U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 20-0326 BLA
and 21-0152 BLA

RUTH LEE NEAL (o/b/o and Widow of THOMAS H. NEAL)	)	
Claimant-Petitioner	)	
v.	)	
UNION CARBIDE CORPORATION	)	DATE ISSUED: 08/20/2021
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Request for Modification of Lystra A. Harris and the Decision and Order Denying Benefits of Lauren C. Boucher, Administrative Law Judges, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Lystra A. Harris's Decision and Order Denying Request for Modification (2019-BLA-05501) and Administrative Law Judge Lauren C. Boucher's Decision and Order Denying Benefits (2020-BLA-05123) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] This case involves a request for modification of a miner's subsequent claim[2] filed on September 26, 2011, and a request for modification of a survivor's claim filed on December 6, 2012.[3] The Benefits Review Board (the Board) has consolidated these appeals for purposes of decision only.

In the initial decision in the Miner's claim, dated November 29, 2017, Administrative Law Judge Richard A. Morgan credited the Miner with 13.93 years of underground coal mine employment and therefore found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[4] Addressing whether Claimant could establish entitlement without the benefit of the presumption, Judge Morgan found the new evidence established a totally disabling respiratory or pulmonary impairment and a change in an applicable condition of entitlement, 20 C.F.R. §§718.204(b), 725.309, but also found that Claimant failed to establish clinical or legal pneumoconiosis.[5] He therefore denied benefits. On

[1] Claimant is the widow of the Miner, who died on November 10, 2012, while his subsequent claim was pending. Survivor's Claim Director's Exhibit 10. In addition to pursuing this claim on behalf of his estate, she is also pursuing her own claim for survivor's benefits.

[2] Administrative Law Judge Victor Chao denied the Miner's prior claim, filed on October 19, 1987, for failure to establish any element of entitlement. Miner's Claim Director's Exhibit 1.

[3] On September 11, 2015, Administrative Law Judge Richard A. Morgan granted Claimant's request to hold her survivor's claim in abeyance pending the outcome of the Miner's pending claim. On November 29, 2017, Judge Morgan issued a Decision and Order on Remand Denying Benefits in the Miner's claim. On December 20, 2017, Judge Morgan issued a Decision and Order Denying Benefits in the survivor's claim.

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[5] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition

appeal, the Board affirmed Judge Morgan's findings that Claimant established total disability and a change in an applicable condition of entitlement, and that Claimant did not establish the existence of legal pneumoconiosis. *Neal v. Union Carbide Corp.*, BRB Nos. 16-0317 BLA and 16-0317 BLA-A (Apr. 13, 2017) (unpub.). The Board, however, vacated his finding that Claimant failed to establish clinical pneumoconiosis and remanded the case for further consideration. On remand, Judge Morgan again found Claimant failed to establish the existence of clinical pneumoconiosis and thus denied benefits. Claimant requested modification of that denial on September 12, 2018.

In her Decision and Order Denying Request for Modification dated May 21, 2020, the subject of the current appeal in the Miner's claim, Judge Harris found Claimant failed to establish the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a). She therefore found Claimant did not establish a basis for modification at 20 C.F.R. §725.310 and denied benefits.

In the initial decision in the survivor's claim, dated December 20, 2017, Judge Morgan again credited the Miner with 13.93 years of coal mine employment and therefore found Claimant could not invoke the Section 411(c)(4) presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[6] He further found Claimant failed to establish the existence of clinical or legal pneumoconiosis and denied benefits. 20 C.F.R. §718.202(a). On appeal, the Board affirmed Judge Morgan's findings that Claimant failed to establish the existence of legal or clinical pneumoconiosis. *Neal v. Union Carbide Corp.*, BRB No. 18-0138 BLA (Feb. 28, 2019) (unpub.). Claimant requested modification of the denial of survivor's benefits on March 27, 2019.

In her Decision and Order Denying Benefits dated November 19, 2020, the subject of the current appeal in the survivor's claim, Judge Boucher found Claimant failed to

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of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

establish clinical or legal pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, or that pneumoconiosis caused or substantially contributed to the Miner's death, and that Claimant thus did not establish a mistake of fact. 20 C.F.R. §§718.202(a), 718.205(a), 725.310. She therefore found Claimant did not establish a basis for modification at 20 C.F.R. §725.310 and denied benefits.

On appeal in the Miner's claim, Claimant challenges Judge Harris's finding that she failed to establish the existence of clinical pneumoconiosis and thus did not establish a mistake in fact. In the survivor's claim, Claimant asserts Judge Boucher erred in finding she failed to establish clinical or legal pneumoconiosis, or that the Miner's death was due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, did not file a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judges' Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

The Miner's Claim

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions can aid claimants in meeting these elements if certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

An administrative law judge may grant modification based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director,*

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim Director's Exhibit 1.

OWCP [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993).

Because Claimant did not submit new evidence, and the Board previously affirmed Judge Morgan's finding that Claimant did not establish legal pneumoconiosis, Judge Harris considered only whether Claimant established a mistake in fact in Judge Morgan's findings on remand regarding whether the Miner had clinical pneumoconiosis. Miner's Claim Decision and Order at 8.

Judge Harris considered six interpretations of two x-rays. Miner's Claim Decision and Order at 34-36. Dr. Gaziano, a B reader, and Dr. Smith, a dually-qualified Board-certified radiologist and B Reader, concluded the October 20, 2011 x-ray is positive for simple and complicated pneumoconiosis, while Dr. Meyer, also dually qualified, opined it is negative for both. Miner's Claim Director's Exhibit 12. Concluding Dr. Meyer's reading is more consistent with the results of the June 9, 2010 and November 22, 2011 computed tomography (CT) scans regarding the existence of simple and complicated pneumoconiosis, discussed below, Judge Harris gave his reading greater weight and found the October 20, 2011 x-ray negative for pneumoconiosis. Miner's Claim Decision and Order at 34-35.

Dr. Smith read the August 22, 2012 x-ray as positive for simple and complicated pneumoconiosis, while Dr. Zaldivar, a B reader, and Dr. Meyer concluded this x-ray is negative for both. Miner's Claim Claimant's Exhibit 2; Miner's Claim Employer's Exhibits 1-2. Judge Harris noted the Board previously affirmed Judge Morgan's finding that the Miner did not have complicated pneumoconiosis and that Dr. Smith's interpretation is inconsistent with the November 22, 2011 CT scan, both of which undermine his opinion. Miner's Claim Decision and Order at 35. She further concluded Dr. Smith, being dually qualified, is more qualified than Dr. Zaldivar, but Dr. Meyer, also dually qualified and with a practice concentrating in diagnostic radiology of chest diseases, is most qualified. *Id.* Therefore, finding the readings of the August 22, 2012 x-ray to be, at best, in equipoise, Judge Harris found it does not establish the existence of clinical pneumoconiosis. *Id.*

Judge Harris also considered the interpretations of two CT scans. Miner's Claim Decision and Order at 34-36. Dr. Smith read the June 9, 2010 CT scan as positive for simple pneumoconiosis but negative for complicated pneumoconiosis, while Dr. Meyer read this CT scan as negative for both simple and complicated pneumoconiosis.[8] Miner's

[8] Dr. Leef, whose qualifications are not in the record, also reviewed the June 9, 2010 CT scan for treatment purposes and concluded it demonstrated severe pulmonary fibrosis,

Claim Claimant's Exhibit 4; Miner's Claim Employer's Exhibit 4. Dr. Smith read the November 22, 2011 CT scan as consistent with complicated pneumoconiosis, but cautioned that it could also be consistent with superimposed coexistent lung cancer, whereas Dr. Meyer read this CT scan as negative for simple and complicated pneumoconiosis.[9] Miner's Claim Claimant's Exhibit 4. Judge Harris concluded Dr. Meyer provided the most detailed descriptions of the CT scans and that his conclusions were most consistent with those of the Miner's treating physicians. Miner's Claim Decision and Order at 35. She therefore gave his readings of the CT scan evidence greater weight than those of Dr. Smith and found the CT scan evidence failed to establish the existence of clinical pneumoconiosis. *Id.*

Turning to the medical opinions, Judge Harris considered the opinions of Drs. Gaziano, Rasmussen, and Sood that the Miner had clinical pneumoconiosis, and those of Drs. Zaldivar and Meyer that he did not. Decision and Order at 36-40; Miner's Claim Director's Exhibits 12, 31; Miner's Claim Claimant's Exhibits 7, 9; Miner's Claim Employer's Exhibits 1, 7-9. She determined the opinions of Drs. Gaziano, Rasmussen, and Sood are not well-reasoned and therefore entitled to reduced weight, whereas the opinions of Drs. Zaldivar and Meyer are well-reasoned and well-documented and therefore entitled to great weight. Miner's Claim Decision and Order at 37-40. She therefore determined the medical opinion evidence does not establish the existence of clinical pneumoconiosis. *Id.* at 40.

On appeal, Claimant recounts the medical record and generally asserts Judge Harris erred in finding the Miner did not have clinical pneumoconiosis and thus that Claimant did not establish a mistake in a determination of fact. Miner's Claim Claimant's Brief at 6-15. Claimant has not, however, identified any specific error of law or fact in the administrative law judge's weighing of the evidence relevant to the existence of pneumoconiosis.[10] *Cox v. Director, OWCP*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Anderson*, 12 BLR at 1-113.

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but his findings and conclusion are silent as to the presence of pneumoconiosis. Miner's Claim Claimant's Exhibit 3.

[9] Dr. Schlarb also reviewed the November 22, 2011 CT scan and diagnosed end-stage pulmonary fibrosis with differential considerations of neoplasm or infection, but his findings and conclusion are silent as to the presence of pneumoconiosis. Miner's Claim Claimant's Exhibit 5.

[10] Claimant asserts error with regard to the weighing of the physicians' qualifications, but her arguments relate to Judge Morgan's decisions and do not address Judge Harris's findings. Miner's Claim Claimant's Brief at 9.

As the trier-of-fact, the administrative law judge has broad discretion to assess the credibility of the medical opinions and assign them appropriate weight. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 211 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997). Claimant's contentions amount to a request for reweighing of the evidence, which the Board is not empowered to do. *Anderson*, 12 BLR at 1-113. Thus, we affirm Judge Harris's finding that Claimant failed to establish the existence of clinical pneumoconiosis or a mistake of fact, and therefore affirm her denial of benefits. *See Stanley*, 194 F.3d at 497; *Jessee*, 5 F.3d at 724-25; *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; 20 C.F.R. §725.310; Decision and Order at 40.

Survivor's Claim

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record 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*, 404 U.S. at 256. The administrative law judge may correct "any mistake . . . including the ultimate issue of benefits eligibility." *Stanley*, 194 F.3d at 497; *see Jessee*, 5 F.3d at 725.

In a survivor's claim where no statutory presumptions are invoked, a claimant must establish, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88. A miner's death is considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of death, or if pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Collins v. Pond Creek Mining Co*., 751 F.3d 180, 184 (4th Cir 2014). Judge Boucher found Claimant failed to establish the existence of legal or clinical pneumoconiosis. Survivor's Claim Decision and Order at 7-8.

Clinical Pneumoconiosis

Judge Boucher considered the same x-ray and CT scan interpretations of Drs. Smith and Meyer as Judge Harris did. Survivor's Claim Decision and Order at 5-7. She concluded Dr. Meyer's radiological qualifications are superior to those of Dr. Smith based

on his position as professor and vice-chair of radiology at the University of Wisconsin and therefore gave his opinions greater weight. *Id.* at 7. She further noted that, even if she were to give the opinions of Drs. Smith and Meyer equal weight, the x-ray and CT scan evidence would be in equipoise, and thus found Claimant did not meet her burden to establish the existence of clinical pneumoconiosis. *Id.*

On appeal, Claimant alleges Judge Boucher erred in giving greater weight to the x-ray and CT scan readings of Dr. Meyer because they are inconsistent with the findings of a 2012 medical study authored by Laney and Petsonk. Survivor's Claim Claimant's Brief at 7-8, citing and discussing Laney and Petsonk, *Small Pneumoconiotic Opacities on U.S. Coal Workers' Surveillance Chest Radiographs are not Predominantly in the Upper Lung Zones,* Am. J. Indus. Med., 55: 793-98 (2012). We disagree.

Judge Boucher directly addressed the Laney and Petsonk medical study and declined to discredit Dr. Meyer's opinion, as she noted Dr. Meyer considered the study and articulated methodological inadequacies that undermine the study's conclusions. Survivor's Claim Decision and Order at 7; Survivor's Claim Employer's Exhibit 7 at 1418. She further found that, even if she were to find the Laney and Petsonk study reliable, she would find it insufficient to invalidate Dr. Meyer's negative x-ray and CT readings because he specifically addressed the study and explained why it did not change his opinion regarding the Miner's lung disease. Survivor's Claim Decision and Order at 7. The administrative law judge is empowered to weigh the evidence and make credibility determinations. *See Underwood,* 105 F.3d at 949; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Claimant has not made any specific allegation of error regarding the administrative law judge's consideration of the Laney and Petsonk medical study.[11] *See Cox,* 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21. We therefore affirm Judge Boucher's determination that the x-ray and CT scan evidence did not establish the existence of clinical pneumoconiosis. 20 C.F.R. §§718.107, 718.202(a)(1).

Because Claimant does not allege any additional errors regarding Judge Boucher's finding that the evidence did not establish the existence of clinical pneumoconiosis, we further affirm her finding based on the record as a whole. 20 C.F.R. §718.202(a); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Legal Pneumoconiosis

To prove that the Miner had legal pneumoconiosis, Claimant must establish he had a chronic lung disease or impairment that was "significantly related to, or substantially

[11] Claimant points to no evidence calling Dr. Meyer's assessment of the Laney and Petsonk study into question.

aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Claimant argues the administrative law judge erred in finding the medical opinion evidence did not establish legal pneumoconiosis. Survivor's Claim Claimant's Brief at 8-11.

Claimant relies on the opinions of Drs. Rasmussen and Sood that the Miner had legal pneumoconiosis, while Employer relies on the opinion of Dr. Spagnolo that he did not. Miner's Claim Claimant's Exhibit 9; Survivor's Claim Director's Exhibit 12; Survivor's Claim Employer's Exhibits 8-9. Judge Boucher found Dr. Rasmussen's opinion unpersuasive because it was based on "general statistics" that he "failed to connect" with the Miner's specific lung disease. Survivor's Claim Decision and Order at 8. She further found Dr. Sood's opinion unpersuasive because she found his diagnosis of legal pneumoconiosis equivocal and because he failed to adequately explain his basis for diagnosing legal pneumoconiosis in this case. *Id*. As she discredited the opinions of Drs. Rasmussen and Sood, the only opinions supportive of Claimant's burden, Judge Boucher found Claimant failed to establish legal pneumoconiosis or a mistake in fact. *Id.*

Claimant argues the opinions of Drs. Rasmussen and Sood "should have been found to outweigh the opinion of Dr. Spagnolo concerning whether legal pneumoconiosis was present." Claimant's Brief at 9. Claimant, however, alleges no specific error in regard to Judge Boucher's consideration of the medical opinion evidence. *See Cox*, 791 F.2d at 446-47; *Sarf*, 10 BLR at 1-120-21. Because Claimant provides no basis to review the administrative law judge's findings, we affirm her determination that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §802.211(b); *Sarf*, 10 BLR at 1-120. Claimant thus failed to establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718,[12] *see Trumbo*, 17 BLR at 1-87-88, or a mistake in fact. *See Stanley*, 194 F.3d at 497; *Jessee*, 5 F.3d at 724-25; 20 C.F.R. §725.310.

[12] Because we affirm Judge Boucher's finding that Claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993), we need not address Claimant's argument that Judge Boucher erred in finding she did not establish that the Miner's death was due to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-276, 1-1278 (1984).

Accordingly, we affirm Judge Harris's Decision and Order Denying Request for Modification and Judge Boucher's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge