

BRB No. 97-0560 BLA

GOLDIE THOMAS)	
(Widow of CODY THOMAS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NATIONAL MINES CORPORATION)	DATE ISSUED:
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser,
Administrative Law Judge, United States Department of Labor,

Edmond Collett, Hyden, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for
employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (96-BLA-0716) of

¹ Claimant is Goldie Thomas, the widow of the miner, Cody Thomas, who filed two miner's claims with the Department of Labor on October 12, 1982 which was denied on January 28, 1987 and June 9, 1993, which is the subject of the instant appeal. Director's Exhibit 56. The miner died on May 24, 1994. Director's Exhibit 12. The widow then filed a survivor's claim on September 24, 1994. Director's Exhibit 1.

Administrative Law Judge Donald W. Mosser in both a miner's 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 administrative law judge found that the evidence submitted since the denial of the earlier claim established a totally disabling respiratory condition pursuant to 20 C.F.R. §718.204(c) and thus, a material change in conditions pursuant to 20 C.F.R. §725.309(c). He also found however that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits in the miner's claim.

The administrative law judge also found that the evidence was insufficient to establish the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and he, thereby, denied benefits in the survivor's claim.

On appeal, claimant challenges the administrative law judge's finding that the evidence fails to establish the existence of pneumoconiosis at Sections 718.202(a)(1), (a)(2) and (a)(4). Claimant relies mostly upon the x-ray reports, autopsy slide reviews, and medical opinions of Drs. Potter and Abolos in support of this contention. Claimant also challenges the administrative law judge's findings with respect to Section 718.204(b). Claimant asserts that Dr. Potter's opinion, as claimant's treating physician, is sufficient to meet claimant's burden that his total disability is due to pneumoconiosis and that the administrative law judge failed to give Dr. Potter's opinion appropriate weight. Claimant also challenges the administrative law judge's findings that the opinion evidence fails to establish death due to pneumoconiosis at Section 718.205, relying upon Dr. Potter's opinion. Employer, in response asserts that the administrative law judge's Decision and Order is supported by substantial evidence, and accordingly, he urges affirmance. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not file a response brief.²

The Board's scope of review is defined by statute. 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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² Inasmuch as the administrative law judge's findings that the evidence establishes nineteen years of qualifying coal mine employment and that the evidence establishes a material change in conditions pursuant to Section 725.309(c), are unchallenged on appeal, they are affirmed. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant challenges the administrative law judge's finding that the evidence fails to establish that the miner's total disability was not due to pneumoconiosis pursuant to Section 718.204(b). Claimant asserts that the administrative law judge did not give appropriate weight to claimant's treating physician, Dr. Potter who opined that the miner's total disability was due to pneumoconiosis. Initially, we note that the administrative law judge utilized the correct standard at Section 718.204(b), as set forth in *Adams v. Director, OWCP*, 886 F. 2d 1116, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge credited the contrary opinions of Dr. Wicker and Broudy. Decision and Order at 16. Although the administrative law judge previously noted that Dr. Potter was claimant's treating physician, and that he opined that claimant's total disability was due to cigarette smoking and pneumoconiosis, Decision and Order at 15-16, the administrative law judge found that two of three examining physicians concluded that the miner's total disability did not arise from pneumoconiosis. *Id.* He noted further that Dr. Broudy is Board-certified in internal medicine and has a subspecialty in pulmonary medicine. The administrative law judge then gave Dr. Broudy's opinion additional weight because he was highly qualified. The administrative law judge permissibly credited the majority of examining physicians after considering the respective qualifications of the doctors. See *Woodward v. Director, OWCP*, 991 F. 2d 314, 17 BLR 2-77 (6th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Tackett v. Director, OWCP*, 12 BLR 1-11 (1989). We affirm, therefore, the administrative law judge's finding that the evidence fails to establish that the miner's total disability arose from pneumoconiosis at Section 718.204(b). As this finding precludes entitlement pursuant to the Part 718 regulations, see *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986), we affirm the denial of benefits in the miner's claim.³

³ It is not necessary to address claimant's contentions with respect to 20 C.F.R. §718.202(a) in the miner's claim, as they are rendered moot by our affirmance of the administrative law judge's findings at 20 C.F.R. §718.204(b). See *Cochran v. Director, OWCP*, 16 BLR 1-101(1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant finally challenges the administrative law judge's finding that the evidence fails to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). Claimant contends that the administrative law judge fails to accord the opinions of Drs. Potter and Abolos, that pneumoconiosis hastened the miner's death, appropriate weight. Claimant also asserts that while the miner died due to lung cancer, it is possible for the miner to die from multiple causes, including pneumoconiosis as claimant was initially diagnosed as having pneumoconiosis in 1982, and since it is a progressive disease, it must have contributed to the miner's death in 1994, because it adversely affected his deteriorating respiratory condition. We disagree. The administrative law judge applied the appropriate standard, whether pneumoconiosis was a substantially contributing condition to the miner's death, including hastening the miner's death. Decision and Order at 16; *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 1-35 (6th Cir. 1993). The administrative law judge then correctly noted that although Dr. Abolos diagnosed pneumoconiosis in his autopsy report, he did not address the cause of the miner's death. Decision and Order at 16; Director's Exhibit 13. As such, this opinion is insufficient to establish claimant's burden at Section 718.205(c). See *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The administrative law judge then found that Dr. Potter opined that pneumoconiosis hastened the miner's death, but that his opinion was outweighed by the death certificate, which lists only lung cancer as the cause of death and the contrary opinions of Drs. Naeye, Broudy and Anderson. Decision and Order at 17. The administrative law judge permissibly concluded that the latter evidence was entitled to greater weight due to the qualifications of Drs. Naeye and Broudy, and because it constituted a preponderance. *Id*; see *Woodward, supra*; *Worhach, supra*; *Tackett, supra*. Further, we reject claimant's assertion that because claimant was diagnosed with pneumoconiosis in 1982, and it is a progressive disease, that it necessarily hastened his death in 1994, as credited medical evidence is required to substantiate claimant's burden of proof in the instant case. See *Neeley, supra*; *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1981). We affirm, therefore, the administrative law judge's finding that the evidence fails to establish death due to pneumoconiosis at Section 718.205(c), and thereby, the administrative law judge's denial of the survivor's claim pursuant to Part 718.⁴

⁴ It is not necessary to address claimant's contentions with respect to Section 718.202(a), as they are rendered moot in the survivor's claim by our affirmance of the administrative law judge's findings pursuant to 20 C.F.R. §718.205. See *Cochran, supra*; *Wetzel, supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge