BRB No. 00-0119 BLA

ORA BOYD (o/b/o and Widow of BRADY BOYD)	)	
Claimant-Petitioner	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	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 Denying Miner's and Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ora Boyd, Davenport, Virginia, *pro se*.[1]

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Claimant,[2] without the assistance of counsel, appeals the Decision and Order Denying Miner's and Survivor's Benefits (98-BLA-1190) of Administrative Law Judge Thomas M. Burke on claims 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). This case is before the Board for the third time. Adjudicating the miner's duplicate claim pursuant to 20 C.F.R. Part 718, Administrative Law Judge John S. Patton initially credited the miner with "at least" thirty years of qualifying coal mine employment. Next, Administrative Law Judge Patton determined that the miner established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded. Director's Exhibit 171.

Employer appealed the award and the Board affirmed Administrative Law Judge Patton's findings regarding length of coal mine employment and pursuant to 20 C.F.R. §718.203(b) inasmuch as these findings were unchallenged. The Board, however, vacated Administrative Law Judge Patton's findings under 20 C.F.R. §§718.202(a)(1) and 718.204(c), and instructed him to consider the relevant evidence under the aforementioned sections and render findings under 20 C.F.R. §§718.204(b) and 725.309. Accordingly, the Board vacated the award of benefits and remanded the case. *Boyd v. Clinchfield Coal Co.*, BRB No. 88-0384 BLA (Aug. 29, 1990) (unpub.); Director's Exhibit 184.

Because Administrative Law Judge Patton was no longer with the Office of Administrative Law Judges, the case was reassigned, without objection by the parties, to Administrative Law Judge Robert D. Kaplan on remand. In a Decision and Order issued on February 18, 1993, Administrative Law Judge Kaplan initially determined that the miner

[2] Claimant, Ora Boyd, is the widow of Brady Boyd, the miner, who died on December 31, 1997. Director's Exhibits 5, 244, 247; Claimant's Exhibit 5. The miner filed his first application for benefits on October 14, 1980, which was finally denied on June 5, 1981. Director's Exhibit 24. The miner took no further action on this claim, and subsequently, filed a duplicate application for benefits on October 14, 1983. Director's Exhibit 1. The widow filed her application for benefits on February 25, 1998. Director's Exhibit 1. Both claims are presently pending.

affirmatively established a material change in conditions pursuant to Section 725.309. Next, Administrative Law Judge Kaplan addressed the merits and found that the miner failed to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4), and accordingly, denied benefits. Director's Exhibit 191.

Consequently, the miner appealed and the Board affirmed the administrative law judge's findings pursuant to Section 718.202(a)(1)-(4) and the denial of benefits. *Boyd v. Clinchfield Coal Co.*, BRB No. 93-1201 BLA (Mar. 30, 1994) (unpub.); Director's Exhibit 199. The miner appealed the Board's decision and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, affirmed the Board's decision. *Boyd v. Clinchfield Coal Co.*, No. 94-1546 (4th Cir. Jan. 12, 1995) (unpub.); Director's Exhibit 201.

The miner, thereafter, filed a request for modification on March 30, 1995. Director's Exhibit 202. Administrative Law Judge Kaplan determined that the miner failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), and, therefore, that the miner failed to establish a change in conditions under Section 725.310. Additionally, Administrative Law Judge Kaplan found that there was no mistake in a determination of fact pursuant to Section 725.310 in the previous denial issued on February 18, 1993, and accordingly, denied benefits. Director's Exhibit 236.

The miner filed a request for modification accompanied by supporting medical evidence on June 12, 1997, which was denied by the district director on June 20, 1997 and on August 1, 1997. Director's Exhibits 238-241. The miner died on December 31, 1997, and, on his behalf, claimant requested modification of the district director's denial dated August 1, 1997 and filed additional medical evidence. Director's Exhibit 245. Furthermore, claimant filed a survivor's claim for benefits on February 25, 1998. Director's Exhibit 1.
The case was assigned to Administrative Law Judge Thomas M. Burke (administrative law judge), who credited the parties' stipulation that the miner established "at least" thirty years of qualifying coal mine employment. Initially, the administrative law judge reviewed the entire evidence of record consisting of previously and newly submitted evidence and found that there was no mistake in a determination of fact under Section 725.310. After reviewing the newly submitted medical evidence, the administrative law judge determined that, because claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b), she established a change in conditions pursuant to Section 725.310.[3] Next, the administrative law judge found that claimant failed

[3] In his summary of the procedural posture of the case, the administrative law judge stated that the miner filed a third claim for benefits on March 30, 1995. Decision and Order at 2. Contrary to the administrative law judge's determination, however, the miner filed a petition for modification accompanied by supporting medical evidence. Director's Exhibit

to demonstrate total respiratory disability under Section 718.204(c) in the miner's claim, and death due to pneumoconiosis pursuant to Section 718.205(c) in the survivor's claim. Accordingly, the administrative law judge denied benefits in both the miner's and survivor's claims.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating in this appeal.[4]

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 Co.*, 12 BLR 1-176 (1989). We must affirm the

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202. After considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge properly found that claimant affirmatively established a change in conditions pursuant to Section 725.310. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994) (*en banc*); *Napier v. Director, OWCP*, 17 BLR 1-111, 1-113 (1993); Decision and Order at 10. The administrative law judge additionally found, "the miner has thereby also established a material change in conditions pursuant to §725.309, so as to permit reconsideration of his 1980 claim which was denied by the district director in 1981 and administratively closed." Decision and Order at 10.

[4] We affirm the administrative law judge's findings pursuant to Sections 718.202(a), 718.203(b), and 725.310 inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 9-10.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

To establish entitlement to benefits on a survivor's claim filed on or after January 1, 1982, a claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(a), 718.205(a). Death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The Fourth Circuit court has held that pneumoconiosis is a substantially contributing cause of death if it actually hastens the miner's death. *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

With respect to the miner's claim, the administrative law judge found that total disability was not demonstrated pursuant to Section 718.204(c)(1)-(4). Relevant to Section 718.204(c)(1), a review of the evidence of record reveals ten pulmonary function studies. Six tests yielded non-qualifying results. The three qualifying[5] pulmonary function studies are dated October 27, 1983, July 16, 1984, and May 2, 1986. Director's Exhibits 9, 10, 21, 26, 94, 95, 166, 202, 216. The pulmonary function study conducted on March 12, 1987 yielded pre-bronchodilator values that were non-qualifying and post-bronchodilator values that were qualifying. Director's Exhibit 202. The pulmonary function study evidence also includes several consulting physicians' opinions. Dr. Zaldivar invalidated the qualifying pulmonary function study administered on October 27, 1983. Director's Exhibit 11. Drs. Castle and O'Neill each reviewed the qualifying pulmonary function study conducted on July 16, 1984 and opined that this test was invalid. Director's Exhibits 22, 40, 148. Both Drs. Stewart and

[5] 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 yields values that exceed those values. 20 C.F.R. §718.204(c)(1), (2).

Long opined that the qualifying pulmonary function study conducted on May 2, 1986 was invalid. Director's Exhibits 135, 141. Subsequent to these physicians' opinions, Ms. Cynthia Webb, the administering technician for the May 2, 1986 study, noted that, notwithstanding the miner's shortness of breath during the testing and complaints of chest pain and dizziness, she "sincerely believe[d]" that the miner "gave his fullest effort to complete each test." Director's Exhibit 32. Drs. Castle and Stewart each reviewed the pulmonary function study dated March 12, 1987 and opined that both pre-bronchodilator and post-bronchodilator results were invalid. Director's Exhibits 220, 221.

We affirm the administrative law judge's determination that total disability was not demonstrated pursuant Section 718.204(c)(1) inasmuch as the administrative law judge found that the pulmonary function studies dated December 10, 1983, January 17, 1985, March 23, 1993, and October 16, 1995 all yielded non-qualifying values and the qualifying pulmonary function studies dated October 27, 1983, July 16, 1984, and March 12, 1987 were invalidated. *See Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 882, 16 BLR 2-129, 2-132 (7th Cir. 1992); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984); Decision and Order at 11-12; Director's Exhibits 9-11, 14, 21, 22, 40, 148, 166, 202, 220, 216, 221.[6]

With respect to Section 718.204(c)(2), the record contains eleven blood gas studies, of which only the exercise results of the October 27, 1983 study yielded qualifying values. Director's Exhibits 10, 14, 21, 26, 39, 75, 94, 96, 106, 136, 202, 216. The October 27, 1983 test was invalidated by Dr. Zaldivar on June 25, 1984. Director's Exhibit 11. The administrative law judge, within a proper exercise of his discretion, rejected the sole qualifying arterial blood gas study of record inasmuch as this test was invalidated. *See Alexander v. Island Creel Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Fazio v. Consolidation Coal Co.*, 8 BLR 1-223, 1-224 (1985); Decision and Order at 13. Because the administrative law judge properly credited the non-qualifying arterial blood gas studies of record, we affirm his determination that the blood gas study evidence of record was insufficient to demonstrate total disability. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Mahan v. Kerr-McGee Coal Corp.*, 7 BLR 1-159, 1-162 (1984); Decision and Order at 13.

Because the administrative law judge properly found that the evidentiary record does not contain evidence of cor pulmonale with right-sided congestive heart failure, we affirm his determination that total disability cannot be demonstrated under Section 718.204(c)(3). *See*

[6] Error, if any, in the administrative law judge's consideration of the pulmonary function studies of August 7, 1985, May 2, 1986, and October 28, 1986 would be harmless as it would not change the outcome of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibits 26, 39, 94, 95.

20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Mining Co.*, 13 BLR 1-37, 1-39 (1989); Decision and Order at 10 n.4.

Relevant to Section 718.204(c)(4), there are eight physicians' opinions of record. In a report dated May 8, 1986, Dr. Baxter opined that the miner was totally and permanently disabled from performing coal mine employment. Director's Exhibit 26. On November 23, 1992, Dr. Sutherland opined that the miner's "lung condition alone would prevent him from returning to any type of mining operation... or strenuous activity" as required in coal mine employment. Director's Exhibits 190, 202. On April 30, 1986, Dr. Riaz diagnosed a combination of emotional and physical problems precluding the miner's ability to perform gainful employment. Director's Exhibit 90. Dr. Robinette's reports dated January 28, 1985 and June 1, 1987 and his treatment records were silent as to whether the miner suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibits 14, 202; Claimant's Exhibit 7. However, on November 13, 1995, Dr. Robinette opined, "there is no evidence of pulmonary disability based on spirometry data or prior arterial blood gas studies" and "[o]n the basis of all of the information available in our medical record dating from 1985 to current dates it would be impossible to prove strict pulmonary disability which would qualify [the miner] for Federal Black Lung Benefits." Director's Exhibit 14; Claimant's Exhibit 7; Employer's Exhibit 1. Dr. Sargent opined that the miner had the respiratory capacity to do his last coal mine employment in a report dated October 18, 1995. Director's Exhibits 212, 216. During his deposition on December 7, 1998, Dr. Castle opined that, based on the valid, normal pulmonary function studies, the miner "could have performed, from a pulmonary standpoint, virtually any mining job for which he had been trained." Employer's Exhibit 7 at 14. Similarly, Dr. Kleinerman reviewed normal pulmonary function studies from 1985 until ten years after the miner's retirement in addition to normal blood gas studies from December 1983 to October 16, 1995 and opined that the miner suffered no respiratory or pulmonary dysfunction during his lifetime. Director's Exhibit 259. On April 28, 1998, Dr. Tomashefski opined that, based on normal pulmonary function and blood gas studies, the miner would have had minimal respiratory impairment. Director's Exhibit 12; Employer's Exhibit 2.

The administrative law judge permissibly discredited the report of Dr. Riaz inasmuch as this physician failed to specify whether the miner is totally disabled from a respiratory standpoint alone. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-5-6 (4th Cir. 1994); Decision and Order at 14; Director's Exhibit 90. Furthermore, the administrative law judge reasonably found that Dr. Sutherland's opinion was less persuasive inasmuch as Dr. Sutherland failed to cite specific objective medical evidence supporting his opinion that the miner was totally disabled. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); Decision and Order at 15; Director's Exhibits 190, 202. Even though Dr. Baxter cited the arterial blood gas study administered on May 2, 1986, the administrative law judge rationally found that

Dr. Baxter's opinion was less probative because it was inconsistent with the valid, non-qualifying pulmonary function and arterial blood gas studies of record. *See Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985); *Trumbo, supra; Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984), *citing Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 15; Director's Exhibit 26. The administrative law judge, within a permissible exercise of his discretion, accorded dispositive weight to Dr. Sargent's opinion, as supported by Dr. Byers' opinion, inasmuch as Dr. Sargent relied on valid, normal pulmonary function and blood gas studies, which are consistent with the preponderance of the objective medical evidence of record, *see King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985), and he conducted a more recent pulmonary evaluation and objective tests of the miner in October 1995 compared to those conducted by Drs. Baxter and Sutherland in May 1986 and November 1992 respectively. *See Allen v. Director, OWCP*, 69 F.3d 532, 20 BLR 2-97 (4th Cir. 1995); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993); Decision and Order at 15; Director's Exhibits 26, 39, 94, 190, 202 212, 216. Finally, the administrative law judge accorded less weight to Dr. Robinette's January 1985 opinion because Dr. Robinette did not provide a definitive conclusion regarding the degree of the miner's disability.[7] Therefore, as the administrative law judge's determination that claimant failed to demonstrate that the miner suffered from a totally

[7] Dr. Robinette unequivocally opined that "there is no evidence of pulmonary disability" in his November 1995 report, however. Decision and Order at 14; Director's Exhibit 14; Claimant's Exhibit 7; Employer's Exhibit 1. Accordingly, any error by the administrative law judge in failing to consider Dr. Robinette's 1995 opinion is harmless inasmuch as Dr. Robinette's November 1995 opinion affirmatively supports the administrative law judge's determination that the medical opinion evidence is insufficient to demonstrate total disability under Section 718.204(c)(4). *See Larioni, supra.*

disabling respiratory or pulmonary impairment is rational and supported by substantial evidence, we affirm the administrative law judge's Section 718.204(c)(4) finding. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*).[8]

Turning to the survivor's claim, the administrative law judge found that claimant failed to establish that pneumoconiosis substantially contributed to the miner's demise. Relevant to Section 718.205(c), the record contains the opinions of six physicians. Dr. Perper opined that coal workers' pneumoconiosis substantially contributed to the miner's death. Director's Exhibits 7, 249; Claimant's Exhibit 7. Dr. Robinette opined that it is "possible" that the miner's coal workers' pneumoconiosis "may have contributed to his death related to the hypoxemic or bronchospastic episode... ." Claimant's Exhibit 8. Drs. Kleinerman, Caffrey, Castle, and Tomashefski all opined that simple pneumoconiosis did not cause, contribute to, or hasten the miner's demise. Director's Exhibit 12, 258, 259; Employer's Exhibits 2, 3, 6, 7.

The administrative law judge, within a proper exercise of his discretion, found Dr. Robinette's opinion equivocal, and thus, entitled to less weight. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 16. Likewise, the administrative law judge properly discredited Dr. Perper's opinion inasmuch as Dr. Perper failed to provide an explanation for his conclusion that pneumoconiosis directly contributed to the miner's death and his opinion that pneumoconiosis indirectly contributed to the miner's death through hypoxemia was sufficiently rebutted by Dr. Kleinerman's observation that the miner medical records, including the eleven arterial blood gas studies, fail to demonstrate arterial hypoxemia. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, BLR (4th Cir. 2000); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 17. Consequently,

[8] Under his Section 718.204(c) analysis, the administrative law judge did not consider the opinions of Drs. Castle, Kleinerman, and Tomashefski, physicians who reviewed the autopsy and medical records in this case. Director's Exhibits 12, 258, 259; Employer's Exhibits 2, 7. Notwithstanding this omission, these physicians opined that the miner was not totally disabled which further supports the administrative law judge's Section 718.204(c)(4) determination.

the administrative law judge reasonably found that the opinions of Drs. Kleinerman, Caffrey, Castle, and Tomashefski outweighed that of Dr. Perper because their opinions that pneumoconiosis did not hasten the miner's death were more credible. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); Decision and Order at 17. Inasmuch as the administrative law judge permissibly found that claimant failed to satisfy her burden of establishing that pneumoconiosis substantially contributed to the miner's death, we affirm the administrative law judge's Section 718.205(c) finding. *See Shuff, supra.*

Claimant's failure to satisfy her burden of affirmatively establishing that the miner was totally disabled pursuant to Section 718.204(c) and that pneumoconiosis substantially contributed to or hastened his death pursuant to Section 718.205(c) precludes a finding of entitlement to benefits on both the miner's and survivor's claim. *See Shuff, supra; Trent, supra; Perry, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge