BRB No. 02-0588 BLA

WILMA FAY KISER (Widow of RIT B. KISER)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
CLINCHFIELD COAL COMPANY	)	
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 Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Wilma Fay Kiser, Castlewood, Virginia, *pro se.*

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

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2001-BLA-0954) of Administrative Law Judge Jeffrey Tureck on 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).[1] This case

[1] Claimant is the widow of the miner, Rit B. Kiser, who died on February 23, 1991. Director's Exhibit 9. The miner filed two claims for benefits. The first application for benefits was filed on March 28, 1979 and denied in a Decision and Order dated on

is before the Board for the fourth time. The administrative law judge found that this case is the second request for modification of the denial of claimant's survivor's claim filed March 27, 1991. Reviewing the case pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence of record, old and newly submitted, failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[2]

April 2, 1985 by Administrative Law Judge David A. Clarke, Jr. Director's Exhibits 95-1, 95-55. In a Decision and Order issued August 19, 1986, the Board vacated the denial of benefits and remanded the case to the administrative law judge for further consideration of the evidence. *Kiser v. Clinchfield Coal Co.*, BRB No. 85-1101 BLA (Aug. 19, 1986)(unpub.); Director's Exhibit 95-61. On remand, Judge Clarke again denied benefits, finding the evidence sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b). Director's Exhibit 95-62. No further action was taken on this claim. The miner filed a second application for benefits on March 16, 1989, more than one year after the previous denial. Director's Exhibit 95-63. This claim was finally denied by the district director on September 26, 1989. Director's Exhibits 95-86, 95-92. No further action was taken on the miner's claims.

[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 20 C.F.R.

The administrative law judge thus found the evidence insufficient to support modification pursuant to 20 C.F.R. §725.310 (2000).[3] Accordingly, the administrative law judge denied benefits.

Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The amendments to the regulations at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

The procedural history of this claim, in pertinent part, is as follows: claimant filed her survivor's claim on March 27, 1991. Director's Exhibit 1. In a Decision and Order dated December 1, 1992, Administrative Law Judge Edward J. Murty, Jr. denied benefits, finding that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Director's Exhibit 56. Pursuant to claimant's first appeal, the Board vacated the denial of benefits and remanded the case to Judge Murty to reconsider the evidence of record pursuant to Section 718.205(c) in light of the holding of the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied,* 113 S.Ct. 969 (1993).[4] *Kiser v. Clinchfield Coal Co*., BRB No. 93-1060 BLA (Feb. 22, 1995)(unpub.); Director's Exhibit 61. On remand, Judge Murty again denied benefits, finding that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Director's Exhibit 63. Claimant appealed this denial to the Board. In a Decision and Order issued May 30, 1996, the Board affirmed Judge Murty's denial of benefits. *Kiser v. Clinchfield Coal Co.*, BRB No. 96-0640 BLA (May 30, 1996)(unpub.); Director's Exhibit 67.

Claimant requested modification of the denial of her survivor's claim by letter dated February 26, 1997, and submitted new x-ray evidence with her request. Director's Exhibit 68. Judge Murty, in a Decision and Order dated June 22, 1998, denied claimant's request for modification, finding that the evidence of record, including the new evidence, was insufficient to connect the miner's death to his pneumoconiosis. Accordingly, Judge Murty denied benefits. Director's Exhibit 77. Pursuant to claimant's appeal, the Board affirmed Judge Murty's denial of claimant's request for modification. *Kiser v. Clinchfield Coal Co.*, BRB No. 98-1311 BLA (Jun 10, 1999) (unpub.); Director's Exhibit 82.

Claimant filed a second request for modification on June 8, 2000. Director's Exhibit 83. In addition, claimant submitted the February 28, 2001 medical report of Dr. Robinette. Director's Exhibit 89. In a Decision and Order dated April 23, 2002, Administrative Law Judge Jeffrey Tureck (the administrative law judge) denied claimant's request for modification, finding that the evidence of record, including the newly submitted evidence, was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and, thus, insufficient to establish a

[4] The Board noted that Judge Murty did not render a specific finding regarding the existence of pneumoconiosis, but, nonetheless, held that, based on employer's implicit concession, the autopsy evidence of record established the existence of pneumoconiosis. *Kiser v. Clinchfield Coal Co.*, BRB No. 93-1060 BLA, slip op. at 3-4 (Feb. 22, 1995)(unpub.); Director's Exhibit 61.

mistake in a determination of fact. Consequently, the administrative law judge found the evidence insufficient to support modification and denied benefits. This denial of benefits is the subject of claimant's *pro se* appeal. In response to claimant's appeal, employer urges affirmance of the denial of benefits as support by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), a party may request modification of a denial based upon a change in conditions or a mistake in a determination of fact. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). However, the sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner's condition. *See Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197, 1-199 (1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that the miner's death was due to pneumoconiosis in order to establish entitlement to survivor's benefits. *See* 20 C.F.R. §§718.202(a), 718.203; 718.205(c); *Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Evidence that pneumoconiosis hastened the miner's death is sufficient to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c)(5); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that it is insufficient to establish that the miner's death was due to pneumoconiosis and, thus, insufficient to

establish a mistake in a determination of fact. The administrative law judge initially reviewed the evidence of record submitted prior to the 1995 and 1998 decisions in this case and found that it supports Judge Murty's finding that the evidence is insufficient to establish that the miner's pneumoconiosis contributed in any way to his death. Decision and Order at 3. The administrative law judge then considered the newly submitted evidence, that evidence submitted since the second request for modification, and found that it was insufficient to establish any connection between the miner's pneumoconiosis and his death. *Id*.

A review of the record supports the administrative law judge's finding that the opinion of Dr. Robinette, the only relevant new evidence,[5] was insufficient to establish that pneumoconiosis contributed to the miner's death since the physician opined that there was no "reasoned medical relationship to the diagnosis of coal workers' pneumoconiosis present at autopsy and the development of the immunoblastic lymphoma with its associated sequelae which ultimately caused Mr Kiser's death." Decision and Order at 3; Director's Exhibit 89. In addition, the previously submitted evidence supports the administrative law judge's finding that there was no mistake in a determination of fact in the 1995 and 1998 decisions as the death certificate states that the cause of the miner's death was pneumonia due to immunoblastic lymphoma, and made no mention of pneumoconiosis. Decision and Order at 3; Director's Exhibit 8.

Moreover, the previously submitted medical reports of record, *i.e.*, the autopsy report of Dr. Stefanini and the medical reviews of Drs. Naeye, Caffrey and Tomashefski, while including diagnoses of simple coal workers' pneumoconiosis as shown on autopsy, nonetheless, did not state that the miner's pneumoconiosis contributed in any way to his death. Director's Exhibits 9, 10, 50, 51. Since it is claimant's burden to establish that the miner's pneumoconiosis was a substantially contributing cause of his death, 20 C.F.R. §718.205(c); *Mays, supra; Shuff, supra*; *see also Haduck v. Director, OWCP*, 14 BLR 1-29 (1990), we affirm the administrative law judge's finding that the evidence of record is insufficient to carry claimant's burden of proof. Moreover, because we hold that the record does not establish that the miner's death was due to pneumoconiosis, we affirm the administrative law judge's finding that the

[5] The exhibits submitted by employer in connection with the second request for modification are not relevant to the current inquiry as the administrative law judge properly found that none of the ten exhibits contains an opinion regarding the cause of the miner's death. Decision and Order at 3 n.5; *see* Employer's Exhibits 1-10.

record does not support a finding that there was a mistake in a determination of fact pursuant to Section 725.310 (2000) in the prior denials of benefits. Decision and Order at 3; 20 C.F.R. §725.310 (2000); *Jessee, supra*; *Wojtowicz, supra*.

Consequently, we affirm the administrative law judge's denial of claimant's request for modification as supported by substantial evidence.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge