

BRB No. 04-0730 BLA

ANNA M. KINDER)	
(Widow of GEORGE A. KINDER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 04/18/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Michelle S. Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2003-BLA-00201) of Administrative Law Judge Janice K. Bullard denying modification and benefits on a 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). The administrative law judge found that the instant case was a modification request of a previously denied survivor's claim, noted the proper standard and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ Decision and Order at 2-3. The administrative law judge found, and the parties

¹ Claimant is Anna M. Kinder, the miner's widow. The miner, George A. Kinder,

stipulated to, the existence of pneumoconiosis arising out of the miner's sixteen years of qualifying coal mine employment. Decision and Order at 2; Director's Brief at 3; Director's Exhibit 60. Considering the relevant evidence of record, the administrative law judge concluded that it was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 6-8. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the evidence of record pursuant to Section 718.205. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 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

filed claims for benefits on October 10, 1975, December 10, 1981 and March 2, 1983. Director's Exhibit 38. On September 16, 1986, the Director withdrew its controversion and conceded liability for the miner's benefits. Director's Exhibit 38. The miner died on September 14, 2000. Director's Exhibit 3. Claimant filed her claim for benefits on October 3, 2000, which was finally denied by Administrative Law Judge Paul H. Teitler on February 22, 2002. Director's Exhibits 1, 47. Claimant subsequently requested modification which was denied by the district director on February 19, 2003. Director's Exhibits 49, 51, 52, 57. Claimant requested a hearing on her survivor's claim and the case was transferred to the Office of Administrative Law Judges on June 9, 2003. Director's Exhibits 58, 60.

² The administrative law judge's length of coal mine employment determination and her findings pursuant to 20 C.F.R. §§718.202, 718.203 and 718.304 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

cause” of a miner’s death if it hastens the miner’s death. *See* 20 C.F.R. §718.205(c)(5); *see also Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).³

In considering a petition for modification, the administrative law judge must determine whether the record demonstrates a change in conditions since the prior decision or a mistake of fact in the prior decision, even where no specific allegation of either has been made by claimant. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Furthermore, in determining whether claimant has established a basis for modification 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.⁴ *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).

After considering 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 contains no reversible error. The administrative law judge rationally determined that the evidence of record was insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 and therefore insufficient to establish modification.⁵ *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Initially, claimant’s contention that the administrative law judge’s Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibits 2, 38.

⁴ Based upon the circumstances of the instant case, modification can not be established based on a change in conditions. *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

⁵ Administrative Law Judge Paul H. Teitler denied benefits in the prior decision as claimant failed to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Director’s Exhibit 47.

§919(d) and 30 U.S.C. §932(a), is without merit.⁶ The administrative law judge fully discussed the relevant evidence of record and her reasoning is readily ascertainable from her discussion of the evidence.

Claimant further contends that the administrative law judge erred in failing to find the weight of the evidence sufficient to award benefits. Specifically, claimant contends that the administrative law judge failed to accord determinative weight to the opinions of Dr. Abdul-Al, the miner's treating physician, as well as the opinion of Dr. Simelaro, a reviewing physician. Claimant's Brief at 6-10. We disagree. Claimant's contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). 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 *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Further, although the United States Court of Appeals for the Third Circuit has indicated that treating physicians' opinions are assumed to be more valuable than those of non-examining physicians, see *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004)(Roth, J., dissenting), an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Additionally, a physician's opinion based upon his own tests and observations, or the review of other objective test results, may be substantial evidence in support of an administrative law judge's findings. *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); see also *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel*, 8 BLR 1-139.

Contrary to claimant's arguments, the administrative law judge adequately examined and discussed all of the relevant evidence as it relates to the cause of the miner's death and permissibly concluded that the evidence fails to carry claimant's burden pursuant to Section 718.205. Decision and Order at 4-8; Director's Exhibits 3, 6, 41, 42, 56, 63; Claimant's Exhibits 1-5; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax*

⁶ The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record..." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Coal Co., 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The relevant evidence of record concerning the cause of death consists of three medical opinions and the death certificate. Dr. Michos, who reviewed the evidence of record, opined that the miner's death was not hastened or due to his coal workers' pneumoconiosis, but concluded that hypertension was the true culprit. Director's Exhibits 41, 63. Dr. Simelaro, who also reviewed the evidence of record, opined that pneumoconiosis contributed to the miner's death. Claimant's Exhibits 1, 5. Dr. Abdul-Al, the miner's treating physician, opined that pneumoconiosis "no doubt played a major role in the miner's death." Claimant's Exhibit 3. The death certificate, signed by Dr. Pachipala, listed the cause of death as septicemic shock and pneumonia. Director's Exhibit 3. 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 as the administrative law judge permissibly determined that the affirmative evidence was unreasoned as the physicians did not explain the basis for their conclusions. *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *King v. Consolidation Coal Co.*, 8 BLR 1-167 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 6-8.

Claimant's contention that Dr. Simelaro's opinion was entitled to greater weight, as the physician is board-certified in internal medicine and medical diseases of the chest, lacks merit. A medical opinion, even by an expert, must be credible to be entitled to weight. *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Clark*, 12 BLR 1-149. The administrative law judge properly questioned the reliability of the opinion as Dr. Simelaro did not discuss a wide range of the miner's serious medical conditions and the physician did not describe the precise nature of the miner's lung impairment, how it manifested itself or how it hastened or caused death. *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Lafferty*, 12 BLR 1-190; *Clark*, 12 BLR 1-149; *Hutchens* 8 BLR 1-16; Decision and Order at 7; Claimant's Exhibit 1. The administrative law judge, in this instance, rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. See *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; Decision and Order at 6-8; Director's Exhibits 41, 63; Claimant's Exhibits 1-5. Further, although Dr. Abdul-Al is the miner's treating physician, the administrative law judge properly concluded that this opinion was not entitled to greater weight pursuant to 20 C.F.R. §718.104(d)(5) as the physician's opinion is not well reasoned since it failed to explain with any certainty the basis for his opinion that the miner's death was due to pneumoconiosis. See *Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia*, 130 F.3d 579; *Lango*, 104 F.3d 573; *Evosevich*, 789 F.2d 1021, 9 BLR 2-10; *Tedesco*, 18 BLR 1-103; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Hutchens*, 8 BLR 1-16; Decision and Order at 7-8.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the evidence of record does not establish that the miner's death was due to pneumoconiosis, claimant has not met her burden of proof on all the elements of entitlement. *Trumbo*, 17 BLR 1-85; *Haduck*, 14 BLR 1-29; *Boyd*, 11 BLR 1-39. 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* 12 BLR 1-149; *Anderson*, 12 BLR 1-111; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish claimant's burden of proof in this survivor's claim as it is supported by substantial evidence and is in accordance with law.⁷ *See Keating*, 71 F.3d 1118, 20 BLA 2-53; *Lukosevicz*, 888 F.2d 1001, 13 BLR 2-100; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149.

Because 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. *See Lukosevicz*, 888 F.2d 1001, 13 BLR 2-100; *Trumbo*, 17 BLR 1-85; *Kneel v. Director, OWCP*, 11 BLR 1-85 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

⁷ In setting forth the issues presented in her brief, claimant asserted that the administrative law judge erred in denying claimant's request to depose one of her medical witnesses. Claimant's Brief at 4. Claimant, however, fails to specifically brief this contention and thus the Board has no basis to consider this argument. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Decision and Order denying modification and benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge