

BRB Nos. 98-1134 BLA  
and 98-1134 BLA-A

HELEN C. PENDERGRASS	)	
(Widow of CHARLES R. PENDERGRASS)	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Helen C. Pendergrass, Cedar Bluff, Virginia, *pro se*.

Natalie D. Brown (Jackson & Kelly), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,<sup>1</sup> and employer cross-appeals the Decision and Order (97-BLA-1904) of Administrative Law Judge Daniel F. Sutton denying a request for modification of a miner's duplicate claim and denying survivor's benefits 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>

The miner's duplicate claim was denied on the merits by Administrative Law Judge Robert G. Mahony on April 26, 1996 because the evidence did not establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The miner died on April 18, 1996. Claimant's application for survivor's benefits, filed on May 12, 1996, was considered as a request for modification of the miner's duplicate claim as well as a survivor's claim. In considering claimant's petition for modification under 20 C.F.R. 725.310, Administrative Law Judge Daniel F. Sutton (the administrative law judge) concluded that the newly submitted evidence, considered in conjunction with the evidence previously submitted before Judge Mahony, did not establish total disability due to pneumoconiosis under 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied the miner's claim, finding that claimant failed to establish a change in conditions or a mistake in a determination of fact under Section 725.310. With respect to the survivor's claim, the administrative law judge found that claimant failed to establish that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied survivor's benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director),

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<sup>1</sup>Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's Decision and Order. In a letter dated June 2, 1998, the Board stated that claimant would be considered to be representing herself on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

<sup>2</sup>The miner filed his first claim for benefits on June 17, 1983. Director's Exhibit-Miner's Claim 39. Administrative Law Judge Giles J. McCarthy denied benefits because the miner did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c)(1)-(4). The Board affirmed Judge McCarthy's Decision and Order denying benefits. *Pendergrass v. Island Creek Coal Co.*, BRB Nos. 89-1389 BLA and 89-1389 BLA-A (Nov. 23, 1992)(unpub.). The miner's duplicate claim was filed on September 15, 1994. Director's Exhibit-Miner's Claim 1.

has declined to participate in this appeal. In its cross-appeal, employer argues that if the case is remanded pursuant to claimant's appeal, the Board should instruct the administrative law judge to reverse Judge Mahony's previous finding of pneumoconiosis. Neither claimant nor the Director, has responded to employer's cross-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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). With regard to employer's cross-appeal, the Board will review the issues specifically raised by employer. 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 under 20 C.F.R Part 718 in a living miner's claim, claimant must prove that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203 and 718.204. Failure to establish any one of these elements precludes entitlement. see *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, in a claim filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's 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. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 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). The administrative law judge correctly noted that the requirements of Section 718.205(c) are satisfied if claimant proves that pneumoconiosis hastened the miner's death in any way. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); Decision and Order at 11.

We first consider claimant's appeal. After review of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that the administrative law judge's denial of miner's claim under 20 C.F.R. §§725.310

and 725.204(b), and of the survivor's claim under Section 718.205(c), is supported by substantial evidence. Under Sections 725.310 and 718.204(b), the administrative law judge properly found that the medical opinions submitted with the request for modification of the miner's claim attributed claimant's respiratory or pulmonary disability to his cardiac condition or smoking history and not to pneumoconiosis. Decision and Order at 11; Director's Exhibit-Miner's Claim 34; Director's Exhibits-Widow's Claim 13, 14, 25; Employer's Exhibit 1. Additionally, the administrative law judge properly concluded that the newly submitted evidence, considered with the evidence previously submitted, is insufficient to support a finding that pneumoconiosis contributed in any part to the miner's disability. Thus, the administrative law judge properly found that claimant failed to establish total disability due to pneumoconiosis under Section 718.204(b). *Id.* Accordingly, we affirm the administrative law judge's finding that claimant has failed to establish a change in conditions or a mistake in a determination of fact in the prior denial pursuant to Section 725.310. See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

With respect to the survivor's claim, the administrative law judge considered the miner's death certificate prepared by Dr. Mitchell, the autopsy protocol performed by Dr. Stefanini, and the reports by Drs. Javed, Naeye, Bush, Kleinerman, Dahhan, Castle and Loudon. Director's Exhibits-Widow's Claim 12-14, 25; Director's Exhibit-Miner's Claim 34; Employer's Exhibits 1-3. The administrative law judge properly found that only the reports of Drs. Javed and Mitchell arguably support a finding that pneumoconiosis hastened the miner's death. Decision and Order at 11. Drs. Naeye, Bush, Kleinerman, Castle, and Loudon specifically concluded that the miner's death was not hastened in any manner by pneumoconiosis or by any lung disease cause by coal dust exposure. Director's Exhibit-Miner's Claim 34; Director's Exhibit-Widow's Claim 25; Employer's Exhibit 1. The administrative law judge noted Dr. Javed's comments that the miner's history of chronic obstructive pulmonary disease is among causes<sup>3</sup> of the miner's shortness of breath. Decision and Order at 11. Further, the administrative law judge noted that Dr. Mitchell listed chronic obstructive pulmonary disease among his final diagnoses on the death certificate under other significant conditions which

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<sup>3</sup>The administrative law judge also noted that Dr. Javed diagnosed an impression of atrial fibrillation with rapid ventricular response, possibly due to atherosclerotic heart disease, that cardiomyopathy was a consideration and that the miner had signs and symptoms of congestive heart failure related to his rapid ventricular rate. Decision and Order at 5; Director's Exhibit Widow's Claim 13.

contributed to the miner's death. *Id.* The administrative law judge then found that no physician attributed the miner's chronic obstructive pulmonary disease to coal mine dust exposure and that the physicians who expressed an opinion on the etiology of the miner's chronic obstructive pulmonary disease, namely Drs. Kleinerman, Dahhan, Louden and Castle, either identified his history of cigarette smoking, or specifically ruled out coal dust exposure as the cause. *Id.* Consequently, the diagnoses of chronic pulmonary disease by Drs. Mitchell and Javed do not satisfy the definition of pneumoconiosis under 20 C.F.R. §718.201, and as such, the administrative law judge properly concluded that claimant did not meet the burden of establishing that pneumoconiosis contributed to the miner's death. We, therefore, affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis under Section 718.205(c). *See Shuff, supra.*

Inasmuch as substantial evidence supports the administrative law judge's finding that claimant failed to establish a change in conditions or a mistake in a determination of fact in the prior denial on the miner's claim under Sections 725.310, and 718.205(c) and failed to establish that pneumoconiosis contributed to or hastened the miner's death pursuant to Sections 718.205(c), an award of benefits under Part 718 in both the miner's claim and the survivor's claim is precluded. Therefore, we need not consider employer's arguments on cross-appeal.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge