BRB No. 04-0624 BLA

DELANA RAY (Widow of and o/b/o CHARLES B. RAY) Claimant-Petitioner v. EASTOVER MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/15/2005 DECISION and ORDER

Appeal of the Decision and Order – Denial of Survivor Benefits Denial of Black Lung Disability Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Delana Ray, New Tazewell, Tennessee, *pro se*.

W. Stacy Huff (Huff Law Offices), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, the Decision and Order – Denial of Survivor Benefits, Denial of Black Lung Disability Benefits (02-BLA-0245) of

[1] Claimant is the widow of the miner, Charles B. Ray. Director's Exhibit 2. The miner filed his initial claim for benefits on August 24, 1992, which was denied by Administrative Law Judge Paul H. Teitler on November 11, 1996 on the ground that the radiographic and medical opinion evidence established that the miner did not suffer from pneumoconiosis, although the medical evidence established that the miner suffered from a totally disabling respiratory impairment. Director's Exhibit 93-65. On July 29, 1998,

Administrative Law Judge Richard T. Stansell-Gamm rendered on both a miner's duplicate 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).[2] In a Decision and Order dated March 24, 2004, the administrative law judge credited the miner with twenty years of coal mine employment[3] and, turning first to the survivor's claim, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and therefore, insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on the survivor's claim. Turning to claimant's request for modification of the denial of the miner's duplicate claim, the administrative law judge found that as the evidence failed to establish the existence of pneumoconiosis, the element of entitlement previously decided against the miner, claimant failed to establish either a material change in conditions pursuant to 20 C.F.R. §718.309(d) or a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge further denied claimant's request for modification of the denial of the miner's duplicate claim.

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the miner filed a second, duplicate claim, which was preliminarily denied on November 25, 1998. Director's Exhibits 1, 36. The miner continued to submit additional medical evidence over the next three years, which the Department of Labor treated as requests for modification and denied, the last denial occurring on October 6, 2000, the day after the miner died. Director's Exhibits 50, 63, 69. On October 16, 2000, claimant appealed the denial of the miner's claim on his behalf, and on October 24, 2000 she filed her own claim for survivor's benefits. Director's Exhibits 2, 70. Following the submission of additional evidence and requests for further review, on February 12, 2001 and December 13, 2001, both the miner's claim and the survivor's claims were again denied. Director's Exhibits 72, 73, 90, 91. On appeal of both claims, the miner's and survivor's claims were consolidated and on March 4, 2002, both claims were forwarded to the Office of Administrative Law Judges for adjudication. Director's Exhibit 94.

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

[3] The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

On appeal, claimant generally challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a) and 718.205(c), and thereby, his denial of claimant's request for modification of the denial of the miner's duplicate claim pursuant to 20 C.F.R. §§725.309(d), 725.310. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[4]

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). The Board 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).

To be entitled to benefits under the Act in the miner's claim, 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 a finding of 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).

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 or that death was caused by complications of pneumoconiosis. 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, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d

[4] The administrative law judge's finding that claimant had twenty years of coal mine employment is affirmed as unchallenged on appeal. *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). In addition, we affirm the administrative law judge's finding that the regulatory presumptions at 20 C.F.R. §718.202(a)(3) are inapplicable to these claims. 20 C.F.R. §718.202(a)(3); Decision and Order at 5.

977, 16 BLR 2-90 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Turning first to the survivor's claim, in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge properly noted that the record contained sixty-three readings of thirty-four x-rays taken during the miner's life. Decision and Order at 6-8. Of these, twenty-three films were read exclusively as negative for the existence of pneumoconiosis, two films were read exclusively as positive, and the remaining nine films received mixed, positive and negative readings. Decision and Order at 6-7. In weighing the mixed readings of the nine remaining films, the administrative law judge properly considered both the quantity and the quality of the x-ray readings of record, and permissibly found that the preponderance of readings by the more highly qualified B readers and Board-certified radiologists established that only one of these films was positive. Thus, the administrative law judge permissibly concluded that the thirty-one negative films of record outweighed the three positive films of record and, therefore, the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon.*); Decision and Order at 9. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

In evaluating the autopsy and medical opinion evidence on the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), the administrative law judge initially noted that Dr. Blake, the Board-certified pathologist who performed the autopsy, diagnosed "striking massive bullous emphysematous blebbing of the medial aspect" of the upper and middle lobes of the right lung, and stated that while the lungs were "very heavily anthracotic over the exposed anterior surface," and had "heavy anthracotic stippling," the numerous sections of the lungs examined did "not demonstrate nodular structures on the heavily anthracotic surface." Director's Exhibit 87. Dr. Blake concluded that, therefore, the gross and microscopic studies failed to fulfill the gross or microscopic criteria for coal workers' pneumoconiosis. Director's Exhibit 87. Dr. Blake's autopsy diagnoses included severe coronary artery disease, massive desmoplastic squamous carcinoma of the right upper lobe of the lung and bilateral pulmonary emphysema with bronchopneumonia, pulmonary interstitial fibrosis and obstructive bronchiectosis. Director's Exhibit 87. Dr. Blake opined that the miner's death was due to massive bullous emphysema and massive right upper lobe infiltrative lung carcinoma. Director's Exhibit 87.

In considering the remaining medical opinion evidence, the administrative law judge permissibly accorded greater probative value to the opinions of four physicians,

Drs. Blake, Branscomb, Dahhan and Boggan, who had based their conclusions, in part, on the autopsy findings as this is the most reliable evidence of the existence of coal workers' pneumoconiosis.[5] *See Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); Director's Exhibits 87, 89; Employer's Exhibit 2; Decision and Order at 11-13. The administrative law judge found that Dr. Blake, Dr. Branscomb, a Board-certified internist, and Dr. Dahhan, a Board-certified internist and pulmonologist, agreed that the autopsy failed to reveal the presence of coal workers' pneumoconiosis or any other coal dust induced disease, while Dr. Boggan, a Board-certified surgeon, disagreed with the statement that there was no evidence of pneumoconiosis, stating that "the absence of nodules simply means that this exposure did not result in anthrasilicosis rather than primary anthracosis." Director's Exhibits 87, 89; Employer's Exhibit 2; Decision and Order at 11-12. Dr. Boggan concluded that the miner had coal workers' pneumoconiosis, and further stated that coal dust exposure had also contributed to the development of the miner's emphysema. Director's Exhibit 87. The administrative law judge initially noted that Dr. Boggan had used the term "anthracosis" to identify the autopsy finding of anthracotic coating, while the regulations describe anthracosis as a condition including both deposits of particulate matter in the lungs *and* the fibrotic reaction of the lung tissue to that deposition. 20 C.F.R. §718.201(a)(1); Decision and Order at 12. The administrative law judge thus reasonably concluded that although Dr. Boggan diagnosed the presence of anthracosis, he used the term "anthracosis" merely to describe the presence of anthracotic pigmentation in the lungs, a condition not included within the definition of pneumoconiosis at Section 718.201. 20 C.F.R. §§718.201(a)(1), 718.202(a)(2); *see generally Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587, 2-602 (4th Cir. 1999)(focus should be on a doctor's description of a miner's lungs and not on his use of a legal term of art); Decision and Order at 12-13. The administrative law judge further found, as was within his discretion, that Dr. Boggan's

[5] The administrative law judge noted that the record additionally contains the opinions of Drs. Merrill, Lobban, Rose, Bechtel, Venkatesh, Robbins, Smiddy, Thomas and of Dr. Foster, the miner's treating physician, who either did not render a pulmonary diagnosis concerning the presence of pneumoconiosis or simply mentioned black lung disease as part of the miner's medical history. Decision and Order at 23. In addition, the administrative law judge noted that the record contains opinions from Drs. Sargent, Fino and Burki, who opined that the miner did not have pneumoconiosis, and opinions from Drs. Pharoah, Baker, Brock, Fejeran and Kiser, who found the disease present. Decision and Order at 24-25. The administrative law judge further specifically found that although Dr. Kiser was the miner's long-term treating physician, as he had lost contact with the miner in April 2000 and was unaware of the nature and manner of the miner's death, his opinion was of diminished probative value. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); Director's Exhibit 62; Decision and Order at 25.

additional conclusion, that coal dust also contributed to the development of the miner's emphysema, is unsupported by any reasonable explanation. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 12-13. Thus, the administrative law judge permissibly concluded the well-reasoned and well-documented opinions of Drs. Blake, Branscomb and Dahhan outweighed the opinion of Dr. Boggan, and that, therefore, the autopsy and medical opinion evidence does not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Mays*, 176 F.3d at 753, 21 BLR at 2-587; *Clark*, 12 BLR at 1-149.

Turning to claimant's request for modification of the denial of the miner's duplicate claim, a claimant may establish modification by establishing either a change in conditions since the issuance of a previous denial or a mistake in a determination of fact in the previous denial. 20 C.F.R. §725.310(a) (2000). In considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an 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 at least one element of entitlement which defeated entitlement in the prior decision. 20 C.F.R. §725.310 (2000); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). An administrative law judge, in considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), should initially address whether the newly submitted evidence alone is sufficient to support a material change in conditions. *See* 20 C.F.R. §725.309(d) (2000); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998); *Nataloni*, 17 BLR at 1-82 (1993). If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge would then be required to address whether all of the evidence submitted since the denial of the previous claim is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). If the evidence is sufficient to establish a material change in conditions, the administrative law judge would proceed to the merits of the duplicate claim. *Hess*, 21 BLR at 1-143.

With respect to the issue of whether the evidence submitted since the denial of the miner's prior claim is sufficient to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, or a material change in conditions pursuant to 20 C.F.R. §725.309(d), the administrative law judge initially noted that the miner's prior claim was denied on the grounds that the evidence of record failed to establish that the miner suffered from pneumoconiosis. Decision and Order at 28. The administrative law judge permissibly concluded that as, in adjudicating the survivor's claim, he had determined that the preponderance of the more probative radiographic, autopsy and medical opinion evidence, both included with prior claim and submitted since the prior denial, failed to establish the existence of pneumoconiosis, claimant had

not established grounds for modification of the denial of the miner's duplicate claim. Decision and Order at 28.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *Compton*, 211 F.3d at 211, 22 BLR at 2-174, and the Board may not reweigh the evidence or substitute its own inferences on appeal, *Mays*, 176 F.3d at 753, 21 BLR at 2-587; *Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-111. Therefore, we affirm the administrative law judge's finding that the existence of

pneumoconiosis, an essential element of entitlement, was not established pursuant to 20 C.F.R. §718.202(a). We therefore further affirm the administrative law judge's denial of benefits on the survivor's claim pursuant to 20 C.F.R. §718.205(c), *see Sparks*, 213 F.3d at 186, 22 BLR at 2-251; *Shuff*, 967 F.2d at 977, 16 BLR at 2-90; *Trumbo*, 17 BLR at 1-85, 1-87-88, and his finding that claimant failed to establish a change in conditions at 20 C.F.R. §725.310, or a material change in conditions pursuant to 20 C.F.R. §718.309(d) (2000) in this case. *See Hess* 21 BLR at 1-141. Because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement to benefits under Part 718, *see 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*), an award of benefits is precluded in both the miner's and survivor's claims.

Accordingly, the administrative law judge's Decision and Order – Denial of Survivor Benefits Denial of Black Lung Disability Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge