BRB Nos. 09-0730 BLA
and 09-0732 BLA

MARY LOU SCHOFFSTALL, o/b/o and Widow of CHARLES W. SCHOFFSTALL	)	
Claimant-Petitioner	)	
v.	)	
HARRIMAN COAL CORPORATION	)	DATE ISSUED: 07/29/2010
and	)	
AMERICAN MINING INSURANCE	)	
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 Miner's Benefits and Denying Survivor's Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Mary Lou Schoffstall, Wiconisco, Pennsylvania, *pro se*.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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,[1] without the assistance of counsel,[2] appeals the Decision and Order Denying Miner's Benefits and Denying Survivor's Benefits (08-BLA-5225 and 08-BLA-5226) of Administrative Law Judge Adele Higgins Odegard on a miner's claim[3] and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act). In the initial Decision and Order issued on February 28, 2007 in this case, Administrative Law Judge Paul H. Teitler, adjudicating the claim pursuant to 20 C.F.R. Part 718, found that the evidence of record supported the parties' stipulation that the miner worked in qualifying coal mine employment for twenty years. Judge Teitler found that the evidence of record was sufficient to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b), but was insufficient to establish either the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), or disability causation pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied. Director's Exhibit 62. The miner filed an appeal with the Board, but died while the appeal was pending, and claimant subsequently requested that the case be remanded to the district director for consolidation with her survivor's claim. By Order dated September 24, 2007, the Board dismissed the miner's appeal and remanded the case to the district director for modification proceedings. *Schoffstall v. Harriman Coal Corp.*, BRB No. 07-0639 BLA (Sept. 24, 2007) (unpub. Order); Director's Exhibit 70.

Following the district director's denial of modification in the miner's claim and his denial of survivor's benefits, both claims were forwarded to the Office of Administrative Law Judges and consolidated for hearing. The case was ultimately assigned to

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[1] Claimant, Mary Lou Schoffstall, is the widow of the miner, who died on March 5, 2007. Survivor-Director's Exhibit 11. Claimant filed a survivor's claim for benefits on April 7, 2007. Survivor's Director's Exhibit 2. The survivor's claim was consolidated with the miner's claim for adjudication before the administrative law judge.

[2] Claimant's daughter, Rosemary Klinger, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] The miner's first application for benefits, filed on November 25, 1994, was denied by the district director on February 21, 1995. Miner-Director's Exhibit 1. Subsequently, however, the miner requested that this claim be withdrawn. Administrative Law Judge Ainsworth H. Brown granted the miner's request and withdrew the miner's claim on February 9, 1996. The miner filed a second application for benefits on July 6, 2004, which is pending herein. Miner-Director's Exhibit 3. Claimant continues to pursue the miner's claim on behalf of his estate.

Administrative Law Judge Adele Higgins Odegard (the administrative law judge), who credited the miner with 21.27 years of qualifying coal mine employment. With respect to the miner's claim, the administrative law judge reviewed the evidence considered by Judge Teitler, and found no mistake of fact, pursuant to 20 C.F.R. §725.310,[4] in his determination that the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4). The administrative law judge further found that the evidence submitted in support of modification was insufficient to establish the existence of clinical or legal pneumoconiosis at Section 718.202(a), and therefore claimant had failed to establish a change in conditions. With respect to the survivor's claim, the administrative law judge found that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to Section 718.202(a), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

In the present appeal, claimant generally challenges the administrative law judge's denial of benefits in both claims. Employer has not filed a response to claimant's appeal. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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

[4] In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971). In considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an 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 at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

with law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

By Orders dated May 6, 2010 and May 12, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. Employer and the Director have filed supplemental briefs addressing this issue.

The Director states, and employer agrees, that the recent amendments to the Act are not applicable to the miner's claim, as it was filed prior to January 1, 2005. However, the Director asserts that the recent amendments are applicable to the survivor's claim, as it was filed after January 1, 2005, and remained pending as of March 23, 2010. Thus, the Director maintains that, if the Board affirms the administrative law judge's findings on the merits, the denial of benefits in the survivor's claim must be vacated and the case remanded to the administrative law judge for consideration of claimant's entitlement to the rebuttable presumption of death due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[6] The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, in compliance with the evidentiary limitations at 20 C.F.R. §725.414. Employer disagrees, arguing that a remand is not necessary because the administrative law judge's finding that the miner did not have

[5] The Board will apply the law of the United States Court of Appeals for the Third Circuit as the miner's last coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Survivor- Director's Exhibit 3.

[6] Section 411(c)(4) provides, *inter alia*, that "if a miner was employed for fifteen years or more in one or more underground coal mines, and … if other evidence demonstrates the existence of a totally disabling respiratory impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4). In the present case, the miner was credited with 21.27 years of coal mine employment, and Administrative Law Judge Paul H. Teitler found the evidence sufficient to demonstrate the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) in the miner's claim. Miner-Director's Exhibit 62.

pneumoconiosis establishes rebuttal and precludes entitlement to survivor's benefits. As discussed *infra*, we agree with the Director's position.

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a miner's claim, 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In order to establish entitlement to survivor's benefits in a claim filed on or 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 his 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 suffered from complicated pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In adjudicating claimant's request for modification of the denial of benefits in the miner's claim, the administrative law judge determined that the newly submitted x-ray evidence relevant to Section 718.202(a)(1) consisted of multiple x-rays associated with the miner's hospitalization and/or medical treatment records that made no mention of pneumoconiosis, and two x-rays, dated June 21, 2000 and October 31, 2001, interpreted as positive for pneumoconiosis by "Henry K. Smith, D.O., radiologist."[7] Survivor-Director's Exhibit 12; Claimant's Exhibit 2. In evaluating this evidence, the administrative law judge determined that the x-ray dated October 31, 2001 was the only x-ray conducted and interpreted under the International Labour Organization (ILO) classification system, as required pursuant to 20 C.F.R. §718.102, and that the radiological qualifications of the interpreting physicians were not contained in the record. Decision and Order at 11. By contrast, the administrative law judge noted that the x-ray evidence before Judge Teitler consisted of multiple readings of the miner's x-ray dated

[7] A review of the record reveals that Dr. Smith interpreted the June 21, 2000 x-ray as showing "probable early mild coal workers' pneumoconiosis," and that he interpreted the October 31, 2001 x-ray as showing "mild COPD" and "findings of borderline early mild pneumoconiosis with slight interstitial fibrosis through both lungs," with a profusion of opacities rating of 1/0. Survivor-Director's Exhibit 12; Claimant's Exhibit 2; Decision and Order at 11.

October 14, 2004, using the ILO classification system, and that the majority of the readings were made by dually qualified Board-certified radiologists and B readers. Decision and Order at 10. The administrative law judge concurred with Judge Teitler's finding that the weight of the x-ray evidence was insufficient to establish the existence of pneumoconiosis, and noted that the newly submitted x-rays predated the x-ray evidence considered by Judge Teitler. Decision and Order at 11. The administrative law judge permissibly accorded minimal weight to the x-ray interpretations that were not classified under the ILO system and, assuming *arguendo* that Dr. Smith was a Board-certified radiologist, accorded greater weight to the interpretations by dually qualified physicians on the basis of their superior qualifications. *See* 20 C.F.R. §718.102; Decision and Order at 11; Survivor-Director's Exhibit 12; Miner-Director's Exhibits 1, 14, 18-21, 42, 43, 45-48. Consequently, the administrative law judge rationally determined that claimant failed to meet her burden of establishing the existence of pneumoconiosis by x-ray evidence at Section 718.202(a)(1). Decision and Order at 13; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Trent*, 11 BLR at 1-27-28; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). As the administrative law judge properly conducted a qualitative and quantitative analysis of the x-ray evidence, we affirm her finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) in the miner's claim, as supported by substantial evidence.

Likewise, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3), as the record contains no biopsy or autopsy evidence, and none of the presumptions set forth in Section 718.202(a)(3) is applicable to the miner's claim.[8] Decision and Order at 10.

At Section 718.202(a)(4), the administrative law judge determined that the newly submitted evidence consisted of treatment records from Dr. Seidel, who treated the miner for various ailments between 2000 and 2006. The administrative law judge reasonably found Dr. Seidel's January 14, 2004 opinion, that the miner was totally and permanently

[8] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. With respect to the presumption set forth in 20 C.F.R. §718.305, the statutory provision that it implements was amended, by Section 1556 of Public Law No. 111-148, to delete the requirement that the claim be filed before January 1, 1982. However, as indicated *supra*, this amendment does not apply to the miner's claim as it was filed before January 1, 2005. Lastly, as the miner died after March 1, 1978, the presumption at 20 C.F.R. §718.306 is also inapplicable. Decision and Order at 10.

disabled due to "restrictive lung disease," insufficient to constitute a diagnosis of pneumoconiosis because Dr. Seidel did not relate the disease to the miner's coal dust exposure. Similarly, the administrative law judge found that the medical treatment records did not establish the existence of pneumoconiosis because the notations of "COPD" did not attribute the condition to coal dust exposure, and the administrative law judge reasonably concluded that the notation of "coal worker's [sic] pneumoconiosis" did not constitute a well-reasoned medical opinion or well-reasoned diagnosis of pneumoconiosis. 20 C.F.R. §718.201(a)(2); *see Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). The administrative law judge considered the previously submitted medical opinions of Drs. Santarelli, Galgon, Fino, and Kraynak and, within a permissible exercise of her discretion, concurred with Judge Teitler's finding that the overall weight of the better-reasoned and documented physicians' opinions failed to demonstrate that the miner suffered from either clinical or legal pneumoconiosis. *See Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 12. Because the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm her finding that claimant failed to establish the existence of pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4).

As the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) is rational, contains no reversible error, and is supported by substantial evidence, we affirm her determination that claimant failed to satisfy her burden of establishing either a change in conditions or a mistake in a prior determination of fact pursuant to Section 725.310. Therefore, we affirm the administrative law judge's determination that claimant failed to establish a basis for modification and that entitlement to benefits is precluded in the miner's claim. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); Decision and Order at 12-13.

Turning to the survivor's claim, the administrative law judge complied with claimant's request to consider the medical evidence from the miner's claim in her survivor's claim on the issue of pneumoconiosis, *see* Hearing Transcript at 13-14, and rationally found, consistent with her weighing of the evidence in the miner's claim, that claimant failed to meet her burden of establishing the existence of pneumoconiosis at Section 718.202(a). Decision and Order at 13-14. The administrative law judge properly found that claimant also failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), as the record contained no medical opinion regarding the cause of the miner's death, and the miner's death certificate listed "renal carcinoma" as the cause of death. Decision and Order at 15; Survivor-Director's Exhibit 11. While substantial evidence supports the administrative law judge's findings,

we are persuaded, based upon the Director's response to the Board's Orders, that the Director is correct in maintaining that the administrative law judge's denial of benefits in the survivor's claim must be vacated and the case remanded to the administrative law judge. The Section 411(c)(4) presumption requires a determination of whether the miner was totally disabled due to a pulmonary or respiratory impairment, an issue that, prior to the recent amendments, was not relevant in this survivor's claim. In addition, if the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. Contrary to employer's arguments, therefore, we cannot affirm the denial of benefits because claimant did not establish the existence of pneumoconiosis. Thus, we vacate the administrative law judge's denial of survivor's benefits, and remand this case to the administrative law judge.

On remand, the administrative law judge must consider this claim under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[9] As invocation of the presumption requires a determination that the miner worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine, *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988), and the miner was engaged in both underground and surface mining, the administrative law judge must determine whether the miner's 21.27 years of combined underground and surface mining was equivalent to at least fifteen years of underground employment. She must also allow both parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1).

[9] Section 1556 of the Public Law No. 111-148 also amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), to provide that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. Claimant may not benefit from this provision because the miner's claim was denied.

Accordingly, the administrative law judge's Decision and Order Denying Miner's Benefits and Denying Survivor's Benefits is affirmed in part, vacated in part, and the 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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BETTY JEAN HALL
Administrative Appeals Judge