

BRB Nos. 03-0816 BLA
and 03-0816 BLA-A

AGNES E. COLLINS)
(Widow of CYRUS A. COLLINS))
)
 Claimant-Petitioner)
)
 v.)
)
 LTV STEEL COMPANY) DATE ISSUED: 09/15/2004
)
 Employer-Respondent)
)
 and)
)
 CLINCHFIELD COAL COMPANY)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents and Cross-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Respondent and)
 Cross-Petitioner) DECISION and ORDER

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

Gregory C. Hook (Hook & Hook), Waynesburg, Pennsylvania, for
claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, carrier for employer Clinchfield Coal Company.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and the Director, Office of Workers' Compensation Programs (the Director) cross-appeals, the Decision and Order-Denying Benefits (02-BLA-0208) of Administrative Law Judge Daniel L. Leland rendered on a miner's claim and a 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).¹ The miner's claim is before the Board for the second time. The Board's prior decision in *Collins v. J & L Steel*, 21 BLR 1-181 (1999), contains a full procedural history of the miner's claim. *Collins*, 21 BLR at 1-182-84. We now address the procedural aspects relevant to this appeal of the administrative law judge's decision to deny modification of the miner's claim and to deny the survivor's claim.

In *Collins*, the Board affirmed Administrative Law Judge Gerald M. Tierney's finding that the miner established a material change in conditions in his duplicate claim under 20 C.F.R. §725.309(d) (2000), based on the parties' stipulation that biopsy evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b). *Collins*, 21 BLR at 1-184 n.5. However, the Board vacated Judge Tierney's findings that the medical opinion evidence established that the miner was totally disabled by a respiratory or pulmonary impairment and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(c)(4) (2000), 718.204(b) (2000).² The Board remanded the case for Judge

¹ 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² No party disputed Judge Tierney's findings that total respiratory or pulmonary disability was not established by pulmonary function or blood gas studies, or by evidence

Tierney to consider whether the relevant medical opinions were reasoned and documented, and to provide valid, adequately explained rationales for what weight, if any, he accorded each opinion. *Collins*, 21 BLR at 1-189-93.

The miner died on March 12, 2000, while his claim was pending on remand before Judge Tierney. Director's Exhibit 157.

In a Decision and Order on Remand issued on April 19, 2000, Judge Tierney denied benefits based on a finding that the miner failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 153. Judge Tierney found that the better documented and reasoned medical opinions did not establish total disability and were consistent with “the clear preponderance of the nonqualifying pulmonary function studies and arterial blood gas tests.” Director's Exhibit 153 at 9. Accordingly, Judge Tierney denied benefits.

The miner’s counsel filed a notice of appeal with the Board, but subsequently moved to remand the case to the district director for modification proceedings on the miner’s claim pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibits 154, 157. On July 11, 2000, the Board granted the motion, dismissed the miner’s appeal, and remanded the case to the district director. Director's Exhibit 158.

Claimant, the miner’s widow, filed a survivor’s claim on May 24, 2000. SC-Director's Exhibit 1.³ The district director denied the survivor’s claim and the request for modification in the miner’s claim, and claimant requested a hearing on both claims. Director's Exhibits 163, 164. Administrative Law Judge Daniel L. Leland held a hearing on both claims on June 11, 2003.

In the Decision and Order - Denying Benefits that is the subject of this appeal, the administrative law judge denied benefits on both the miner’s claim and the survivor’s claim. The administrative law judge found no basis to modify the denial of the miner’s claim, because he determined that the evidence of record failed to establish that the miner was totally disabled by a respiratory or pulmonary impairment. Consequently, the administrative law judge found that “the miner’s lifetime claim was properly denied.”

of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(c)(1)-(c)(3) (2000). *Collins v. J & L Steel*, 21 BLR 1-181, 1-184 n.5 (1999).

³ The record contains two sets of Director's Exhibits, one containing the miner’s claim exhibits and some survivor’s claim exhibits, numbered 1-178, and the other containing only survivor’s claim exhibits, numbered 1-50. We will refer to a document in the survivor’s claim set of Director's Exhibits as “SC-Director's Exhibit.”

Decision and Order at 6. In the survivor's claim, the administrative law judge found that the autopsy evidence and pathologists' reports established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), but did not 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 survivor's benefits. Although he denied benefits, the administrative law judge next dismissed Clinchfield Coal Company and the West Virginia Coal Workers' Pneumoconiosis Fund from the claims, ruling that the Black Lung Disability Trust Fund (the Trust Fund) was liable for any benefits ultimately awarded.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that total respiratory or pulmonary disability was not established in the miner's claim. Claimant further asserts that the administrative law judge erred in his analysis of the autopsy evidence and pathologists' opinions when he determined that the miner's death was not due to pneumoconiosis. The Director and carrier respond, urging affirmance of the denial of benefits. The Director cross-appeals from the administrative law judge's Decision and Order, contending that the administrative law judge erred in dismissing Clinchfield Coal Company and in holding the Trust Fund liable for any benefits ultimately awarded. Carrier responds, urging affirmance of the decision below.⁴

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated 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 the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The miner failed to establish that he was totally disabled by a respiratory or pulmonary impairment, but timely requested modification of the denial of benefits

⁴ We affirm, as unchallenged on appeal, the administrative law judge's finding that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pursuant to Section 725.310 (2000). The administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a) (2000). When a request for modification is filed, “any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility.” *Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

Claimant contends that the administrative law judge erred in finding that Dr. John Meyer’s diagnosis of a twenty-five percent impairment from respiratory causes was too ambiguous to establish that the miner was totally disabled by a respiratory or pulmonary impairment. Claimant’s Brief at 5. We need not address this contention, as the administrative law judge provided a valid, unchallenged reason for discounting Dr. Meyer’s opinion. Specifically, in addition to finding Dr. Meyer’s opinion ambiguous, the administrative law judge permissibly found that Dr. Meyer’s impairment rating was not credible because it was based on test results that were persuasively questioned by Dr. Michael Sherman, whose opinion the administrative law judge found to be “clearly better reasoned and documented than the opinion[] of . . . Dr. Meyer.” Decision and Order at 6 n.3; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998). An “administrative law judge is not required to accept evidence that he determines is not credible,” *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-264 (2003), and in this case, claimant raises no challenge to the administrative law judge’s finding that Dr. Sherman’s analysis of the medical evidence was better reasoned and undermined the credibility of Dr. Meyer’s diagnosis of a twenty-five percent impairment due to respiratory causes.⁵ Substantial evidence thus supports the administrative law judge’s discretionary determination. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Consequently, we affirm the administrative law judge’s weighing of Dr. Meyer’s opinion on this ground, and we do not address further claimant’s allegation of error in the administrative law judge’s finding that Dr. Meyer’s opinion was ambiguous. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13, 22 BLR 2-162, 2-178 n.13 (4th Cir. 2000)(declining to address additional argument where “a sufficient factual basis . . . support[ed] one reason for discrediting each opinion”); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

⁵ Claimant asserts that Dr. Sherman’s opinion “was not enough to overcome the opinions of the other doctors that Mr. Collins was disabled” Claimant’s Brief at 5. This argument merely requests that the Board evaluate the credibility of evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Claimant next asserts that the “[B]oard should not only consider the evidence that was before Judge Tierney . . . under the living miner’s case, but also must consider the evidence in the survivorship case.” Claimant's Brief at 5. To the extent claimant argues that the administrative law judge did not consider whether the evidence in the survivor’s claim established a change in conditions or a mistake in a determination of fact to justify modification of the miner’s claim, claimant’s contention lacks merit. The administrative law judge specifically considered “[t]he evidence submitted since the issuance of Judge Tierney’s decision” and found that it “fail[ed] to substantiate total respiratory disability.” Decision and Order at 6. A review of the record supports the administrative law judge’s finding that the miner’s death certificate, autopsy reports, and hospital records do not address “whether the miner had a lifetime respiratory disability.” *Id.* Consequently, we affirm the administrative law judge’s findings that “the evidence fail[ed] to establish total disability and that the miner’s lifetime claim was properly denied.” *Id.*; see 20 C.F.R. §725.310(a) (2000).

To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner’s death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Review of the record indicates that Dr. Harry Taylor conducted an autopsy and diagnosed, among several other diseases, “early coal macules” with “adjacent emphysematous changes and mild to moderate anthracosis.” SC-Director's Exhibit 14 at 2. Dr. Taylor did not specify a cause of death in the autopsy report. *Id.* Dr. Taylor later completed the miner’s death certificate, listing the immediate cause of death as cardiorespiratory failure due to lobar pneumonia, due in turn to “infection/septicemia.” SC-Director's Exhibit 13. Dr. Taylor identified chronic renal failure, cardiovascular accidents, and peripheral vascular disease as other significant conditions contributing to death. *Id.* Subsequently, Dr. Erika Crouch reviewed the autopsy report and pathological tissue slides and diagnosed “acute necrotizing pneumonia,” emphysema due to cigarette smoking, and simple coal workers' pneumoconiosis. Director's Exhibit 173. Dr. Crouch indicated that the miner’s coal workers' pneumoconiosis was too mild “to have caused or otherwise hastened [his] death, most likely secondary to pneumonia.” Director's Exhibit

173 at 2. Thereafter, Dr. Waheeb Rizkalla reviewed the autopsy report and pathological tissue slides and the miner's medical records, and concluded that coal workers' pneumoconiosis was "a substantial contributing factor" in the miner's death. Claimant's Exhibit 1 at 2. Dr. Rizkalla explained that coal workers' pneumoconiosis caused cor pulmonale with right-sided heart failure and emphysema that left the miner more susceptible to pneumonia. *Id.*

Claimant contends that the administrative law judge erred in declining to credit Dr. Rizkalla's opinion that coal workers' pneumoconiosis contributed to the miner's death. Claimant's Brief at 6-7. Claimant's contention lacks merit. The administrative law judge permissibly questioned Dr. Rizkalla's explanation of how coal workers' pneumoconiosis hastened the miner's death, because Dr. Rizkalla stood alone in diagnosing cor pulmonale. *See Underwood*, 105 F.3d at 949, 21 BLR at 2-28 (stating that the administrative law judge need not accept "the opinion or theory of any medical expert"); Decision and Order at 7.

Claimant argues that Dr. Rizkalla's diagnosis of cor pulmonale should not have been discounted, because Dr. Rizkalla based his opinion on a review of the miner's medical records, not just on the pathological tissue slides. However, Dr. Rizkalla's diagnosis of cor pulmonale appears to be based upon his review of the autopsy protocol and pathological tissue slides.⁶ Claimant's Exhibit 1 at 3. Thus, it was appropriate for the administrative law judge to consider Dr. Rizkalla's diagnosis in light of the conclusions reached by his fellow pathologists upon review of the same materials. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175 (requiring administrative law judges to consider contrary diagnoses). Moreover, contrary to claimant's suggestion, the administrative law judge is not compelled to credit the opinion of a physician who has reviewed more medical records. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32 (listing several factors administrative law judges should consider in weighing medical opinions). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Because claimant failed to establish that the miner was totally disabled due to a respiratory or pulmonary impairment, a necessary element of entitlement in a miner's claim under Part 718, and also failed to establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim under Part 718,

⁶ Review of the record does not disclose any prior diagnosis of cor pulmonale. Previously, the Board affirmed Judge Tierney's finding that the record in the miner's claim contained no evidence of cor pulmonale with right-sided congestive heart failure. *Collins*, 21 BLR at 1-184 n.5.

we affirm the administrative law judge's denial of benefits in the miner's and survivor's claims. *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). In light of our affirmance of the administrative law judge's denial of benefits, we need not address the Director's cross-appeal.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge