

BRB No. 98-1514 BLA

NANCY JANE THOMPSON)	
(Widow of STROTHER THOMPSON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WOLF CREEK COLLIERIES)	DATE ISSUED:
)	
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 on the Record - Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Nancy Jane Thompson, Aflex, Kentucky, *pro se*.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's widow, without the assistance of legal counsel, appeals the Decision and Order (97-BLA-0186) of Administrative Law Judge J. Michael O'Neill denying benefits on a request for modification in a miner's duplicate claim and on 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). The miner filed his original claim for black lung benefits on July 23, 1973, which was denied by the district director on August 9, 1979. Decision and Order at 2; Director's Exhibit 28. The miner filed the instant claim on April 14, 1988. Decision and Order at 2; Director's Exhibit 1. In a Decision and Order dated September 9, 1993, the administrative law judge credited the miner with at least thirty years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence submitted since the

previous denial was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge thus found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On March 30, 1994, within one year of the denial, the miner filed a request for modification and on December 26, 1996, while the request was pending, the miner died. Decision and Order at 2-3; Director's Exhibit 51. On February 26, 1996, the miner's widow, claimant herein, filed her survivor's claim. Decision and Order at 3; Director's Exhibit 51. Subsequently, both claims were consolidated and referred to the Office of Administrative Law Judges on November 5, 1996. Decision and Order at 3; Director's Exhibit 52. The administrative law judge decided this case on the record as the parties waived a formal hearing and adjudicated the claims pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found that the evidence submitted since the most recent denial, in conjunction with the previously submitted evidence, failed to establish a change in conditions as it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge further found no mistake in a determination of fact in the prior denial. The administrative law judge thus found that the evidence did not warrant modification pursuant to 20 C.F.R. §725.310 in the miner's claim. With respect to the survivor's claim, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis and also found that claimant failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on both claims. On appeal herein, claimant generally contends that benefits should be awarded. Employer responds, urging affirmance of the denial of benefit. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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 to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to

establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The administrative law judge properly considered the miner's claim under the regulations set forth in Section 725.310 since this case involves a modification request. In determining whether claimant has established a change in conditions pursuant to Section 725.310, 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. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

The administrative law judge properly found that the newly submitted evidence as well as the evidence submitted in connection with the original file failed to establish the existence of pneumoconiosis pursuant to any of the provisions contained in 20 C.F.R. §718.202(a). The administrative law judge rationally concluded that the preponderance of the x-ray evidence was negative for the existence of pneumoconiosis. Decision and Order at 10-11. The administrative law judge also permissibly relied upon the qualifications of the readers in his consideration of the x-ray evidence and rationally found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 11. Inasmuch as the administrative law judge weighed all of the x-ray interpretations and reasonably concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

In determining whether the existence of pneumoconiosis was established by autopsy evidence pursuant to Section 718.202(a)(2), the administrative law judge permissibly credited Dr. Donmezer's autopsy report, which did not include a diagnosis of pneumoconiosis, as well as the report of Dr. Naeye, who reviewed the autopsy report, section slides and tissue blocks and did not find pneumoconiosis. *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Simila v. Bethlehem Mines Corp.*, 7 BLR 1-535 (1984), *vacated in part on other grounds sub nom. Bethlehem Mines Corp. v. Director, OWCP*, 766 F.2d 128, 8 BLR 2-4 (3d Cir. 1985); Decision and Order at 11-12; Director's Exhibits 51, 53. Consequently, we affirm the administrative law judge's finding that the autopsy evidence was insufficient to establish the

existence of pneumoconiosis pursuant to Section 718.202(a)(2).¹

In addition, the administrative law judge properly considered the newly submitted medical opinion evidence of record and acted within his discretion in concluding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In so finding, the administrative law judge permissibly concluded that the opinions of Drs. Myers and Tan, who diagnosed the existence of pneumoconiosis, were outweighed by the contrary opinions of Drs. Dahhan and Fino, based on the documentation and reasoning and the physicians' qualifications. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 12-13. Inasmuch as the administrative law judge weighed all of the medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Clark, supra*; *Perry, supra*; *Lucostic, supra*; *Oggero, supra*. The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and thus failed to establish a change in conditions pursuant to Section 725.310, as it is supported by substantial evidence.

¹ We note that the administrative law judge correctly found that based on the filing date and inasmuch as the record contains no evidence of complicated pneumoconiosis, the presumptions enumerated at 20 C.F.R. §718.202(a)(3) are inapplicable to this claim. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 10.

With respect to the administrative law judge's findings pursuant to Section 718.204(c), the administrative law judge weighed all of the relevant probative evidence, both like and unlike, as required by *Shedlock v. Bethlehem Steel Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987), and permissibly concluded that the newly submitted evidence as well as the other evidence of record failed to establish total disability pursuant to Section 718.204(c). *Piccin, supra*. In determining that total disability was not established pursuant to Section 718.204(c)(1)-(2), the administrative law judge noted that the recent pulmonary function study results varied and reasonably credited the valid non-qualifying study by Dr. Dahhan over the qualifying study by Dr. Myers, which was found to be invalid by four physicians who review the study.² Decision and Order at 13-14; Director's Exhibits 49, 51. The administrative law judge also correctly found that all of the recent blood gas study evidence of record was non-qualifying.³ See *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 14. In addition, the administrative law judge correctly found that there is no evidence of cor pulmonale with right sided congestive heart failure, see 20 C.F.R. §718.204(c)(3), and that establishing total disability by this method was precluded. Decision and Order at 14.

² 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(c)(1), (2).

³ We note that the report by Dr. Myers on October 18, 1994, also contains the results of a non-qualifying blood gas study which the administrative law judge did include in his discussion. Director's Exhibit 46.

In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge permissibly found that the opinions of Drs. Meyers and Tan failed to establish total disability in light of Dr. Myers' reliance on an invalidated pulmonary function study and Dr. Tan's equivocal diagnosis. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel, supra*; Decision and Order at 14. The administrative law judge is empowered to weigh the medical evidence and to draw his 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, supra*; *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that the medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4) and were thus insufficient to establish a change in conditions pursuant to Section 725.310.⁴ *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni, supra*; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Clark, supra*; *Lucostic, supra*. Furthermore, the administrative law judge properly reviewed the entire record and concluded that there was no mistake in fact in the prior denial. Therefore, we affirm the administrative law judge's finding that claimant failed to establish modification in the miner's claim pursuant to 20 C.F.R. §725.310 as it is supported by substantial evidence and is in accordance with law.

To establish entitlement to benefits under 20 C.F.R. Part 718 in the survivor's claim filed after January 1, 1982, claimant must establish, by a preponderance of the evidence, that the miner suffered from pneumoconiosis, that such pneumoconiosis arose out of coal mine employment and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Roberts, supra*. Failure to establish any of these requisite elements precludes entitlement. *Anderson, supra*; *Trent, supra*. In adjudicating the claim which was filed by the survivor after January 1, 1982, the administrative law judge

⁴ As the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), lay testimony alone cannot alter the administrative law judge's finding. *See* 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

properly required claimant to establish that the miner suffered from pneumoconiosis, *see* 20 C.F.R. §718.202(a), and that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) in order to establish entitlement to survivor's benefits. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley, supra*. The administrative law judge correctly found that as claimant failed to establish the existence of pneumoconiosis, as discussed above, she cannot establish that the miner's death was due to pneumoconiosis. *Trumbo, supra*; Decision and Order at 14-15. Moreover, the administrative law judge permissibly concluded that Dr. Tan's opinion was too equivocal to support a finding of death due to pneumoconiosis, the autopsy report signed by Dr. Donmezer did not indicate a cause of death and Dr. Fino determined that the miner died due to a myocardial infarction. *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Clark, supra*; *Lucostic, supra*; Decision and Order at 15. Thus, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Inasmuch as claimant has failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis, requisite elements of entitlement under 20 C.F.R. Part 718, entitlement thereunder is precluded. *See Trumbo, supra*; *Neeley, supra*; *Trent, supra*. Consequently, we affirm the administrative law judge's denial of benefits in the survivor's claim as it is supported by substantial evidence and is in accordance with law.

Accordingly, the Decision and Order of the administrative law judge denying modification and benefits in the miner's claim and benefits in the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

Administrative Appeals Judge