BRB Nos. 02-0781 BLA
and 02-0781 BLA-A

LIZZIE McKAMEY (Widow of LONZA McKAMEY) Claimant-Petitioner v. KEY MINING, INCORPORATED/ KLINE COAL COMPANY, INCORPORATED and AMERICAN MINING INSURANCE COMPANY Employer/Carrier- Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-In-Interest Cross-Respondent	)	DATE ISSUED: 07/10/2003

DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Dorothy B. Stulberg (Mostoller, Stulberg & Whitfield), Oak Ridge, Tennessee, for claimant.

Martin E. Hall (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jennifer U. Toth (Howard M. 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2001-BLA-0084, 2001-BLA-0085) of Administrative Law Judge John C. Holmes denying benefits on a miner=s claim 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 Act).

[1] The miner=s claim for benefits was filed on June 4, 1987 and a hearing was held on the claim on December 14, 1988. Director's Exhibits 1, 40. After multiple administrative law judge and Board decisions, Director's Exhibits 46, 56, 59, 66, 69, 81, 93, 110, 119, the Board ultimately affirmed the administrative law judge=s finding that the miner did not establish that he was totally disabled by a respiratory or pulmonary impairment, and thus did not establish entitlement to benefits. *McKamey v. River Basin Coals, Inc*., BRB No. 97-1372 BLA (July 2, 1998)(unpub.); Director's Exhibit 119. The United States Court of Appeals for the Sixth Circuit affirmed the Board=s decision on August 11, 1999. *McKamey v. River Basin Coals, Inc*., No. 98-3946 (6th Cir. Aug. 11, 1999); Director's Exhibit 120.

The miner died on April 24, 1999 and claimant filed her application for survivor=s benefits on July 16, 1999. Director's Exhibit 122. On November 2, 1999, claimant timely requested modification of the miner=s claim. Director's Exhibit 139; *see* 33 U.S.C. ' 922, implemented by 20 C.F.R. ' 725.310(2000). In support of her modification request, claimant submitted a January 15, 1996 medical examination report by Dr. Burrell stating that the miner was totally disabled, and an August 18, 1997 medical opinion by Dr. Bruton stating that the miner=s dyspnea would make it difficult for him to perform tasks required by his coal mine employment. The miner, through his counsel, previously attempted to submit these two reports into evidence when his claim was on remand before the administrative law judge, Director's Exhibit 95 (Dr. Burrell=s opinion), and on appeal to the Board. Petition for Review, Sep. 4, 1997 (attaching Dr. Bruton=s opinion). However, because the administrative law judge never responded to the miner=s request that Dr. Burrell=s report be

[1] 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.

admitted, and because the Board declined to consider evidence that was not part of the record, neither report was considered in the initial litigation of the miner=s claim. *See McKamey*, No. 98-3946, slip op. at 8 (Holding that the Board properly declined to review the reports of Drs. Burrell and Bruton because they were not in evidence).

Based in part on Dr. Burrell=s January 15, 1996 opinion submitted on modification, the district director found that the miner became totally disabled due to pneumoconiosis as of January 1, 1996. Director's Exhibit 121. The district director found that a change in conditions was established, granted modification, and awarded benefits. Director's Exhibit 121. The district director also awarded benefits on the survivor=s claim. Director's Exhibit 122.

Employer requested a hearing, Director's Exhibits 168, 169, which was scheduled for April 24, 2002. However, for reasons that are not reflected in the record or stated by the parties on appeal, no hearing was held.

In the Decision and Order that is the subject of this appeal, the administrative law judge admitted into the record all of the parties= proffered medical evidence with the exception of Dr. Burrell=s January 15, 1996 report. Although no party objected to the admission of Dr. Burrell=s opinion, the administrative law judge ruled that it would be Ainherently unfair@ for him A[t]o allow evidence that was readily available before an adverse decision@ in the prior proceedings on the miner=s claim Ato be used under the guise of modification to seek . . . black lung benefits . . . .@ Decision and Order at 18. Consequently, the administrative law judge excluded Dr. Burrell=s opinion from the record. Considering the merits of the claims, the administrative law judge credited the miner with forty-two and three-quarter years of coal mine employment and found that employer was properly designated as the responsible operator. The administrative law judge found that the existence of pneumoconiosis arising out of coal mine employment was established by the chest x-ray and autopsy evidence pursuant to 20 C.F.R. ''718.202(a)(1), (a)(2); 718.203(b), but concluded that the miner=s pulmonary function studies, blood gas studies, and medical opinions did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. '718.204(b). The administrative law judge further determined that the relevant evidence did not establish that pneumoconiosis was a substantially contributing cause of the miner=s death pursuant to 20 C.F.R. '718.205(c)(2), (c)(4). Accordingly, the administrative law judge denied benefits on both the miner=s and survivor=s claims.

On appeal, claimant contends that the administrative law judge erred in excluding Dr. Burrell=s report submitted on modification merely because the report was available during the earlier claim proceedings. Claimant contends further that the administrative law judge erred by admitting and relying upon cumulative evidence that was submitted by employer. Claimant argues that her due process rights were violated when employer was permitted to submit post-hearing evidence clarifying a physician=s opinion. Additionally, claimant alleges that the administrative law judge erred in finding that the miner was not totally

disabled because the administrative law judge failed to give appropriate weight to the opinions of the miner=s treating physicians. Employer responds, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal, contending that any liability for benefits must transfer to the Black Lung Disability Trust Fund (the Trust Fund), because employer=s due process rights were violated by the district director=s delay in notifying employer of its potential liability. The Director responds to both appeals, agreeing with claimant that the administrative law judge erred in excluding Dr. Burrell=s report, but urging rejection of employer=s argument that liability must transfer to the Trust Fund.[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 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).

To be entitled to benefits on the miner=s claim under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. '901; 20 C.F.R. ''718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor=s benefits pursuant to 20 C.F.R. '718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. '718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993). For survivor=s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner=s death. 20 C.F.R. '718.205(c)(2), (4). 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)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co*., 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant and the Director contend that the administrative law judge erred in excluding Dr. Burrell=s opinion submitted on modification of the miner=s claim solely because the

[2] We affirm as unchallenged on appeal the findings of forty-two and three-quarter years of coal mine employment, that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. ''718.202(a)(1), (a)(2) and 718.203(b), that the pulmonary function and blood gas study evidence did not establish total disability pursuant to 20 C.F.R. '718.204(b)(2)(i),(ii), and that employer Key Mining, Inc. is the successor operator of the miner=s previous employer, River Basin Coals. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

opinion was available previously. Claimant=s Brief at 4; Director=s Brief at 5-8. The Board reviews the administrative law judge=s procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

The modification provision set forth in Section 22 of the Longshore and Harbor Workers= Compensation Act, 33 U.S.C. '922, as incorporated into the Act by 30 U.S.C. '932(a), and as implemented by 20 C.F.R. '725.310(2000), is a broad reopening provision, and the United States Supreme Court has held that modification may be based on new evidence, cumulative evidence, or merely further reflection on the evidence in the original record. *O=Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The Sixth Circuit court has held that Section 22 is a broad reopening provision, *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001), that is easily invoked. *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 953-54, 22 BLR 2-46, 2-64-66 (6th Cir. 1999). Additionally, the opinion of the United States Court of Appeals for the Seventh Circuit in *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, --- BLR --- (7th Cir. 2002), which the administrative law judge cited as authority for his evidentiary ruling in this case, Decision and Order at 18, holds that there is no limit on the type of evidence that may support a modification request, *Hilliard*, 292 F.3d at 546, and that it is error to deny modification simply because evidence was available in earlier proceedings. *Id.* In view of this authority, we agree with claimant and Director that the administrative law judge abused his discretion in excluding Dr. Burrell=s report merely because it was Areadily available@ previously. Decision and Order at 18; *Clark*, 12 BLR at 1-153. Consequently, we vacate the administrative law judge=s finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. '718.204(b)(2)(iv), and remand this case for him to admit Dr. Burrell=s opinion into evidence and reconsider whether the relevant evidence establishes a mistake of fact or change in conditions in the miner=s claim. 20 C.F.R. '725.310(2000).

Claimant contends that the administrative law judge erred by admitting and relying upon cumulative evidence that was submitted by employer. Claimant=s Brief at 5. Review of the record discloses no objection below by claimant to the admission of any of employer=s proposed exhibits in the miner=s or survivor=s claims. Because claimant waived this issue before the administrative law judge, she cannot raise it on appeal to the Board. *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995). Review of claimant=s brief reveals no further allegation of error in the administrative law judge=s decision to deny the survivor=s claim. Because claimant, who is represented by counsel, raises no other specific legal or factual challenge to the finding that she did not establish that pneumoconiosis was a substantially contributing cause of the miner=s death pursuant to 20 C.F.R. '718.205(c), we affirm the administrative law judge=s finding and the denial of survivor=s benefits. *See* 20 C.F.R. '802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Claimant next alleges that the administrative law judge in the previous litigation of the miner=s claim violated the twenty-day rule of 20 C.F.R. '725.456(b)(1)(2000) and claimant=s due process rights by allowing employer to submit post-hearing evidence clarifying Dr. Seargeant=s opinion. Claimant=s Brief at 4-5. The Board and the Sixth Circuit court previously rejected this argument and held that the administrative law judge properly admitted Dr. Seargeant=s supplemental letter explaining that physical limitations listed in his examination report were the miner=s own complaints and not a medical assessment by Dr. Seargeant. *McKamey*, BRB No. 97-1372 BLA, slip op. at 4; *McKamey*, No. 98-3946, slip op. at 5-6. To the extent claimant argues that the current administrative law judge should have considered whether the previous administrative law judge=s ruling was a mistake of fact, we hold that claimant has identified no abuse of discretion in the administrative law judge=s decision not to revisit this issue. *See Milliken*, 200 F.3d at 956, 22 BLR at 2-69 (The exercise of modification authority is discretionary).

Claimant contends that the administrative law judge erred by failing to accord proper weight to the disability opinions of the miner=s treating physicians, Drs. Burrell and Bruton. Claimant=s Brief at 6. The Board has vacated the administrative law judge=s finding that total disability was not established by the medical opinion evidence pursuant to 20 C.F.R. '718.204(b)(2)(iv) and has instructed him to reweigh the relevant medical evidence. On remand, the administrative law judge should assess the opinions of the miner=s treating physicians in accordance with the law of the Sixth Circuit. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, --- BLR --- (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

Employer argues that it must be dismissed as the responsible operator and liability for the claims transferred to the Trust Fund because of a nine year delay by the district director in notifying employer of its potential liability in the miner=s claim. Employer's Brief at 4-8, citing *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Employer=s contention lacks merit.

Review of the record reflects that the underlying facts regarding the identity of the responsible operator changed after the 1988 hearing in the miner=s claim, when the district director no longer had jurisdiction over the claim. Prior to referring the claim to the Office of Administrative Law Judges for a hearing, the district director identified the miner=s then-current employer, River Basin Coals (River Basin), as the responsible operator, and River Basin did not contest that finding. Director's Exhibits 16-18. Thereafter, in 1991, while the miner was still working for River Basin, Key Mining, Inc. (Key Mining), purchased River Basin=s assets and employed the miner at the same mine site until he retired. Director's Exhibit 145 at 2. While the miner=s claim was on remand to the administrative law judge in 1992, River Basin attempted to raise the defense that Key Mining was liable as a successor operator under 20 C.F.R. '725.493(a)(2)(2000). Director's Exhibit 68. However, the

administrative law judge, and subsequently, the Board, declined to consider River Basin=s responsible operator argument. Director's Exhibits 69, 110 at 3. River Basin thereafter continued to litigate the miner=s claim on the merits until the Sixth Circuit court affirmed the denial of benefits on August 11, 1999. When claimant requested modification of the miner=s claim in November of 1999, the district director investigated the responsible operator issue and determined that Key Kline was the responsible operator in its capacity as the successor to River Basin. Director's Exhibit 145. Thus, the record reflects that as soon as the district director had jurisdiction over the claim, the district director investigated and resolved the responsible operator issue.

On the foregoing facts, the administrative law judge correctly determined that this case falls within the holding of *Director, OWCP v. Oglebay Norton Co.* [*Goddard*], 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989), that where a claim has not been finally adjudicated, the district director may name a responsible operator A[a]t any time during the processing of a claim . . . .@ *Goddard*, 877 F.2d at 1302, 12 BLR at 2-360, quoting 20 C.F.R. '725.412(a)(2000). Employer is correct that it was notified as the responsible operator on the miner=s claim nine years after purchasing River Basin=s assets, but when employer was named the responsible operator, the miner=s claim had not been finally adjudicated and was being processed by the district director on modification. As noted above, this was the first time that the miner=s claim had been before the district director since 1987, when the district director initially identified River Basin as the responsible operator. Director's Exhibit 16. Like the operator in *Goddard*, employer has not been prejudiced in its ability to defend the claim by the delayed responsible operator determination, because employer has access to the medical evidence that was developed by River Basin and has developed its own evidence. Thus, employer=s reliance on *Lockhart*, a case in which the district director=s delay in notifying the employer deprived it of the ability to mount a defense, is inapposite.[3] Consequently, we reject employer=s contention and affirm the administrative law judge=s finding that employer was properly designated as the responsible operator.

[3] Employer=s sole allegation of prejudice is that it did not have the opportunity Ato >speak= with Mr. McKamey first hand@ because it was not named the responsible operator until after his death. Employer's Brief at 6. But as noted in *Lockhart*, A[t]he Due Process Clause does not require the government to insure the lives of black lung claimants.@ 13 F.3d at 807, 21 BLR at 2-319. The issue is whether the government=s delay in notice of a claim deprives a party of the ability to mount a defense. *Id*.

Accordingly, the administrative law judge=s Decision and Order is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge