BRB Nos. 06-0647 BLA
and 06-0647 BLA-A

JANET HUMPHRIES (Widow of JAMES C. HUMPHRIES)	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	DATE ISSUED: 04/27/2007
UNITED STATES STEEL MINING COMPANY	)	
Employer-Respondent Cross-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits in the Miner's Claim, Denying Benefits in the Survivor's Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton (Singleton Law Office), Bessemer, Alabama, for claimant.

James N. Nolan (Walston, Wells & Birchall LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Awarding Benefits in the Miner's Claim, Denying Benefits in the Survivor's Claim (2005-BLA-5068 and 2005-BLA-5069) of Administrative Law Judge Edward Terhune Miller with respect to a 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). The miner filed claims for benefits on August 12, 1991, March 23, 1992, December 17, 1997, June 12, 2000, and May 1, 2002. Director's Exhibits 26, 27, 32, 34. In a Decision and Order dated October 23, 2003, Administrative Law Judge Robert J. Lesnick stated that pursuant to 20 C.F.R. §725.310 (2000), the miner's most recent filing constituted a request for modification of the denial of benefits issued by Administrative Law Judge Gerald Tierney.[1] Judge Lesnick noted that Judge Tierney determined that although the miner established that he was totally disabled, he did not prove that he had pneumoconiosis. Judge Lesnick found that the miner failed to establish a change in condition or a mistake in a determination of fact with respect to this element of entitlement and denied benefits accordingly.

The miner died on July 22, 2003, prior to the issuance of Judge Lesnick's Decision and Order. Director's Exhibits 45, 48. Subsequently, claimant, the miner's surviving spouse, submitted the miner's death certificate to the district director on February 2, 2004 and filed an application for survivor's benefits on the same date. Director's Exhibit 45. The district director treated the submission of the death certificate as a request for modification of the denial of the miner's most recent claim and consolidated the request for modification with the survivor's claim. Director's Exhibit 47. After the district director's issuance of a proposed Decision and Order denying the request for modification and the survivor's claim, the case was transferred to the Office of Administrative Law Judges for a hearing, which was held before Judge Miller (the administrative law judge) on April 19, 2005.

In his Decision and Order, the administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and, therefore, sufficient to establish a mistake in a determination of fact in the denial of the miner's claim. On the merits of entitlement, the

[1] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These amendments became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). The revised version of 20 C.F.R. §725.310 does not apply in this case, as the miner's June 12, 2000 claim was still pending on the effective date of the amended regulations. 20 C.F.R. §725.2(c).

administrative law judge found that the miner was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment. The administrative law judge further found that the evidence of record was sufficient to establish that the miner was totally disabled at 20 C.F.R. §718.204(b)(2)(i), (iv) and that pneumoconiosis was a contributing cause of his total disability under 20 C.F.R. §718.204(c). Accordingly, benefits were awarded in the miner's claim. With respect to the survivor's claim, however, the administrative law judge determined that claimant failed to prove that pneumoconiosis caused the miner's death pursuant to 20 C.F.R. §718.205(c) and, therefore, denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding the evidence insufficient to satisfy her burden of proof under Section 718.205(c) in her survivor's claim. Employer has responded and urges affirmance of the denial of survivor's benefits. In its cross-appeal, employer contends that in the miner's claim, the administrative law judge erred in finding a mistake in a determination of fact established pursuant to Section 725.310 (2000) and in weighing the medical opinion evidence relevant to the existence of pneumoconiosis and total disability due to pneumoconiosis. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a substantive response to either appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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 in a miner's claim filed after January 1, 1982, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that he was totally disabled due to pneumoconiosis. 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).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718 in a claim filed after January 1, 1982, claimant must establish that the miner had

[2] We affirm the administrative law judge's findings that the miner was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that total disability was not established under 20 C.F.R. §718.204(b)(2)(ii) and (iii), as they are unchallenged on appeal. Decision and Order at 11; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711-12 (1983).

pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1; 718.202; 718.203; 718.205(c); 718.304. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(2); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 1365, 21 BLR 2-166, 2-176 (11th Cir. 1997). [3]

We will first address claimant's appeal of the denial of benefits in the survivor's claim. The relevant evidence consists of the death certificate prepared by Dr. Miller, the autopsy report submitted by Dr. Force, and the reports of Dr. Rosenberg. Director's Exhibits 45, 48; Employer's Exhibit 1. On the death certificate, Dr. Miller identified myocardial infarction due to coronary artery disease as the immediate cause of the miner's death. Director's Exhibit 48. Dr. Miller indicated that hypertension, hyperthyroidism, hyperlipidemia, and cerebrovascular disease were other significant conditions contributing to, but not resulting in, the underlying cause of death. Id. Based upon an autopsy of the miner's lungs, Dr. Force diagnosed simple pneumoconiosis and emphysema. Director's Exhibit 45. She did not offer an opinion as to whether pneumoconiosis contributed to or caused the miner's death. In two separate reports, Dr. Rosenberg reviewed the medical evidence of record and stated that although the miner had pneumoconiosis, it did not cause or hasten his death. Employer's Exhibit 1.

The administrative law judge noted that claimant objected to the consideration of Dr. Rosenberg's medical reports in the survivor's claim, as Dr. Rosenberg referred to evidence in excess of the evidentiary limitations set forth in 20 C.F.R. §725.414. The administrative law judge determined that Dr. Rosenberg's reports were admissible, but also determined that even if they were excluded, claimant had failed to carry her burden under Section 718.205(c), as there was no evidence linking the miner's death to pneumoconiosis. Decision and Order at 12-13.

Claimant argues that the administrative law judge erred in failing to find that the evidence of record was sufficient to establish that the miner's death was due to pneumoconiosis. This contention is without merit. The administrative law judge rationally determined that claimant did not prove that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), as the record does not contain any

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner's most recent coal mine employment occurred in Alabama. Director's Exhibits 7, 26, 27; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

evidence in which a connection between the miner's simple pneumoconiosis and his death due to myocardial infarction is described. 20 C.F.R. §718.205(c); *Bradberry*, 117 F.3d at 1365, 21 BLR at 2-176; *Trumbo*, 17 BLR at 1-87; *Neeley*, 11 BLR at 1-86. We affirm, therefore, the denial of benefits in the survivor's claim.

We will now address employer's appeal of the award of benefits in the miner's claim. With respect to the issue of the existence of pneumoconiosis, employer asserts that the administrative law judge erred in failing to weigh the non-qualifying pulmonary function studies and blood gas studies of record against the autopsy evidence of pneumoconiosis pursuant to Section 718.202(a). In support of its argument, employer cites the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). This contention is without merit.

As indicated above, because the miner's coal mine employment occurred in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. Director's Exhibits 7, 26, 27; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The Eleventh Circuit has declined to apply the interpretation of Section 718.202(a) adopted in *Williams* and *Compton*, but rather has held that Section 718.202(a) sets forth four alternative methods for establishing the existence of pneumoconiosis. *United States Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 991, 23 BLR 2-213, 2-236-238 (11th Cir. 2004). In this case, the administrative law judge determined that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(2) based upon the newly submitted autopsy report of Dr. Force and the newly submitted report in which Dr. Rosenberg acknowledged that the pathological evidence supported a diagnosis of a very minimal degree of coal workers' pneumoconiosis. Decision and Order at 9-10; Director's Exhibit 45; Employer's Exhibit 1. We affirm the administrative law judge's finding, as it is rational, supported by substantial evidence, and in accordance with applicable law.[4] We also affirm, therefore, the administrative law judge's finding that a mistake in a determination of fact was established in the prior denial of benefits pursuant to Section 725.310 (2000).

With respect to the issue of total disability, the administrative law judge determined that the qualifying pre- and post-bronchodilator pulmonary function studies obtained by Dr. Shad on July 7, 2000 were sufficient to establish total disability pursuant

[4] Because Drs. Force and Rosenberg were the only physicians who had access to the autopsy evidence, no contrary opinions were offered as to whether the autopsy findings were consistent with a diagnosis of coal workers' pneumoconiosis.

to Section 718.204(b)(2)(i). [5] Decision and Order at 10-11; Director's Exhibit 7. Employer argues that the administrative law judge erred in finding that the FEV1/FVC ratio from this study was 47% and, therefore, qualifying. A review of the July 7, 2000 study reveals that the administrative law judge transposed the number representing the percentage of the predicted value reflected in the miner's actual FEV1 with the number representing the best FEV1/FVC ratio. The correct figure was 70%, which is nonqualifying. Director's Exhibit 7; 20 C.F.R. §718.204(b)(2)(i)(C). However, the FEV1 and MVV produced in this study were below the table values set forth in Appendix B to Part 718, thereby rendering the pre-bronchodilator test qualifying regardless of the FEV1/FVC ratio.[6] *Id.* Because employer has raised no other allegations of error regarding the administrative law judge's finding that the pre- and post-bronchodilator studies dated July 7, 2000 were sufficient to establish total disability under Section 718.204(b)(2)(i), we affirm the administrative law judge's finding. *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711-12 (1983).

Employer further contends that the administrative law judge did not properly weigh the medical opinion evidence under Section 718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Shad, Sherman, and Rosenberg. Dr. Shad examined the miner on July 7, 2000 and obtained nonqualifying blood gas studies and qualifying pre- and post-bronchodilator pulmonary function studies. Director's Exhibit 10. Dr. Shad diagnosed pneumoconiosis and severe obstructive lung disease and stated that the miner was unable to perform his last coal mine job due to a pulmonary impairment. *Id.* In a report dated September 9, 2000, Dr. Sherman reviewed various medical records and concluded that the miner had pneumoconiosis and a totally disabling obstructive impairment based upon an FEV1 on the July 7, 2000 pre-bronchodilator pulmonary function study that was 47% of predicted. Director's Exhibit 17. Dr. Rosenberg performed a record review and, in a report dated February 21, 2005, stated that Dr. Shad had found that the miner was suffering from a totally disabling restrictive impairment. Employer's Exhibit 1. Dr. Rosenberg noted that the miner's normal

[5] 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, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] For a pulmonary function test to constitute evidence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), it must produce both a qualifying FEV1 value and either an FVC or MVV equal to or less than those values appearing in the tables set forth in Appendix B, or it must produce an FEV1 to FVC ratio equal to or less than 55%. 20 C.F.R. §718.204(b)(2)(i)(A)-(C).

FEV1/FVC ratio ruled out the presence of chronic obstructive pulmonary disease, but did not explicitly refute Dr. Shad's diagnosis of a totally disabling restrictive impairment. *Id*. Dr. Rosenberg did, however, dispute the attribution of the miner's impairment to pneumoconiosis or coal dust exposure. *Id*.

The administrative law judge found that Dr. Rosenberg's opinion was entitled to "little weight because Dr. Rosenberg repeatedly and inaccurately described the miner's FEV1% as normal." Decision and Order at 10-11. Accordingly, the administrative law judge gave greater weight to the medical opinions of Drs. Shad and Sherman and determined that they were sufficient to establish that the miner was totally disabled under Section 718.204(b)(2)(iv). *Id*. Employer argues that the administrative law judge's finding with respect to Dr. Rosenberg's opinion must be vacated, as the administrative law judge misidentified the value on the July 7, 2000 pulmonary function study to which Dr. Rosenberg referred. Employer's contention has merit.

In his report dated February 21, 2005, Dr. Rosenberg stated that the miner's "FEV1% (FEV1/FVC)" was normal. Employer's Exhibit 1. The administrative law judge apparently did not note the information in the parentheses and, therefore, believed that Dr. Rosenberg was describing as normal the ratio of the miner's actual FEV1 to the predicted FEV1 value rather than the ratio of the actual FEV1 to the actual FVC.[7] Because the administrative law judge did not accurately characterize this aspect of Dr. Rosenberg's opinion, we must vacate the administrative law judge's determination that it was entitled to less weight than the opinions of Drs. Shad and Sherman and remand this case to the administrative law judge for reconsideration of the medical opinion evidence relevant to Section 718.204(b)(2)(iv). *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). In addition to reassessing Dr. Rosenberg's opinion in light of an accurate understanding of the pulmonary function study values to which he referred, the administrative law judge should reconsider his finding that Dr. Rosenberg concluded that the miner was not totally disabled in light of Dr. Rosenberg's comments suggesting that he did not disagree with Dr. Shad's diagnosis of total disability. Prior to rendering a determination that total disability has been established pursuant to Section 718.204(b)(2) on remand, the administrative law judge must consider all of the evidence of record and weigh the evidence supportive of a finding of total disability against the contrary probative evidence. 20 C.F.R. §718.204(b)(2); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*).

[7] As indicated above, the FEV1 produced on the miner's July 7, 2000 pre-bronchodilator pulmonary function study was qualifying and the FEV1/FVC ratio was nonqualifying. Director's Exhibit 7; 20 C.F.R. §718.204(b)(2)(i)(A). The percentage of the predicted FEV1 value that the miner achieved was 47%. Director's Exhibit 7.

Regarding the contrary probative evidence of record, employer maintains that the administrative law judge did not properly perform the requisite weighing when he determined that the preponderance of the evidence as a whole was sufficient to establish total disability pursuant to Section 718.204(b)(2). Employer argues specifically that the administrative law judge should have accorded conclusive weight to the blood gas studies of record, all of which were nonqualifying. This argument has no merit. Because blood gas studies and pulmonary function studies measure different types of impairment, the administrative law judge was not required to find that the nonqualifying blood gas studies rebutted the qualifying pulmonary function studies of record or the diagnoses of total disability that were based upon them. *Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984).

Lastly, employer contends that the administrative law judge's finding that total disability due to pneumoconiosis was established under Section 718.204(c) based upon the opinion of Dr. Shad cannot be affirmed, as the administrative law judge relied upon his erroneous weighing of Dr. Rosenberg's opinion under Section 718.204(b)(2)(iv). We agree. In rendering his finding under Section 718.204(c), the administrative law judge specifically stated that Dr. Rosenberg's "erroneous analysis of the recent pulmonary function study evidence undermines his overall opinion, including his finding that the miner did not suffer from a coal mine-related impairment." Decision and Order at 12. Because the administrative law judge did not properly characterize Dr. Rosenberg's assessment of the pulmonary function study evidence, we must also vacate his finding discrediting Dr. Rosenberg's opinion that pneumoconiosis was not a contributing cause of the miner's totally disabling pulmonary impairment. *Tackett*, 7 BLR at 1-706. We must also vacate, therefore, the administrative law judge's determination that total disability due to pneumoconiosis was established under Section 718.204(c). If the administrative law judge determines, on remand, that total disability has been proven pursuant to Section 718.204(b)(2), he must reconsider whether pneumoconiosis was a substantially contributing cause of the miner's total disability under Section 718.204(c). 20 C.F.R. §718.204(c); *United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits in the Miner's Claim, Denying Benefits in the Survivor's Claim is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

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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JUDITH S. BOGGS
Administrative Appeals Judge