BRB No. 00-0689 BLA

SELBA J . COOPER (Widow of CYRIL E. COOPER) Claimant-Petitioner v. CANNELTON INDUSTRIES/CYPRUS AMAX Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Selba J. Cooper, Comfort, West Virginia, *pro se.*

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Timothy S. Williams (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1], without the assistance of counsel, appeals the Decision and Order (98-BLA-0541) of Administrative Law Judge Gerald M. Tierney denying a request for modification on a miner's and a survivor's claim 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).[2] In considering claimant's petition for modification under 20 C.F.R. §725.310

[1]Claimant is Selba Cooper, widow of Cyril E. Cooper, the miner, whose application for benefits, filed on May 6, 1993 was pending when he died on September 20, 1994. Director's Exhibit 73. Claimant filed her claim on October 9, 1994. Director's Exhibit 1. Both the miner's and the survivor's claims were denied by Administrative Law Judge Michael P. Lesniak on March 21, 1997. Director's Exhibit 73. Claimant initially appealed that decision to the Benefits Review Board, but then opted to file a request for modification. Director's Exhibits 74-81.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the prior regulations, as the disposition of this case is not affected by the regulations.

(1999), the administrative law judge found that claimant did not establish a change in conditions or a mistake in a determination of fact.[3] Consequently, the administrative law judge denied benefits. Claimant appeals, generally challenging the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), did not file a brief on the merits of this appeal.

[3]The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of this regulation as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which only employer and the Director have responded.[4] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations.[5] Therefore, the Board will proceed to adjudicate the merits of this appeal.

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[5]In a brief dated March 22, 2001, employer asserted that the regulations at issue in the lawsuit "could" or "may" affect the outcome of this case. Employer's Brief at 5, 12. Employer contends that the provisions contained at 20 C.F.R. §§718.201(c) and 718.204(a)(2000), may affect the disposition of this case, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of the instant appeal. In a brief dated March 19, 2001, the Director asserted that the regulations at issue in the lawsuit do not affect the outcome of the present case.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.* 380 U.S. 359 (1985).

Initially, based on the facts of the instant case, we hold that there was a valid waiver of claimant's right to be represented by an attorney, *see* 20 C.F.R. §725.362(b)(2000), and that the administrative law judge provided claimant with a full and fair hearing. *See Shapell v. Director, OWCP,* 7 BLR 1-304 (1984); Decision and Order at 2; Hearing Transcript at 4.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718 (2000), claimant must establish 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 (2000). Failure of claimant to establish any 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*). In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c), 718.304 (2000); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*), held in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied,* 113 S.Ct. 969 (1993), that pneumoconiosis will be found to be a substantially contributing cause or factor in the miner's death where it is found to have actually hastened death.

Turning to the merits of both claims, after consideration of the administrative law judge's Decision and Order denying benefits, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge reasonably found that claimant cannot establish a change in conditions as the miner is deceased, and that proof that there was a mistake in a determination of fact in the prior

denial was claimant's only option to succeed in her request for modification. Decision and Order at 2.

The administrative law judge correctly found that both claims were previously denied, *inter alia*, because claimant failed to establish the existence of pneumoconiosis. The administrative law judge also correctly noted that to support her modification request, claimant submitted a letter from Dr. Teleron, the oncologist who treated the miner, which stated that the miner's autopsy revealed that the "associated pneumoconiosis was most likely replaced by the tumor masses," and a letter from Dr. Vidal, the family physician, correcting the death certificate to add pneumoconiosis as the cause of death. Decision and Order at 2; Director's Exhibits 77, 81. The administrative law judge further determined that Dr. Teleron specialized in hematology and medical oncology, and that Dr. Vidal was not Board-certified in any specialty, whereas employer provided contrary opinions by pathologists, Drs. Naeye, Bush and Hansbarger, and by Board-certified pulmonary specialists, Drs. Zaldivar, Castle and Jarboe that the miner did not have pneumoconiosis. While the administrative law judge gave "special" consideration to the opinions of Drs. Teleron and Vidal due to their status as the miner's treating physicians, he acted within his discretion in according greater weight to the contrary opinions of Drs. Naeye, Bush, Hansbarger, Zaldivar, Castle and Jarboe based on their superior qualifications in the specific area of pneumoconiosis. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 4.

Moreover, the administrative law judge, based on his *de novo* review of all the evidence of record, found that claimant failed to establish the existence of pneumoconiosis. The administrative law judge correctly found that the record contained no positive biopsy or autopsy evidence of pneumoconiosis, and that the preponderance of the x-ray evidence does not establish the existence of pneumoconiosis.[6] Decision and Order at 4 n. 3. The administrative law judge further acted within his discretion in determining that the preponderance of medical opinions prepared by physicians with qualifications as Board-certified pulmonologists who had the opportunity to review the evidence of record supported a finding that the miner did not have pneumoconiosis.[7] *Id.*; *see McMath*, *supra*; *Dillon*,

[6]Of the twelve x-ray readings of record, all are negative for the existence of pneumoconiosis except Dr. Patel's reading that was subsequently read as negative by Drs. Wheeler, Francke, Scott, and Zaldivar. Director's Exhibit 30. In addition, Administrative Law Judge Michael P. Lesniak, in his Decision and Order dated March 21, 1997, correctly found that claimant conceded that the x-ray evidence is negative for pneumoconiosis. Decision and Order dated March 21, 1997 at 4.

[7]Drs. Zaldivar, Jarboe, and Castle, all of whom are Board-certified in

supra; *Martinez, supra*; *Wetzel, supra*. Inasmuch as the administrative law judge found that the preponderance of the new evidence developed in connection with the modification request, as well as the preponderance of the previously submitted evidence, does not establish the existence of pneumoconiosis, the threshold element for entitlement in both the miner's and the survivor's claims, we affirm his finding that claimant is precluded from entitlement to benefits under 20 C.F.R. Part 718 (2000) in both claims. Decision and Order at 4; *Trent, supra; Trumbo, supra*.

Pulmonary Medicine and Internal Disease, submitted opinions that were considered in the prior denial of benefits in which they concluded that the miner did not have pneumoconiosis or any impairment related to dust exposure in coal mine employment. Director's Exhibits 35, 67, 69. Dr. Rasmussen's opinions dated July 10, 1993 and October 21, 1993, in which he diagnosed pneumoconiosis, are also in the record. Director's Exhibits 10, 12. The record does not reflect that Dr. Rasmussen is Board-certified in Pulmonary Medicine.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge