

BRB No. 99-0204 BLA

DELLA M. PIKE )  
(Widow of HERBERT W. PIKE) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 ARCH OF KENTUCKY/ARCH MINERAL )  
 CORPORATION )  
 ) DATE ISSUED:  
 — 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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Della M. Pike, Pound, Virginia, *pro se*.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, without the assistance of counsel,<sup>1</sup> appeals the Decision and Order (98-BLA-0547/548) of Administrative Law Judge Linda S. Chapman denying benefits on claims filed by the miner and the survivor 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). The administrative law judge found seventeen 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.<sup>2</sup> After determining that the miner's claim was a duplicate claim, the administrative law judge noted the proper standard and found that, based on the newly submitted evidence, claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 as the evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). The administrative law judge further found, with respect to the survivor's claim, that claimant failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205. 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 in both claims. 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.

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<sup>1</sup>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).

<sup>2</sup>Claimant is Della M. Pike, the miner's widow. The miner, Herbert W. Pike, filed a claim for benefits on April 13, 1987, which was denied on November 14, 1989 as the evidence of record was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 28. The miner subsequently requested modification, which was granted as the miner established the existence of pneumoconiosis, but benefits were again denied on May 25, 1994 because the miner failed to establish that he was totally disabled pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 28. The miner took no further action until he filed a second claim on January 22, 1997, which was denied by the district director on November 18, 1997. Director's Exhibits 20, 26. The miner died on June 7, 1997 and claimant filed a survivor's claim on August 27, 1997, which was denied on November 19, 1997. Director's Exhibits 1, 52, 54. Claimant subsequently requested a hearing on both claims. Director's Exhibits 27, 58.

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 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 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).

In order to establish entitlement to benefits in the miner's claim 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. 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). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death. See *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

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 Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge, in addressing the miner's duplicate claim in the instant case, permissibly determined that the newly submitted evidence of record was insufficient to establish total disability pursuant to Section 718.204(c), and therefore was insufficient to establish a material change in conditions pursuant to Section 725.309. See *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge properly found that total disability was not established pursuant to Section 718.204(c)(1)-(3) as all of the newly submitted pulmonary function studies and blood gas studies of record

produced non-qualifying values<sup>3</sup> and there is no evidence of cor pulmonale with right sided congestive heart failure in the record. See 20 C.F.R. §718.204(c)(1)-(3); Director's Exhibits 15, 17, 42, 43; Decision and Order at 15; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the administrative law judge considered the relevant newly submitted medical opinion evidence of record and properly found that the opinions were insufficient to establish claimant's burden of proof as no physician opined that claimant was totally disabled by a respiratory or pulmonary condition. See Decision and Order at 16; Director's Exhibits 16, 34, 35, 39, 40; *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry, supra*; *Piccin, supra*. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. See *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Consequently, we affirm the administrative law judge's findings that the newly submitted evidence of record is insufficient to establish total disability pursuant to Section 718.204(c) and that therefore claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 as they are supported by substantial evidence and in accordance with law. Inasmuch as claimant has failed to establish a material change in conditions in the miner's duplicate claim, entitlement thereunder is precluded. See *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1985).

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<sup>3</sup>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, Appendix B, C respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

With respect to the survivor's claim, the administrative law judge, in the instant case, rationally found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *Piccin, supra*. The relevant evidence of record concerning the cause of death consists of three medical opinions and the death certificate. Dr. Gale, who performed the initial autopsy, stated that the miner suffered diffuse intracranial hemorrhage, but did not offer an opinion as to the cause of death. Director's Exhibit 52. Dr. Oxley, who examined the miner's brain as well as lung tissue slides, opined that the cause of death was a spontaneous intracranial hemorrhage. Director's Exhibit 52. Dr. Naeye, who reviewed the autopsy reports of Drs. Gale and Oxley and examined the lung tissue slides, opined that the cause of death was a large intraventricular cerebral hemorrhage and that the miner would have died at the same time and in the same way if he had never mined coal. Director's Exhibit 53. The death certificate, signed by Dr. Smith, who treated the miner prior to his death, listed the cause of death as intraventricular hemorrhage. Director's Exhibit 52. The administrative law judge properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205(c) as none of the medical evidence of record indicated that the miner's death was in any way related to pneumoconiosis.<sup>4</sup> See *Shuff, supra*; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Director's Exhibits 52, 53; Decision and Order at 13. The administrative law judge is empowered to weigh the medical evidence and to draw her 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 v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 as it is supported by substantial evidence and is in accordance with law. See *Shuff, supra*; *Neeley, supra*; *Trumbo, supra*.

Inasmuch as claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded and we need not address the administrative law judge's findings regarding the existence of pneumoconiosis

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<sup>4</sup>The administrative law judge properly found that the presumption at 20 C.F.R. §718.304 is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein. See 20 C.F.R. §718.205(c)(3); Decision and Order at 12.

pursuant to 20 C.F.R. §718.202(a). See *Shuff, supra*; *Trumbo, supra*; *Neeley, supra*.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge