U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 05Jul2001

Case No.: 1999-BLA-1184

In the Matter of:

DON WOOTON, Deceased,
by ALICE W. WOOTON, Widow,

and

ALICE W. WOOTON, Widow of
DON WOOTON,
Claimants

v.

DON WOOTON MINING CO., INC.,
Employer

OLD REPUBLIC INSURANCE CO., INC.,
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:[1]

John Hunt Morgan, Esq.
For the Claimant

Lois A. Kitts, Esq.
For the Employer

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

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[1] The Director, Office of Workers' Compensation Programs, was not represented at the hearing.

This proceeding arises from claims filed by Don Wooton and Alice W. Wooton for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901, *et seq.*, as amended (Act). In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs (OWCP). The regulations issued under the Act are located in Title 20 of the Code of Federal Regulations, and regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

Benefits under the Act are awarded to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. Survivors of persons who were totally disabled at their times of death or whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis is a dust disease of the lungs arising out of coal mine employment and is commonly known as black lung disease.

A formal hearing was held in Corbin, Kentucky on April 26, 2000. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations thereunder. The findings and conclusions that follow are based on my observation of the demeanor and appearance of the witness who testified at the hearing and a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. PROCEDURAL HISTORY

The Miner, Don Wooton, filed a claim for benefits under the Act on February 2, 1981 (DX 68).[2] The Office of Workers' Compensation Programs (OWCP), on March 31, 1981, denied the claim (DX 68). No appeal was made and the decision became final. Mr. Wooton filed a second claim on February 27, 1986, more than one year after the previous denial, making the claim a duplicate claim (DX 69, p. 316). OWCP denied the claim on June 20, 1986 (DX 69, p. 270). Following the submission of additional evidence, OWCP again denied the claim on August 6, 1986 (DX 69, p. 269). The Miner appealed and the case was forwarded to the Office of Administrative Law Judges on November

[2] In this Decision and Order, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "Tr." refers to the transcript of the April 26, 2000 hearing.

7, 1986 (DX 69, pp. 238, 267A). Administrative Law Judge Richard E. Huddleston, by Order dated April 14, 1988, remanded the case to OWCP to allow processing of the claim in light of *Lukman v. Director, OWCP*, 11 B.L.R. 1-71 (1988)(*Lukman II*), including consideration of whether the Miner established a material change in conditions (DX 69, p. 214). OWCP, on April 28, 1988, filed a Motion to Reconsider, requesting that Judge Huddleston reconsider his Order of Remand and hold the claim in abeyance pending the disposition of *Lukman* by the court of appeals (DX 69, p. 24). Judge Huddleston denied the Motion on July 12, 1988 (DX 69, p. 5). The Deputy Commissioner, on October 24, 1988, issued a Proposed Decision and Order of No Material Change in Condition and Denial of Claim (DX 69, p. 1). No appeal was made and the decision became final. The Miner's third claim for benefits, filed on September 6, 1995, was denied by OWCP on February 5, 1996 and December 12, 1996 (DX 1, 16, 19). The District Director affirmed the denial on June 17, 1997 (DX 45). By letter dated June 18, 1997 the Miner requested a formal hearing before the Office of Administrative Law Judges (DX 46). A hearing was held before Administrative Law Judge Daniel J. Roketenetz on June 6, 1997 (DX 52). The Miner died on June 29, 1997 (DX 10). Judge Roketenetz, on December 30, 1997, issued a Decision and Order denying benefits (DX 52).[3] The denial was appealed to the Benefits Review Board (Board) on February 3, 1998 (DX 52). The record contains a letter acknowledging receipt of the appeal by the Board, but there is no evidence of a decision being made (DX 48).

Alice W. Wooton, the Claimant herein, filed a survivor's claim on September 30, 1997 (DX 3). OWCP denied the claim on January 27, 1998 (DX 17). The District Director, on April 29, 1998, informed the Claimant that her "Federal Black Lung claim" was being forwarded to the Office of Administrative Law Judges (DX 53). The letter did not specify if it was the Miner's claim or the Widow's claim that was being forwarded. The undersigned Administrative Law Judge, on January 19, 1999, issued an Order remanding the Widow's case to the District Director so that the Miner's and Widow's claims could be consolidated (DX 63). The Director, on July 6, 1999, issued a Proposed Decision and Order Memorandum of Conference denying benefits in both the Miner's and Widow's claims (DX 66). The Claimant appealed the denial of both claims and the case was transferred to the Office of

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[3] Neither the June 6, 1997 hearing transcript nor the December 30, 1997 Decision and Order are found in the record.

Administrative Law Judges on July 29, 1999 (DX 67, 71). A hearing was held in Corbin, Kentucky, on April 26, 2000. The record was held open for thirty (30) days from the date of the hearing for the submission of additional x-ray interpretations (Tr. 8–9).

II. ISSUES[4]

The specific issues presented for resolution as noted on Form CM-1025 are as follows:

1. Length of coal mine employment;

2. Whether the Miner had pneumoconiosis as defined in the Act and the regulations;

3. Whether the Miner's pneumoconiosis arose out of coal mine employment;

4. Whether the Miner was totally disabled;

5. Whether the Miner's disability was due to pneumoconiosis;

6. Whether the Miner's death was due to pneumoconiosis;

7. The number of dependents for purposes of augmentation;

8. Whether Alice W. Wooton is an eligible survivor of the Miner; and,

9. Whether the evidence establishes a material change in conditions per 20 C.F.R. § 725.309.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The Miner was born on May 28, 1908 and died on July 29, 1997 at the age of eighty-nine (DX 10). He married the Claimant on June 18, 1941 (DX 9). Ms. Wooton was the Miner's only dependent at the time of his death. She has not remarried since his death and is the surviving spouse of the Miner.

The Miner testified at the March 25, 1997 deposition that he smoked about one pack of cigarettes per day for seven to

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[4] The following Issues were withdrawn at the hearing: (1) miner; (2) post-1969 employment; (3) responsible operator; and, (4) most recent period of cumulative employment (Tr. 11). Timeliness was reserved for appeal purposes. The Employer renewed its motion for summary judgment, which was also preserved for appeal purposes (Tr. 10). The Employer conceded at least five years of coal mine employment (Tr. 11).

eight years until age thirty-five or forty (DX 44). As most physicians of record noted similar histories, I find that the Miner had a smoking history of approximately seven and one-half pack years.

Length of Coal Mine Employment

The Miner alleged thirty years of coal mine employment on his September 6, 1995 application for benefits (DX 1). The Claimant alleged that the Miner had thirty-five years of coal mine employment on her September 30, 1997 claim (DX 3). Form CM-1025 states that the Miner worked "at least ten" years in the mines. The Employer conceded at least five years of coal mine employment (Tr. 11). The record contains testimony by the Claimant and the Miner, an Employment History form, a Description of Coal Mine Work, a letter signed by the Miner describing his employment history, and Social Security earnings records.

Mr. Wooton testified by deposition on March 25, 1997 (DX 44). He said that he mined for approximately thirty years and last worked in the mines in 1982 or 1983. The Claimant testified that her husband began "deep mining" in 1947 and continued until 1967, at which time he went to school and became a teacher (Tr. 15). He taught for seven years and began strip mining in the early 1970's (Tr. 15–16). He actively mined until sometime in the early 1980's (Tr. 16). From about 1985 until 1987 the Miner performed only reclamation work (Tr. 16). An Employment History form completed by the Miner lists seven companies at which the Miner worked and was exposed to coal dust (DX 4). The years listed on the form total approximately thirty-four years between 1927 and 1983. The record also contains a Description of Coal Mine Work signed by the Miner (DX 5). He listed six coal mining companies for whom he worked between 1938 and 1983, totaling approximately twenty-eight years. The Miner signed a letter dated August 30, 1996 describing his employment history (DX 8). He worked as a coal loader for Blue Diamond Coal Co. from 1927 until 1928 and as a coal loader "in deep mines" for U.S. Steel from 1938 until 1940. He was self-employed as a coal operator from 1948 until 1967 for five different companies. Mr. Wooton stated that he owned and operated these mines and "was inside the mines every day, and paid other men to work the outside taking care of the tipple, and loading trucks, and anything else that had to be done." From 1974 until 1983 he owned and operated three different strip coal mines. He noted that "we mined our last coal in 1982, but our bonds were not released until 1987."

The Social Security earnings records show earnings from six coal mining companies, including self-employment from 1937 until

1982 (DX 69). The records show fifteen quarters from 1937 through 1950 in which the Miner had earnings of $50.00 or more.[5] The earnings for the years 1951 through 1959 are listed annually, not quarterly. I find that the Social Security records show seven years and one quarter of coal mine employment from 1951 through 1959. The earnings for 1971 and 1972 are also listed annually. Based on the Miner's prior earnings, I find that the Claimant had one quarter of coal mine employment in each of those years. The Social Security records show two quarters of coal mine employment in 1976 and four quarters in 1977. Based on the Miner's previous earnings, I find that the records show three quarters of coal mine employment in 1978, one quarter in 1980, two quarters in 1981 and one quarter in 1982. In sum, the Miner's Social Security records show fifty-nine quarters, or fourteen years and nine months of coal mine employment. The Miner's Social Security earnings statement is the only documented and public record of his employment history and is the most complete and reliable source of his coal mine employment. I place the greatest weight on these records and find that they establish fifty-nine quarters, or fourteen years and nine months of coal mine employment between 1937 and 1982. Based on other evidence of record, I also credit the Miner with one year of coal mine employment from 1927 to 1928 for a total coal mine employment history of fifteen years and nine months.

Responsible Operator

Don Wooton Mining Company has been named as the Responsible Operator. This was withdrawn as an Issue at the April 26, 2000 hearing (Tr. 11). This designation is supported by the evidence and I find that Don Wooton Mining Company is the proper Responsible Operator.

IV. MEDICAL EVIDENCE

The record also contains medical records regarding the Miner's coronary artery disease and cancer of the prostate, stomach, and esophagus. As such evidence is not pertinent to the issues in this case, it will not be discussed further in this Decision.

X-ray Studies

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[5] The Board has held that counting quarters in which the miner earned $50.00 or more, while not counting the quarters in which he earned less, is a reasonable method of computation. *See Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984); *Combs v. Director, OWCP*, 2 B.L.R. 1-904 (1980).

	Date	Exhibit	Doctor	Reading	Standards
1.	09/20/95	EX 8	Wiot B reader[6] Board cert.[7]	No pneumo.	Good
	Date	Exhibit	Doctor	Reading	Standards
2.	09/20/95	EX 9	Spitz B reader Board cert.	No pneumo.	Good
3.	09/20/95	DX 12	Wicker B reader	No pneumo.	Good
4.	09/20/95	EX 5	Branscomb B reader	No pneumo.	Good
5.	09/20/95	DX 13	Sargent B reader Board cert.	No pneumo.	Good
6.	09/20/95	EX 3	Fino B reader	No pneumo.	Good
7.	03/07/88	DX 69	Marshall B reader Board cert.	2/2 p,q	Good
8.	03/07/88	DX 69	Kim B reader Board cert.	No pneumo.	Fair
9.	01/25/88	DX 69	Clarke	1/2 p	Good

[6] A B reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services.

[7] A Board-certified Radiologist is a physician who is certified in Radiology or Diagnostic Roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* § 718.202(a)(ii)(C).

10.	01/25/88	DX 69	Wershba B reader Board cert.	No pneumo.	Fair
11.	01/25/88	DX 69	Binns B reader Board cert.	No pneumo.	Fair
12.	01/25/88	DX 69	Duncan	No pneumo.	Fair
13.	01/25/88	DX 69	Nichols B reader Board cert.	No pneumo.	Fair
14.	01/25/88	DX 69	Marshall B reader Board cert.	1/2 q,q	Good
15.	01/25/88	DX 69	Halbert B reader Board cert.	No pneumo.	Fair

	Date	Exhibit	Doctor	Reading	Standards
16.	01/28/87	DX 69	Quillin B reader Board cert.	0/0	Not stated
17.	01/26/87	DX 69	Broudy B reader	No pneumo.	Good
18.	01/26/87	DX 69	Quillin B reader Board cert.	0/0	Good
19.	01/26/87	DX 69	Nichols B reader Board cert.	No pneumo.	Fair
20.	01/26/87	DX 69	Binns B reader Board cert.	No pneumo.	Fair
21.	01/26/87	DX 69	Wershba B reader	0/1; 0/0	Fair

			Board cert.			
22.	01/26/87	DX 69	Gogineni B reader Board cert.	0/0	Fair	
23.	05/15/86	DX 69	Blackburn	0/1		Not stated
24.	05/15/86	DX 69	Marshall B reader Board cert.	1/0 p,q	Good	
25.	05/15/86	DX 69	Cole B reader Board cert.	No pneumo.		Poor
26.	05/15/86	DX 69	Swann B reader	0/0	Fair	
27.	05/15/86	DX 69	Quillin B reader Board cert.	0/0	Good	
28.	05/15/86	DX 69	Broudy B reader	No pneumo.	Fair	

	Date	Exhibit	Doctor	Reading	Standards
29.	05/15/86	DX 69	Poulos B reader Board cert.	No pneumo.	Good
30.	05/15/86	DX 69	Halbert B reader Board cert.	No pneumo.	Fair
31.	05/15/86	DX 69	Elmer B reader Board cert.	No pneumo.	Good
32.	04/22/86	DX 69	Marshall B reader Board cert.	1/0 p,q	Good
33.	04/22/86	DX 69	Quillin B reader Board cert.	0/0	Good
34.	04/22/86	DX 69	Cole B reader Board cert.	No pneumo.	Fair
35.	04/22/86	DX 69	Elmer B reader Board cert.	No pneumo.	Good
36.	04/22/86	DX 69	Broudy B reader	No pneumo.	Good
37.	04/22/86	DX 69	Swann B reader	No pneumo.	Good
38.	03/28/86	DX 69	Broudy B reader	No pneumo.	Poor
39.	03/28/86	DX 69	Swann B reader	No pneumo.	Good
40.	03/28/86	DX 69	Quillin B reader Board cert.	0/0	Good

41.	03/28/86	DX 69	Cole B reader Board cert.	No pneumo.	Fair
42.	03/28/86	DX 69	Baker	1/0 t,t	Good

	Date	Exhibit	Doctor	Reading	Standards
43.	03/28/86	DX 69	Elmer B reader Board cert.	No pneumo.	Good
44.	01/29/85	DX 69	Quillin B reader Board cert.	0/0	Good
45.	01/29/85	DX 69	Gogineni B reader Board cert.	No pneumo.	Not stated
46.	01/29/85	DX 69	Nichols B reader Board cert.	No pneumo.	Fair
47.	01/29/85	DX 69	Wershba B reader Board cert.	No pneumo.	Fair
48.	01/29/85	DX 69	Binns B reader Board cert.	No pneumo.	Good
49.	08/28/81	DX 69	Quillin B reader Board cert.	0/0	Good
50.	08/28/81	DX 69	Gogineni B reader Board cert.	No pneumo.	Not stated
51.	08/28/81	DX 69	Nichols B reader Board cert.	No pneumo.	Good

52.	08/28/81	DX 69	Wershba B reader Board cert.	No pneumo.	Fair
53.	08/28/81	DX 69	Binns B reader Board cert.	No pneumo.	Good
54.	02/23/81	DX 69	Broudy B reader	No pneumo.	Fair

	Date	Exhibit	Doctor	Reading	Standards
55.	02/23/81	DX 68	Cole B reader Board cert.	0/0	Fair
56.	02/23/81	DX 68	Baker	1/1 p,q	Fair

Pulmonary Function Studies[8]

	Date	Exhibit	Doctor	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Standards
1.	09/20/95	DX 12	Wicker	87/ 67½″	2.99	3.78	94.5	79%	Good coop. & comp.; tracings included
2.	01/25/88	DX 69	Clarke	79/ 69¾″	3.0	3.7	48.4	81%	Good coop.; tracings included
3.	05/23/86	DX 69	Rader	78/69"	3.38	4.09	101.7	83%	Good effort & coop.; tracings included
4.	04/22/86	DX 69	Wells	77/ 68¼″	3.17	4.16	72	76%	Tracings included
5.	03/28/86	DX 69	Baker	77/ 67¼″	3.29	4.20	85	78%	Good coop. & comp.; tracings included
6.	08/23/81	DX 68	Baker	72/69"	3.58	4.48	105	80%	Sufficient comp. & coop.; tracings included

[8] Because the physicians conducting pulmonary function studies noted varying heights, I must make a finding on the Miner's height. *See Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983). Based on the height most frequently noted, I find that the Miner was sixty-nine inches tall.

Arterial Blood Gas Studies

	Date	Exhibit	pCO_2	pO_2
1.	09/20/95	DX 12	47.8	67.8
		Exercise	50.1	86.2
	Validation:	Dr. N.K. Burki found this study to be technically acceptable (DX 65).		
2.	03/07/88	DX 69	44	68
3.	05/23/86	DX 69	48.7	79.6
4.	04/22/86	DX 69	38.7	72.2
5.	03/28/86	DX 69	35.6	83.4
6.	02/23/81	DX 68	37.6	92
		Exercise	35.6	110.3

Death Certificate

The Certificate of Death, signed by Dr. C.G. Grigsby, Jr., states the date of death as July 29, 1997 and immediate cause of death as refractory septic shock with an onset of “days.” Severe ischemic heart disease is listed as a significant condition contributing to death but not resulting in the underlying cause of death (DX 10).

Narrative Medical Evidence

1. Dr. Gregory J. Fino, a Board-certified Internist and Pulmonologist and a B reader, issued a consultative report dated March 10, 2000 based on the medical evidence of record, including the death certificate. Dr. Fino concluded that: (1) there is insufficient objective medical evidence to justify a diagnosis of pneumoconiosis; (2) the Miner did not suffer from an occupationally acquired pulmonary condition; (3) there was no respiratory impairment present; (4) the Miner was not totally disabled from a respiratory standpoint; (5) assuming that the Miner did suffer from pneumoconiosis, there was no totally disabling respiratory impairment; and, (6) pneumoconiosis did not cause, contribute to, or hasten the Miner’s death (EX 3). In a deposition which was taken on April 14, 2000, Dr. Fino recounted his written report (EX 6).

2. Dr. Ben V. Branscomb, who is a B reader and is Board certified in Internal Medicine, reviewed numerous medical reports and objective test results and issued a consultative report dated February 29, 2000. He concluded that: (1) Mr. Wooton had no impairment which arose from his work as a miner; (2) Mr. Wooton had the respiratory ability to perform the work of a miner until his death; (3) there is no record of any totally disabling respiratory impairment and if he was disabled it was the result of angina pectoris, unrelated to coal dust exposure; (4) coal dust exposure had no discernible consequence on the Miner's breathing or health; (5) the Miner's death was in no way related to pneumoconiosis or coal dust exposure; and, (6) assuming the Miner did suffer from pneumoconiosis, it had no effect on the nature and timing of his death (EX 4).

3. a. Dr. Bruce Broudy, a B reader and Board-certified Internist and Pulmonologist, issued a consultative report dated January 26, 2000 based on the medical evidence of record, including the death certificate. He opined that the evidence fails to support the existence of pneumoconiosis. He noted a majority of negative x-ray readings by the most qualified readers as well as nonqualifying objective test results. Dr. Broudy did not believe that the Miner's death was due to pneumoconiosis based on the evidence. "It appears that this old man died from sepsis which is a common cause of death in elderly patients, especially those with heart disease" (EX 2). In a deposition taken on April 19, 2000, Dr. Broudy recounted his written report (EX 7).

b. Dr. Broudy issued a consultative report dated August 27, 1987 based on medical evidence available at that time. He noted a thirty-year coal mine employment history, twenty underground, and a smoking history of one-half pack to one pack per day for five to six years. Based on x-ray evidence and objective testing, Dr. Broudy opined that the Miner retained the respiratory capacity to perform the work of a miner. He noted normal spirometry and blood gases suggesting that there was no respiratory impairment due to any cause (DX 69).

c. Dr. Broudy examined the Claimant on January 26, 1987, at which time he noted the Miner's symptoms (cough, wheezing) and his occupational (twenty-five years mining), smoking (one-half pack to one pack per day for five to six years until thirty to thirty-five years ago; but previous record indicates he smoked for seventeen years), and medical (unremarkable) histories. He performed a physical examination, pulmonary function, and arterial blood gas testing (normal), and interpreted an x-ray (Category 0) and EKG (unremarkable). Dr.

Broudy diagnosed chronic bronchitis by history and opined that Mr. Wooton did not suffer from pneumoconiosis and was not totally disabled from a respiratory standpoint (DX 69).

4. Dr. Mitchell Wicker, Jr., examined the Miner on September 20, 1995, at which time he reviewed the Miner's symptoms (sputum, wheezing, dyspnea, cough, chest pain, ankle edema), and his occupational (coal mine employment from 1979 to 1983), smoking (smoked one-half pack per day from 1935 until 1940), and medical (arthritis, heart disease, prostate cancer) histories. Dr. Wicker performed a physical examination, pulmonary function, and arterial blood gas studies, and interpreted an x-ray (no pneumoconiosis) and EKG (essentially unremarkable). He found no evidence of pneumoconiosis and opined that the Miner's respiratory capacity "appears to be adequate to perform his previous occupation in the coal mining industry" (DX 12).

5. The record contains several office notes signed by Dr. Ashish Patel. In notes dated January 24, 1995 and May 3, 1995, Dr. Patel noted symptoms of cough, sputum, and sore throat and "no alcohol or tobacco use." He diagnosed bronchitis which he failed to attribute to coal dust exposure (DX 42).

6. Dr. Charles A. Moore examined the Miner on March 7, 1988. Dr. Moore reviewed symptoms (shortness of breath, dyspnea, cough, sputum) and the Miner's occupational (forty years mining, thirty deep mining), smoking (two years of tobacco use), and medical (prostate and hemorrhoid surgeries) histories. He performed a physical examination, pulmonary function, and arterial blood gas testing, and interpreted an x-ray (1/2). He noted that the Miner had a difficult time triggering the pulmonary function test machine. "He tried several attempts and finally had one register. I observed this patient myself and he was trying the best his effort." Dr. Moore opined that the Miner suffered from pneumoconiosis and had a "marked respiratory dysfunction secondary to the pneumoconiosis." He stated that the Miner was totally disabled from coal mine employment on a respiratory basis due to COPD caused by coal dust exposure. He based his findings on examination, x-ray, and objective testing (DX 69).

7. Dr. W.F. Clarke examined Mr. Wooton on January 25, 1988, at which time he noted the Miner's symptoms (shortness of breath, dyspnea, cough, sputum) and his occupational (forty years mining, twenty-five underground), smoking (one-half pack per day for three or four years; quit thirty-five years ago), and medical (unremarkable) histories. He performed a physical

examination, a pulmonary function study (mild restrictive and moderate obstructive disease), and interpreted an x-ray (1/2) and EKG (normal). Dr. Clarke opine that the Miner was totally and permanently disabled due to pneumoconiosis. Dr. Clarke recounted his opinion in a later deposition (DX 69).

8. Dr. Emery Lane, who is a B reader and a Board-certified Internist, issued a consultative report dated August 25, 1987 based on the available medical evidence. He noted a twenty-five to thirty year coal mine employment history, half of which was underground, and a five to six year smoking history. Dr. Lane opined that Mr. Wooton did not suffer from pneumoconiosis and had the respiratory capacity to perform the work of a miner based on normal pulmonary function and arterial blood gas testing (DX 69). Dr. Lane reiterated his opinion at a deposition taken on February 15, 1988 (DX 69).

9. Dr. Emanuel H. Rader examined the Miner on May 23, 1986. He noted symptoms (cough, sputum, shortness of breath, dyspnea) and reviewed the Miner's occupational (thirty-five years mining) and smoking (does not smoke) histories. Dr. Rader performed a physical examination, pulmonary function (uncontributory), and arterial blood gas (mild hypoxemia) testing, and interpreted an x-ray (0/1). Dr. Rader opined that the Miner was "totally and permanently disabled for manual labor, such as work in the mines, on the basis of his lungs." He noted the Miner's coal mining history and stated that Mr. Wooton "denies any other work which would attribute to any lung problems" (DX 69).

10. Dr. B.H. Wells examined Mr. Wooton on April 22, 1986, at which time he reviewed symptoms (smothering, cough, shortness of breath, chest pain on exertion, orthopnea), as well as occupational (thirty years in mines, twenty underground), smoking (does not smoke), and medical (unremarkable) histories. Dr. Wells performed a physical examination, pulmonary function, and arterial blood gas testing (no appreciable obstructive disease), and interpreted an x-ray (Category II) and an EKG (essentially normal). He diagnosed coal workers' pneumoconiosis, Category II A with compensatory emphysema and opined that the Miner was totally and permanently disabled for any type of gainful employment (DX 69).

11. a. Dr. Glen Baker, a B reader and Board-certified Internist and Pulmonologist, examined the Miner on March 28, 1986. He noted symptoms (cough, sputum, wheezing, dyspnea, chest pain, ankle edema), as well as occupational (twenty years underground mining), smoking (two to three cigarettes per day

for less than a year until age twenty-five or thirty), and medical (wheezing, bronchitis, arthritis, chest pain, diabetes, hospitalization for prostate) histories. Dr. Baker performed a physical examination, pulmonary function, and arterial blood gas testing, and interpreted an x-ray (1/0). He diagnosed chronic bronchitis, occupational pneumoconiosis, and ischemic heart disease. Dr. Baker stated that the Miner's condition was related to coal dust exposure based on abnormal x-ray and significant duration of exposure. The Miner suffered a mild pulmonary impairment, related to coal dust exposure, and retained the respiratory capacity to perform his usual coal mine work (DX 69).

b. Dr. Baker previously examined Mr. Wooton on February 23, 1981, at which time he reviewed the Miner's symptoms (cough, sputum, wheezing, dyspnea), and his occupational (forty years mining, mostly underground), smoking (one-half pack per day for two to three years until age thirty-five), and medical (wheezing, chronic bronchitis) histories. Dr. Baker performed a physical examination, pulmonary function, and arterial blood gas testing, and interpreted an x-ray (1/1). He diagnosed chronic bronchitis and occupational pneumoconiosis 1/1. He attributed the diagnoses to coal dust exposure based on abnormal x-ray and significant duration of exposure (DX 68).

V. DISCUSSION AND APPLICABLE LAW

Miner's Claim

Because the Miner filed his claim after March 31, 1980, it must be adjudicated under the regulations at 20 C.F.R. Part 718. To be entitled to benefits, the Claimant must establish by a preponderance of the evidence that the Miner had pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he was totally disabled as a result of pneumoconiosis. *See* 20 C.F.R. §§ 718.202-.204.

In cases where a claimant files more than one claim, and the earlier claim is denied, the later claim must also be denied on the grounds of the earlier denial, unless there has been a material change in conditions or the later claim is a request for modification. The Miner's first claim was finally denied by OWCP on March 31, 1981. OWCP denied his second claim on October 24, 1988. The Miner's present claim was filed on September 6, 1995, more than one year after the previous denial, thus constituting this claim as a duplicate claim. Section 725.309 governs the review of duplicate claims. The United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42

F.3d 993 (6th Cir. 1994), adopted the following standard for determining whether a miner has established a material change in conditions:

> . . . to assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

Id. at 997-98.

Applying the *Ross* standard, I must review the evidence submitted subsequent to October 24, 1988 to determine whether the Claimant has proven at least one of the elements that was previously adjudicated against the Miner. The prior claim was denied when OWCP found that the Claimant failed to show the existence of pneumoconiosis and, therefore, any of the elements necessary for entitlement. If the Claimant establishes this element with new evidence, he will have demonstrated a material change in condition. I will then review the entire record to determine entitlement to benefits.

Under § 718.202(a)(1), a claimant may prove the existence of pneumoconiosis on the basis of x-ray evidence. Six x-ray interpretations have been submitted since the prior denial, all of which are negative for pneumoconiosis. Consequently, I find that the newly submitted x-ray evidence fails to establish the existence of pneumoconiosis.

Under § 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy results. This section is inapplicable in this case because the record does not contain biopsy or autopsy results. Additionally, § 718.202(a)(3) is not available because none of the presumptions of §§ 718.304, 718.305, and 718.306 apply to the facts of this case.

Section 718.202(a)(4) provides that a claimant may establish the existence of pneumoconiosis if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the Claimant suffers from pneumoconiosis as defined in § 718.201. Section 718.201 defines pneumoconiosis as a

chronic dust disease of the lung, including respiratory or pulmonary impairments, arising out of coal mine employment. It is within the Administrative Law Judge's discretion to determine whether a physician's conclusions are adequately supported by documentation. *See Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *King v. Consolidation Coal Co.*, 8 B.L.R. 1-262, 1-265 (1985).

The medical opinions of five physicians have been submitted since the prior denial. Drs. Fino, Branscomb and Broudy issued consultative reports dated between January and March 2000 based on their review of numerous medical records. Dr. Broudy's opinion is also based on his January 1987 examination of Mr. Wooton. All three physicians found no objective medical evidence of pneumoconiosis or of any totally disabling respiratory impairment. They concluded that coal dust exposure played no role in the Miner's death. Drs. Fino, Branscomb and Broudy are highly qualified physicians. Their opinions are well-reasoned, well-documented and are well-supported by the medical evidence. As such, they are entitled to substantial weight.

Dr. Wicker examined the Miner in September 1995, at which time he found no evidence of pneumoconiosis and opined that the Miner retained the respiratory capacity to perform the work of a Miner. Dr. Wicker noted only four years of coal mine employment while I have found that the Miner worked for over fifteen years in the mines. Although his findings are supported by the objective evidence, Dr. Wicker's opinion is entitled to less weight than those listed above because he relied on an inaccurate coal mine employment history.

Dr. Patel examined the Miner on several occasions in 1995. He diagnosed bronchitis but failed to relate it to coal dust exposure. Dr. Patel's opinion fails to support a finding of pneumoconiosis.

The Claimant has failed to establish that the Miner suffered from pneumoconiosis based on the newly submitted evidence. Accordingly, the Miner's claim must fail. Nevertheless, I will evaluate the new evidence to determine if the Miner was totally disabled.

Section 718.204(c) contains the criteria for establishing total disability:

> (c) Criteria. In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (c)(1), (2), (3), (4) or (5) of this section shall establish a miner's total disability.

Section 718.204(c)(1) permits a finding of total disability when the evidence includes pulmonary function studies with FEV_1 values equal to or less than those listed in the tables and either:

1. FVC values equal to or below listed table values; or
2. MVV values equal to or below listed table values; or
3. A percentage of 55 or less when the FEV_1 test results are divided by the FVC test results.

The record contains the results of one new pulmonary function study. As this study yielded nonqualifying values, I find that it fails to support a finding of total disability.

Under § 718.204(c)(2), a claimant may establish total disability with arterial blood gas studies that result in values equal to or less than those contained in the tables. The new evidence contains the results of two studies performed on September 20, 1995. The study which was performed without exercise produced nonqualifying values but the study which was conducted after the Miner performed exercise yielded values which qualify under the regulations. The newly submitted blood gas evidence is, thus, in equipoise. I note that the study which produced qualifying values produced values which barely qualify under the regulations. I note further that the Miner was eighty-seven years old at the time the study was conducted. In light of these circumstances, I find that the preponderance of arterial blood gas evidence fails to support a finding of total disability.

Section 718.204(c)(3) is inapplicable because no evidence suggests cor pulmonale with right-sided congestive heart failure. Likewise, § 718.204(c)(5) is not available because it applies only to survivor's claims filed before January 1, 1982.

Under § 718.204(c)(4), a claimant may establish total disability if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that the claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work.

Subsequent to the prior denial, four physicians gave opinions on the total disability issue. Drs. Fino, Branscomb, Broudy and Wicker all found that the Miner did not suffer from a totally disabling respiratory standpoint.

Weighing the pulmonary function, arterial blood gas and medical opinion evidence as a whole, I find that Claimant has failed to show that the Miner was totally disabled and that there has been a material change in conditions since the October 24, 1988 denial.

Widow's Claim

Because the Claimant filed this claim after March 31, 1980, it must be adjudicated under the regulations at 20 C.F.R. Part 718. These regulations provide that benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. *See* § 718.205(a). In a Part 718 survivor's claim, the Administrative Law Judge must make a threshold determination of the existence of pneumoconiosis under 20 C.F.R. § 718.202(a) prior to considering whether the miner's death was due to the disease under § 718.205. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-88 (1993).

As previously stated, pneumoconiosis can be established through x-ray evidence. *See* § 718.202(a)(1). The record contains fifty-six interpretations of eleven x-rays. Forty-nine are negative and seven are positive. Thirty-six negative interpretations were made by physicians who are dually qualified as B readers and Board-certified Radiologists and eleven were made by physicians who are B readers only. Only four dually qualified physicians gave positive readings. The remaining three positive interpretations were made by physicians with no special radiological qualifications. Interpretations by more highly qualified readers are entitled to greater weight because of their expertise and proficiency in classifying x-rays. *See Aimone v. Morrison Knudson Co.*, 8 B.L.R. 1-32 (1985); *Vance v. Eastern Associated Coal Corp.*, 8 B.L.R. 1-68 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). Based on a majority of negative interpretations by the most qualified readers, I find that the x-ray evidence fails to support a finding of pneumoconiosis.

Pneumoconiosis can also be established on the basis of medical opinion evidence. *See* § 718.202(a)(4). The record contains the medical opinions of eleven physicians. Five found no evidence of pneumoconiosis and five diagnosed the disease.

Another physician, Dr. Patel, diagnosed bronchitis but failed to relate it to coal mine employment.

As previously stated, Drs. Fino, Branscomb, Broudy found no objective evidence of pneumoconiosis or any occupationally acquired pulmonary impairment. I have given their opinions substantial weight. Drs. Wicker and Lane also found no evidence of pneumoconiosis. I have given less weight to Dr. Wicker's opinion for the reasons stated above. Dr. Lane, in his August 25, 1987 consultative report, opined that the Claimant did not suffer from pneumoconiosis and was not totally disabled from a respiratory standpoint. His opinion is reasoned, documented, and is supported by the evidence on which he relied. Dr. Lane's opinion is entitled to substantial weight.

Dr. Moore examined Mr. Wooton in March 1988, at which time he diagnosed pneumoconiosis and opined that the Miner was totally disabled from a respiratory standpoint due to COPD caused by coal dust exposure. Dr. Moore interpreted an x-ray as positive while I have found that the x-ray evidence is negative for pneumoconiosis. The results of the pulmonary function study relied on by Dr. Moore are not found in the record and the arterial blood gas study yielded nonqualifying values. He noted that it was very difficult for the Miner to complete the pulmonary function test. Dr. Moore relied on a coal mine employment history of forty years whereas I have found that Mr. Wooton worked less than sixteen years in the mines.

Dr. Clarke, who examined the Miner in January 1988, opined that the Miner was totally disabled due to pneumoconiosis. His opinion was based in part on a positive x-ray. I have found the x-ray evidence to be negative. He relied on a coal mine employment history of forty years while I have found a history just under sixteen years. The pulmonary function study relied on by Dr. Clarke yielded nonqualifying results. He did not perform an arterial blood gas study.

Dr. Wells examined Mr. Wooton in April 1986, at which time he diagnosed pneumoconiosis and emphysema and opined that the Miner was totally disabled from any gainful employment. Dr. Wells noted a thirty year coal mine employment history which is greater than the history that I have found. He interpreted an x-ray as positive while I have found the x-ray evidence to be negative for pneumoconiosis. The pulmonary function and arterial blood gas studies relied on by Dr. Wells produced values which fail to qualify under the regulations.

Dr. Baker examined the Miner on two occasions. In March 1986 he diagnosed pneumoconiosis and opined that Mr. Wooton suffered a mild, non-disabling pulmonary impairment. His opinion was based partially on the March 28, 1986 x-ray, which he gave a 1/0 reading, the minimum reading under the regulations which will support a finding of pneumoconiosis. Dr. Baker also diagnosed pneumoconiosis based on the February 1981 examination and x-ray. I have found the x-ray evidence to be negative for pneumoconiosis. In both reports Dr. Baker relied on inaccurate smoking and coal mine employment histories. He also relied on nonqualifying pulmonary function and arterial blood gas studies.

Dr. Rader examined the Miner in May 1986 and opined that he was totally disabled from manual labor due to respiratory problems. Dr. Rader noted the Miner's coal mine employment history and stated that he "denies any other work which would attribute to any lung problems." His finding of total disability is unsupported by the objective medical evidence. He equivocally suggested the presence of an occupationally acquired pulmonary disease but interpreted an x-ray as negative for pneumoconiosis. Dr. Rader relied on a coal mine employment history significantly greater than that which I have found.

Based on the foregoing, I find that the opinions of Drs. Moore, Clarke, Rader, Wells and Baker are entitled to less weight than those of Drs. Fino, Branscomb, Broudy and Lane. Accordingly, I find the Claimant has failed to establish the existence of pneumoconiosis based on the medical opinion evidence.

Assuming, *arguendo,* that pneumoconiosis was establish, the Claimant would have to show that the Miner's death was due to pneumoconiosis. Subsection 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides that death will be due to pneumoconiosis if any of the following criteria are met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
>
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
>
> (3) Where the presumption set forth at § 718.304 [complicated pneumoconiosis] is applicable.

The United States Court of Appeals for the Sixth Circuit has held that "pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way." *Griffith v. Director, OWCP*, 49 F.3d 184, 186 (6th Cir. 1995); *see also, Brown v. Rock Creek Mining Co., Inc.,* 996 F.2d 812, 816 (6th Cir. 1993).

Only four physicians gave opinions as to cause of death. Dr. Grigsby signed the death certificate and stated the immediate cause of death as refractory septic shock. He listed severe ischemic heart disease as a significant cause but not resulting in the underlying cause of death. Drs. Fino, Branscomb and Broudy opined that the Miner's death was in no way related to pneumoconiosis or coal dust exposure. Because no evidence was submitted supportive of a finding of death due to pneumoconiosis, I find that the medical opinion evidence fails to establish that the Miner's death was due even in part to pneumoconiosis.

Under § 718.304, there is an irrebuttable presumption of death due to pneumoconiosis when complicated pneumoconiosis is established. As there is no evidence of complicated pneumoconiosis, I find that the Claimant has failed to show that the Miner suffered from that condition.

Injunction Issued In National Mining Association, et al.

On April 5, 2001, an Order was issued due to the injunction issued by the U.S. District Court in *National Mining Association, et al. V. Elaine L. Chao, Secretary of the U.S. Department of Labor, et al.*, No. 1:00 CV 03086 (D. D.C. Feb. 9, 2001). The parties were directed to file a brief on or before April 20, 2001 stating whether the application of the amended regulatory provisions will affect the outcome of this claim. The Employer responded stating that certain sections would affect the outcome of this claim and requested that the claim be held in abeyance until the outcome of the civil litigation or, alternatively, that the case be remanded to the District Director. Briefs were not filed by the Director or the Claimant. After a review of the applicable provisions of the amended regulations, I have determined that the application of the amended regulations will not affect the outcome of this case.

VI. ENTITLEMENT

Alice W. Wooton, on behalf of Don Wooton, deceased, and as the surviving spouse of Don Wooton, has failed to establish

entitlement to benefits under the Act. Therefore, her claims on behalf on the Miner and as the surviving spouse of the Miner must fail.

VII. ATTORNEY'S FEES

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

VIII. ORDER

It is, therefore,

ORDERED that the claims of Alice W. Wooton, on behalf of Don Wooton, deceased, and Alice W. Wooton as the surviving spouse of Don Wooton, are hereby DENIED.

A
ROBERT L. HILLYARD
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C., 20013-7601. A copy of the Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C., 20210.