of record pursuant to Section 718.202(a)(4) (2001) in determining if claimant established a basis for modification of the miner's claim. *Worrell, supra*. In his consideration of the medical opinion evidence, the administrative law judge noted that Drs. Myers, Baker, Anderson and Powell, all who had examined the miner and were Board-certified in Internal Medicine with the latter two physicians also board-certified in Pulmonary Disease, diagnosed the miner with coal workers' pneumoconiosis. Decision and Order at 9; Director's Exhibit 24. The administrative law judge also noted that the contrary opinions were offered by Drs. Broudy, Dahhan and Hudson, each whom had examined the miner and were Board-certified in both Internal Medicine and Pulmonary Disease. Decision and Order at 9; Director's Exhibit 24. Weighing this evidence, the administrative law judge found that he was faced with equally qualified pulmonary specialists, each of whom examined the miner, coming to opposite conclusions regarding the existence of the disease. Decision and Order at 9. The administrative law judge thus found that the medical opinion evidence was in equipoise and that claimant failed to carry her burden of proof in establishing the existence of pneumoconiosis by a preponderance of the evidence. *See Clark, supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 9. We therefore affirm the

[5]Dr. Crouch, who is board-certified in Anatomic Pathology, opined that the miner suffered from bronchopneumonia, sever emphysema and had coal dust deposits but no coal workers' pneumoconiosis. Director's Exhibit 26. Dr. Kleinerman, who is board-certified in Anatomic and Clinical Pathology, opined that although there was black pigment present, there was no evidence of pneumoconiosis or silicosis. Director's Exhibit 19. Drs. Perper and Abalos opined that the autopsy indicated that the miner suffered from simple coal workers' pneumoconiosis. The credentials of these physicians are not in the record. Director's Exhibits 9, 12.

administrative law judge's finding that the medical opinion evidence was in equipoise and thus insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2001) as it is supported by substantial evidence. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In addressing whether claimant established a basis for modification pursuant to 20 C.F.R. §718.204(b), the administrative law judge rationally found the newly submitted and prior evidence insufficient to establish total disability. Decision and Order at 9-10; *Piccin, supra*. Considering the evidence to determine if a basis for modification was established under Section 718.204(b)(2)(i), (ii) (2001) the administrative law judge properly found that the pulmonary function study evidence was qualifying and indicative of total disability while the blood gas study evidence of record was non-qualifying and thus insufficient to establish total disability.[6] *See Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 9-10; Director's Exhibit 24. The administrative law judge further properly found that total disability was not established pursuant to Section 718.204(b)(2)(iii) (2001) as there is no evidence of cor pulmonale with right sided congestive heart failure in the record. Decision and Order at 10.

Moreover, the administrative law judge considered the medical opinion evidence of record and rationally concluded that the opinions were insufficient to establish claimant's burden of proof pursuant to Section 718.204(b)(2)(iv) (2001). *Kuchwara, supra*; *Piccin, supra*. The administrative law judge permissibly determined that the opinions of Drs. Myers and Hudson, who opined that claimant was totally disabled, were insufficient to establish total disability in light of the preponderance of medical opinions, by pulmonary specialists, who stated that the miner was not totally disabled. Decision and Order at 10; Director's Exhibit 24; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We therefore affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability pursuant to Section 718.204(b)(2)(iv) (2001) as it is supported by substantial

[6]A "qualifying" pulmonary function study or 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 exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

evidence.

Furthermore, in determining if total disability was established, the administrative law judge noted the existence of contrary probative evidence in the record and permissibly concluded that this evidence was sufficient to outweigh the evidence supportive of a total disability finding. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); Decision and Order at 10. Consequently, inasmuch as the administrative law judge permissibly found that the arterial blood gas study evidence and the medical opinions of record were sufficient to overcome the qualifying pulmonary function studies upon weighing all of the relevant evidence, we affirm the administrative law judge's finding that the weight of the evidence of record is insufficient to support a finding of total disability. *See Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock, supra*; *Gee, supra*. The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, the administrative law judge rationally found that the medical evidence of record failed to establish total disability pursuant to 20 C.F.R. §718.204(b) (2001) and was thus insufficient to establish a basis for modification pursuant to Section 725.310 (2000).[7] *Nataloni, supra*; *Wojtowicz, supra*; *Kovac, supra*; *Clark, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Therefore, the administrative law judge's denial of claimant's petition for modification in the miner's claim is supported by substantial evidence and is in accordance with law. *Worrell, supra*. Inasmuch as claimant has failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000), we affirm the denial of benefits in the miner's claim. *Worrell, supra*.

With respect to the survivor's claim, the administrative law judge permissibly concluded that the miner's death was not due to pneumoconiosis. *See* 20 C.F.R. §718.205(c)(5) (2001); *Griffith, supra*; *Brown, supra*; *Piccin, supra*. The administrative law judge in the instant case, addressed all the relevant evidence of record, noting that only the opinions of Drs. Abalos and Perper, as well as the miner's death certificate, supported claimant's burden of proof, and permissibly accorded little weight to the death certificate,

[7]As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(I)-(iv) (2001), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d) (2001); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

although Dr. Chaney was a treating physician, as the physician's credentials are unknown and the record contains no basis for his conclusion.[8] Decision and Order at 11; Director's Exhibit 8; *Griffith, supra*; *Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Back v. Director, OWCP,* 796 F.2d 169, 9 BLR 2-93 (6th Cir. 1986); *Clark, supra*; *Dillon, supra*; *Hutchens v. Director, OWCP,* 8 BLR 1-16 (1985); *Kuchwara, supra*; *Piccin, supra*. Additionally, the administrative law judge rationally found that the opinions of Drs. Abalos and Perper were outweighed by the opinions of Drs. Crouch and Kleinerman, that there was no hastening of death by pneumoconiosis, as these physicians had superior qualifications. *See Worhach, supra*; *Clark, supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon, supra*; *Wetzel, supra*; Decision and Order at 11-12; Director's Exhibits 9, 12, 19, 26. Thus, the administrative law judge, within a proper exercise of his discretion, permissibly concluded that claimant failed to prove that the miner's death was due to pneumoconiosis. *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Griffith, supra*; *Brown, supra*; *Piccin, supra*.

Inasmuch as claimant has failed to establish a basis for modification or that the miner's death was due to pneumoconiosis, requisite elements of entitlement in claims filed by the miner and survivor, in the instant case, pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Griffith, supra*; *Worrell, supra; Trumbo, supra*; *Neeley, supra*; *Trent, supra; Perry, supra.*

[8]We note that a treating physician may be accorded deference in the weighing of medical reports but such deference is not accorded as a matter of course. The United States Court of Appeals for the Sixth Circuit has held that "...opinions of treating physicians are entitled to greater weight than those of non-treating physicians." *Tussey v. Island Creek Coal Co.*, 982 F. 2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, in setting this standard the Sixth Circuit did not overrule its earlier admonition that there is no "mechanical rule insulating a treating doctor's opinion from attack...[it] is still subject to attack when thrown in contest with other and contrary respectable opinions." *Halsey v. Richardson*, 441 F.2d 1230, 1236 (6th Cir. 1971).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge