

BRB No. 02-0771 BLA

FERN M. SMITH	)	
(Widow of HARRY W. SMITH)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLORENCE MINING COMPANY	)	DATE ISSUED: 08/27/2003
	)	
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 B Denying Benefits of Robert J. Lesnick,  
Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Gregory J. Fischer (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Rita Roppolo (Howard Radzely, Acting 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 GABAUER,  
Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order-Denying Benefits (01-BLA-0453 and 01-BLA-

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<sup>1</sup> Claimant is Fern M. Smith, the widow of Harry W. Smith, the miner, who died  
on February 21, 2000. Director's Exhibits 5, 29.

0454) of Administrative Law Judge Robert J. Lesnick 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).<sup>2</sup> This case involves the appeal of the denial of benefits on claimant=s survivor=s claim, in addition to the appeal of the denial of benefits on the miner=s duplicate claim.

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<sup>2</sup> 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.

The miner filed his most recent claim for benefits on August 27, 1999.<sup>3</sup> The miner died on February 21, 2000. Director's Exhibits 5. Claimant filed her application for survivor=s benefits on May 8, 2000.

On August 1, 2002, the administrative law judge issued his Decision and Order B Denying Benefits. The administrative law judge reviewed the procedural history of these claims and credited the miner with thirty-eight years of coal mine employment. Addressing the miner=s claim, the administrative law judge determined that a material change in conditions was not established by the newly submitted medical evidence. The administrative law judge found that even if he had found the evidence sufficient to establish a material change in conditions, the evidence would be insufficient to establish that the miner=s disability was due to

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<sup>3</sup> The miner=s 1981 application for benefits was denied by the claims examiner in 1981. No further action was taken on this claim. Director's Exhibit 45. The miner filed another application for benefits in 1987, which was denied by the claims examiner in 1987. No further action was taken on this claim. Director's Exhibit 46. The miner filed another application for benefits on January 24, 1995. After holding a hearing, Administrative Law Judge Thomas M. Burke issued a Decision and Order B Denying Benefits, on December 2, 1997, wherein he credited the miner with thirty-eight years of coal mine employment. Judge Burke noted the stipulation of the parties to the existence of pneumoconiosis, which he found sufficient to establish a material change in conditions pursuant to 20 C.F.R. ' 725.309 and *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Evaluating the evidence on the merits, Judge Burke found the pulmonary function study and blood gas study evidence insufficient to establish total disability, and then found the medical opinion evidence insufficient to establish that the miner was totally disabled due to pneumoconiosis. Accordingly, benefits were denied. No further action was taken on this claim. Director's Exhibit 47.

pneumoconiosis. Accordingly, the administrative law judge denied benefits on the miner=s claim. Turning to the survivor=s claim, the administrative law judge found the evidence insufficient to establish that the miner=s death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits on the survivor=s claim.

On appeal, claimant asserts that the administrative law judge erred in his weighing of the medical opinion evidence in both the miner=s and the survivor=s claims. Employer responds, urging affirmance.<sup>4</sup> The Director, Office of Workers' Compensation Programs (the Director), responds, noting that Dr. Malhotra=s opinion was provided by the Department of Labor. The Director urges that if the Board affirms the administrative law judge=s weighing of the evidence, the case should be remanded to the district director for a supplemental report from Dr. Malhotra so the Department of Labor may comply with its statutory obligation to provide the miner with a complete, credible pulmonary evaluation, as required by the Act.<sup>5</sup>

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).

We first address the miner=s claim. Claimant asserts that it is clear from Dr. Schaaf=s report that the physician is of the opinion that the miner was totally disabled, and claimant asserts that the administrative law judge erred by discrediting Dr. Schaaf=s opinion. Claimant

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<sup>4</sup> We affirm the administrative law judge=s finding that the miner worked for thirty-eight years in coal mine employment, as this finding is not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>5</sup> Because the Director indicates that Dr. Malhotra=s supplemental reports should include explanations of the physician=s opinion regarding the existence of the miner=s total respiratory disability and the cause of this disability, the Director=s request is construed as relating only to the miner=s claim.

also challenges the administrative law judge's finding that Dr. Malhotra's opinion is not adequately reasoned. Claimant additionally asserts that the administrative law judge accepted Dr. Pickerill's opinion without providing specific reasoning.

In weighing the medical opinion evidence regarding total disability at 20 C.F.R. '718.204(b)(2)(iv), the administrative law judge found that Dr. Schaaf's opinion<sup>6</sup> does not address whether the miner was able to perform his usual coal mine employment. In addition, the administrative law judge found that Dr. Schaaf's opinion was based on a grossly understated smoking history and that his conclusion was not adequately explained. The administrative law judge found that Dr. Malhotra's opinion<sup>7</sup> was not reliable because the physician failed to fully explain the medical rationale for his conclusions, particularly in view of the results on the objective studies. The administrative law judge noted that Dr. Malhotra also considered a grossly understated smoking history. The administrative law judge found that Dr. Pickerill<sup>8</sup>

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<sup>6</sup> Dr. Schaaf examined the miner in 1999 and noted a smoking history of 1/3 of a pack per day for five years. Dr. Schaaf opined that the miner's severe disabling dyspnea is due to both his heart condition and his coal workers' pneumoconiosis, and opined that the contributions are about equal. Director's Exhibit 12.

<sup>7</sup> Dr. Malhotra examined the miner in 1996 and 1999, and considered a smoking history of less than one pack per day for twenty-three years. In his 1996 report, Dr. Malhotra opined that the miner was totally and permanently disabled from coal workers' pneumoconiosis. Director's Exhibit 47. Dr. Malhotra's 1999 report is provided on the standard Department of Labor medical form, and in the section of the form regarding the extent of the miner's respiratory or pulmonary disability, the physician stated a total disability. Director's Exhibit 11.

<sup>8</sup> Dr. Pickerill examined claimant in 1996 and in 1999. In his 1996 report, Dr. Pickerill noted a smoking history of between 2 and 1 pack per day for thirty-two years, and opined that the miner was unable to perform his last coal mine employment because of his advanced age and multiple medical problems, including coronary artery disease, his previous neck injury and lumbar spinal stenosis. Dr. Pickerill stated that the miner's coal workers' pneumoconiosis would only have a minor contribution to the miner's overall functional respiratory impairment. Director's Exhibit 47. In his 1999 report, Dr. Pickerill considered a smoking history of between 2 and : of a pack per day, and opined that at the time of the miner's retirement in 1980, he had only a mild functional respiratory impairment which would not have prevented him from performing his last coal mine job. The physician stated that since 1996, there had been a significant decrease in the miner's lung function which was due to his cardiac problems and not the progressing of coal workers' pneumoconiosis. Director's Exhibit 13.

did not provide an opinion regarding total respiratory or pulmonary disability, and found that the physician relied upon questionable studies. Decision and Order at 17-18. In his analysis of disability causation at 20 C.F.R. ' 718.204(c), the administrative law judge only addressed the opinion of Dr. Pickerill, and found it insufficient to establish that any disability the miner had was due to pneumoconiosis. Decision and Order at 18. The administrative law judge also adopted Judge Burke=s finding that the miner smoked one pack of cigarettes per day for forty-six years. Decision and Order at 7.

The administrative law judge is charged with evaluating and weighing the medical evidence, and it is within his purview to draw inferences from the evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). We affirm the administrative law judge=s finding that Dr. Schaaf=s report does not constitute an opinion of total disability at Section 718.204(b)(2)(iv), as a reasonable finding made by the administrative law judge as the finder of fact.<sup>9</sup> See *Calfree v. Director, OWCP*, 8 BLR 1-7 (1985). Turning to Dr. Malhotra=s opinion, the administrative law judge permissibly found this opinion to be unreasoned because the report does not provide an explanation for the physician=s opinion that claimant is totally disabled.<sup>10</sup>

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<sup>9</sup> In view of our affirmance of the administrative law judge=s finding that Dr. Schaaf=s opinion does not constitute an opinion of total disability, claimant=s challenge to the administrative law judge=s finding that Dr. Schaaf=s opinion is not adequately explained, is rendered moot.

<sup>10</sup> Claimant alleges that the administrative law judge erred in relying on Dr. Pickerill=s opinion. Since the administrative law judge did not rely on Dr. Pickerill=s opinion in making his total disability finding pursuant to 20 C.F.R. ' 718.204(b)(2)(iv), claimant has not challenged the administrative law judge=s consideration of Dr. Pickerill=s opinion in his Section 718.204(b) analysis.

*See Oggero v. Director, OWCP, 7 BLR 1-860 (1985).*

In view of our affirmance of the administrative law judge's finding that the opinion of Dr. Malhotra is not well reasoned, and the Director's argument that he has failed to provide claimant with a complete pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. § 923(b), *see* 20 C.F.R. §§ 718.101, 725.405(b); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Petry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*); the case is remanded to the district director to provide claimant with a complete, credible, pulmonary evaluation addressing all issues of entitlement, in accordance with Section 413(b) of the Act. If, on remand, the administrative law judge finds that the newly submitted evidence affirmatively establishes the existence of one of the elements of entitlement previously adjudicated against the miner, then claimant has demonstrated a material change in conditions. *See* 20 C.F.R. § 725.309 (2000); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 317, 20 BLR 2-76, 2-94 (3d Cir. 1995). Then, the administrative law judge must consider all of the evidence of record, including that submitted with the previous claim, to determine whether it establishes entitlement to benefits. *See Swarrow*, 72 F.3d 308, 20 BLR 2-76.

We now turn to claimant's assertions regarding the administrative law judge's findings on the survivor's claim. 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.<sup>11</sup> 20 C.F.R. § 718.205(c). *See* 20 C.F.R. §§ 718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-

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<sup>11</sup> 20 C.F.R. § 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (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.
- (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)(1)-(3), (5).

74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner=s death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death. 20 C.F.R.

' 718.205(c)(2). Pneumoconiosis is a substantially contributing cause@ of a miner=s death if it hastens the miner=s death. *See* 20 C.F.R. ' 718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In finding the evidence insufficient to establish that the miner=s death was due to pneumoconiosis pursuant to Section 718.205, the administrative law judge accorded greatest weight to the opinions of Drs. Oesterling and Naeye, Aas buttressed by Dr. Fino,@ Decision and Order at 20, all of whom opined that coal workers' pneumoconiosis did not cause or hasten the miner=s death. Director's Exhibits 7, 9, 23, 31, 44; Employer=s Exhibit 5. The administrative law judge found that these opinions are A most consistent with the miner=s extensive history of cardiac problemsY and the miner=s less than disabling respiratory impairment, as evidenced by the preponderance of the nonqualifying pulmonary function studies and the normal blood gases.@ Decision and Order at 20.

Claimant maintains that it was error for the administrative law judge to conclude, based on the preponderance of non-qualifying pulmonary function studies and blood gas studies, that there was not a pulmonary contribution to the miner=s death. In addition, claimant asserts that the administrative law judge=s finding is conclusory and does not satisfy 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. ' 919(d) and 30 U.S.C. ' 932(a).

Although it is within the purview of the administrative law judge to determine whether medical opinions are reasoned and documented, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), we vacate the administrative law judge=s finding at Section 718.205(c), as his analysis regarding whether the medical opinions are reasoned does not address the relevant issues in a survivor=s claim. Rather than analyzing the medical opinions to determine whether the miner=s coal workers' pneumoconiosis caused, contributed to, or hastened the miner=s death, the administrative law judge focused on the miner=s cardiac condition, as well as his pulmonary function study and blood gas study results, in weighing the medical opinions and concluding that claimant did not establish that the miner=s death was due to pneumoconiosis pursuant to Section 718.205(c). Therefore, we vacate this finding by the administrative law judge and we remand the case for further consideration of the evidence at Section 718.205(c). On remand, the administrative law judge must provide an adequate explanation and rationale for his crediting and weighing of the evidence in accordance with the requirements of the APA.



Accordingly, the administrative law judge=s Decision and Order B Denying Benefits is affirmed in part, vacated in part, and this case is remanded to the district director for proceedings on the miner=s claim consistent with this opinion.<sup>12</sup>

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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PETER A. GABAUER, JR.  
Administrative Appeals Judge

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<sup>12</sup> Following the district director=s processing of the miner=s claim, we instruct the district director to forward the case to the administrative law judge for further findings pursuant to our holdings regarding the survivor=s claim. If any party is dissatisfied with the district director=s proposed decision and order in the miner=s claim, that party may, in writing, within thirty days after issuance of the proposed decision and order in the miner=s claim, request a revision of the proposed decision and order or a hearing in the miner=s claim pursuant to 20 C.F.R. ' 725.419.