

BRB No. 01-0762 BLA

JUANITA BROCK)	
(Widow of WITT BROCK)))
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Juanita Brock, Tazwell, Tennessee, *pro se*.¹

Jennifer U. Toth (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 GABAUER, Administrative Appeals Judges.

PER CURIAM:

¹Ron 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. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant,² representing herself, appeals the Decision and Order (99-BLA-1143 and 99-BLA-1144) of Administrative Law Judge John C. Holmes 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).³ The instant case involves a duplicate miner's claim filed on February 18, 1997 and a survivor's claim filed on April 15, 1999.

The miner initially filed a claim for benefits on January 26, 1976. Director's Exhibit 22-1. In the initial decision, Administrative Law Judge V. M. McElroy, after crediting the miner with six years and eight months of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment caused by coal mine employment. Judge McElroy, therefore, found that the miner was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. Accordingly, Judge McElroy denied benefits. Director's Exhibit 22-57.

The miner subsequently requested modification of his denied claim. After crediting the miner with six years and eight months of coal mine employment, Administrative Law Judge Giles J. McCarthy found that the evidence was insufficient to establish that the miner was totally disabled due to pneumoconiosis. Accordingly, Judge McCarthy denied benefits. Director's Exhibit 22-65. The miner subsequently filed a motion for reconsideration. Judge McCarthy denied the miner's motion for reconsideration on August 4, 1989. Director's Exhibit 22-67. By Decision and Order dated March 18, 1993, the Board affirmed Judge McCarthy's length of coal mine employment finding as unchallenged on appeal. *Brock v.*

²Claimant is the surviving spouse of the deceased miner who died on January 23, 1999. Director's Exhibit 33.

³The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Director, OWCP, BRB No. 89-2808 BLA (Mar. 18, 1993) (unpublished). The Board, therefore, held that entitlement under 20 C.F.R. Part 727 was precluded. *Id.* The Board also affirmed Judge McCarthy's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. *Id.* The Board, therefore, held that entitlement pursuant to 20 C.F.R. §410.490 was also precluded. *Id.* The Board, however, held that Judge McCarthy erred in failing to consider entitlement under 20 C.F.R. Part 718 (2000). *Id.*

Due to Judge McCarthy's unavailability, Administrative Law Judge Samuel J. Smith considered the claim on remand. Judge Smith reconsidered the x-ray evidence and found that it was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Judge Smith further found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). Judge Smith, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, Judge Smith denied benefits. Director's Exhibit 22-80. By Decision and Order dated July 31, 1995, the Board held that Judge Smith exceeded the scope of the remand order by addressing whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis. *Brock v. Director, OWCP*, BRB No. 94-3965 BLA (July 31, 1995) (unpublished). The Board, therefore, vacated Judge Smith's finding pursuant to 20 C.F.R. §718.202(a)(1) (2000).⁴ *Id.* The Board, however, affirmed Judge Smith's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* The Board, therefore, affirmed Judge Smith's denial of benefits. *Id.* There is no indication that the miner took any further action in regard to his 1976 claim.

The miner filed a second claim on February 18, 1997. Director's Exhibits 1, 2. The district director denied the miner's claim on April 7, 1998. Director's Exhibit 20. The miner requested a hearing and his case was forwarded to the Office of Administrative Law Judges. At a hearing on February 24, 1999, claimant informed Administrative Law Judge Mollie W. Neal that the miner had died on January 23, 1999. Director's Exhibit 28 at 4. Claimant also requested that the miner's claim be remanded to the district director for consolidation with a survivor's claim that claimant intended to file. *Id.* By Order dated March 3, 1999, Judge Neal remanded the miner's claim to the district director. Director's Exhibit 27. Claimant filed a survivor's claim on April 15, 1999. Director's Exhibit 31.

Administrative Law Judge John C. Holmes (the administrative law judge) found, *inter*

⁴The Board affirmed Judge Smith's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) as unchallenged on appeal. *Brock v. Director, OWCP*, BRB No. 94-3965 BLA (July 31, 1995) (unpublished).

alia, that the newly submitted evidence was insufficient to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment. The administrative law judge, therefore, denied benefits in the miner's claim. The administrative law judge also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge also denied benefits in the survivor's claim. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of the survivor's claim. The Director, however, requests that the Board remand the case to the administrative law judge for further consideration of the miner's claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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, with whose jurisdiction the instant case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of 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).

In the adjudication of the miner's 1976 claim, the Board affirmed Judge Smith's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Brock v. Director, OWCP*, BRB No. 94-3965 BLA (July 31, 1995) (unpublished). Consequently, in order to establish a material change in conditions

pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of total disability. *See* 20 C.F.R. §718.204(b).⁵

⁵The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

The newly submitted evidence includes a May 28, 1997 pulmonary function study and a May 28, 1997 arterial blood gas study. Director's Exhibits 9, 11. Both of these studies are non-qualifying.⁶ Consequently, the newly submitted pulmonary function study and arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii).

The record also contains two newly submitted medical reports. Dr. Hudson examined the miner on May 28, 1997. In a report dated May 28, 1997, Dr. Hudson opined that there was no respiratory impairment present. Director's Exhibit 10. Dr. Smith examined claimant on January 23, 1998. In a report dated January 23, 1998, Dr. Smith did not address the extent of the miner's pulmonary impairment. Director's Exhibit 19. Consequently, the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Section 718.204(b)(2)(iii), however, provides that total disability is established if a miner suffers from pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii). Dr. Blake, the autopsy prosector diagnosed, *inter alia*, "cor pulmonale (right heart failure)." Director's Exhibit 34; Claimant's Exhibit 1. In his consideration of whether the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(3) (2000), the administrative law judge stated that:

20 C.F.R. §718.204(c)(3) provides that in the *absence of countervailing* evidence a miner shall be considered totally disabled if he *has pneumoconiosis* and the medical evidence shows him to be suffering from cor pulmonale. (emphasis added). As described above, [the miner] has been determined by all the medical evidence of record to not have pneumoconiosis, thereby making (c)(3) inapplicable. Moreover, the countervailing evidence is that the cor pulmonale derived from other causes as described by Dr. Blake, and was first positively evidenced at the time of death. Dr. Hudson made reference to cor pulmonale but neither definitively diagnosed the condition or [sic] related its possibility to coal dust exposure some 20 or more years previous. Thus the conditions do not exist for a finding of total disability due to pneumoconiosis.

Decision and Order at 3-4.

⁶A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values which exceed the requisite table values.

Thus, the administrative law judge found that claimant was precluded from establishing total disability pursuant to 20 C.F.R. §718.204(c)(3) (2000) because the miner did not suffer from pneumoconiosis. 20 C.F.R. §718.204(b)(2)(iii). Consequently, we must consider whether the administrative law judge properly found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis.

The administrative law judge properly found that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).⁷ Decision and Order at 3. The administrative law judge also properly found that the autopsy evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Id.* Moreover, the miner is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).⁸ Consequently, the miner is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

The Director, however, argues that the administrative law judge erred in his consideration of whether the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis. We agree. The administrative law judge found that neither Dr. Hudson nor Dr. Smith opined that claimant suffered from pneumoconiosis. Decision and Order at 3. Dr. Hudson, however, diagnosed chronic bronchitis caused by the miner's coal dust exposure, a finding which, if credited, satisfies the definition of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2).⁹ Director's Exhibit 10. The

⁷The record does not contain any newly submitted positive x-ray interpretations. Dr. Sargent, a B reader and Board-certified radiologist, and Dr. Hudson, a physician without any special radiological qualifications, each interpreted the miner's May 28, 1997 x-ray as negative for pneumoconiosis. Director's Exhibits 12, 13.

⁸Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because the miner filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, the Section 718.306 presumption is inapplicable in the instant miner's claim. *See* 20 C.F.R. §718.306.

⁹Section 718.201(a)(2) provides that:

“Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

administrative law judge also failed to address the significance of Dr. Smith's diagnosis of "possible pneumoconiosis." Director's Exhibit 19. Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.¹⁰

On remand, should the administrative law judge find the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge is instructed to reconsider whether the newly submitted evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Moreover, should the administrative law judge find the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), he must weigh all the relevant newly submitted evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b), and thus, whether a material change in conditions is established. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (*en banc*).

Should the administrative law judge, on remand, find the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), he should consider the miner's 1997 claim on the merits.

20 C.F.R. §718.201(a)(2).

¹⁰As previously noted, Judge Smith, in his adjudication of the miner's 1976 claim, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis. *See Director's Exhibit 22-80.*

We now turn our attention to the survivor's claim. Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).¹¹ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). 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); see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

The administrative law judge properly found that there was no evidence of record that the miner's death was due to his coal dust exposure. Decision and Order at 4. The administrative law judge noted that the miner's death certificate attributed the miner's death to multiple myeloma due to bone metastasis and renal failure. Decision and Order at 3; Director's Exhibit 33; Claimant's Exhibit 2. Dr. Blake, the autopsy prosector, was the only other physician to address the cause of the miner's death. Dr. Blake listed the proximate cause of the miner's death as massive mucopurulent plugging of major bronchi. Director's Exhibit 34. Dr. Blake listed the immediate cause of the miner's death as mild to moderate pulmonary edema. *Id.* Dr. Blake described the mechanism of the miner's death as a slow heart death with asphyxia. *Id.* Dr. Blake noted that:

Careful gross and microscopic examination of the heart and lungs do not fulfill any of the criteria of Coal Miner's Pneumoconiosis (Black Lung Disease). There is an overall mild to moderate panlobular emphysema noted grossly and microscopically. Polarization microscopy does not demonstrate the presence

¹¹Section 718.205(c) provides that:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) 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).

of any significant contribution of silicon particles and no micronodular fibrosis is present which comports to the required criteria for diagnosis of Coal Miner's Black Lung Disease.

It is noted that [the miner] died in the hospital where he had been admitted on previous occasions, was maintained on oxygen catheter in the hospital. He was said to have been "sick for many years." It would appear that he simply did not have enough prolonged exposure in the underground mine environment to acquire changes qualifying for Pneumoconiosis. In the agonal period, he accumulated progressively massive mucus plugging of his bronchial passages, leading to cerebral hypoxia and slow heart death. The mild degree of pulmonary fibrosis and emphysema contributed to the Cor Pulmonale, i.e., thickening of the right ventricle wall which is clearly demonstrated grossly and microscopically.

Director's Exhibit 34. Thus, Dr. Blake's opinion is insufficient to support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Inasmuch as the record does not contain any other evidence supportive of a finding that the miner's death was due to pneumoconiosis, we affirm the administrative law judge's finding that the medical evidence is insufficient to establish that the miner's death was due to pneumoconiosis.¹² See 20 C.F.R. §718.205(c); *Brown, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

¹²Because there is no evidence of complicated pneumoconiosis in the record, claimant is precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304.

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge