

BRB No. 07-0601 BLA

F.P.)	
(Widow of E.P.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LEECO, INCORPORATED)	DATE ISSUED: 04/02/2008
)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (06-BLA-0008 and 06-BLA-6128) on modification of Administrative Law Judge Donald W. Mosser on a miner's claim and a survivor's claim¹ filed pursuant to the provisions of Title IV of the

¹ Claimant is the widow of the miner. The miner filed a claim for benefits on April 24, 1997. Director's Exhibit 1 at 266. While his claim was pending, the miner died on January 25, 1999. Director's Exhibit 6. Subsequently, claimant filed a survivor's claim for benefits on February 9, 1999. Director's Exhibit 2. After findings of entitlement by the district director on both claims, employer requested a formal hearing.

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the parties' stipulation that the miner worked in qualifying coal mine employment for thirty-three years. Adjudicating claimant's request for modification pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) in the miner's claim, and failed to show that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) in the survivor's claim.² Consequently, the administrative law judge found that claimant failed to demonstrate a

Pursuant to employer's request for a formal hearing, both the miner's claim and the survivor's claim were forwarded to the Office of Administrative Law Judges, where they were consolidated. Administrative Law Judge Donald W. Mosser conducted a formal hearing on June 25, 1999. By Decision and Order dated September 27, 2000, Judge Mosser denied both claims based on claimant's failure to establish the existence of pneumoconiosis and total respiratory disability in the miner's claim, 20 C.F.R. §§718.202, 718.204 (2000) and the existence of pneumoconiosis and death due to pneumoconiosis in the survivor's claim. 20 C.F.R. §§718.202, 718.205 (2000). Director's Exhibit 27. Claimant appealed the denial. The Board affirmed the denial of benefits in both the miner's claim and the survivor's claim. [*F. P.*] *v. Leeco, Inc.*, BRB No. 01-0142 BLA (Nov. 2, 2001) (unpub.); Director's Exhibit 39. On October 23, 2002, claimant filed a subsequent survivor's claim for benefits, which was construed as a request for modification of the prior denial of both claims. The administrative law judge's denial of modification is now on appeal. Director's Exhibit 40 at 1.

² Notwithstanding claimant's failure to establish the existence of pneumoconiosis, the administrative law judge found that, because the miner worked in qualifying coal mine employment for over ten years, claimant would have been entitled to invocation of the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), since employer failed to rebut this presumption. *See* 20 C.F.R. §718.203(b); Decision and Order at 9. In addition, the administrative law judge found that the newly submitted medical opinion of Dr. Broudy, who diagnosed a totally disabling respiratory impairment, supported the administrative law judge's prior determination of total disability, which was based on the qualifying arterial blood gas studies and the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(ii) and (iv) (2000), respectively. *See* 20 C.F.R. §718.204(b)(2)(ii), (iv) (2000); Decision and Order at 9. We affirm these determinations as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 9.

mistake in a determination of fact in the prior denial of both claims.³ Accordingly, the administrative law judge denied claimant's request for modification on both claims under 20 C.F.R. §725.310 (2000)⁴ and denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to find pneumoconiosis established by x-ray and medical opinion evidence under Sections 718.202(a)(1) and (a)(4) and in failing to find that pneumoconiosis substantially contributed to the miner's death pursuant to Section 718.205(c). Employer responds, urging affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.⁵

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.⁶ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR

³ Because claimant filed her petition for modification after the miner's death, the administrative law judge noted that the sole basis for modification was whether a mistake in a determination of fact had been made in the prior denial of the miner's claim and the survivor's claim. Claimant cannot show a change in conditions pursuant to 20 C.F.R. §725.310 (2000) after the miner's death. Decision and Order at 7.

⁴ Although 20 C.F.R. §725.310 has been revised, these revisions apply only to claims filed after January 19, 2001. 20 C.F.R. §725.2(c).

⁵ We affirm the administrative law judge's findings with respect to length of coal mine employment and that claimant failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) since these determinations are unchallenged on appeal. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711; Decision and Order at 4, 7.

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in the state of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1 at 261.

1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

To establish entitlement to survivor's benefits, 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. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310 (2000), authorizes the modification of an award or denial of benefits based, in pertinent part, upon a mistake in a determination of fact. Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

In challenging the administrative law judge's finding that claimant failed to establish pneumoconiosis at Section 718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations and by relying exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical weight of x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence.

In considering the evidence at Section 718.202(a)(1), the administrative law judge found that no additional x-ray evidence was submitted in support of claimant's modification request. The administrative law judge further noted that claimant did not allege that a mistake in fact was made in the administrative law judge's prior decision

considering the x-ray evidence at Section 718.202(a)(1).⁷ Nonetheless, the administrative law judge considered his prior findings at Section 718.202(a)(1), and found that no mistake in fact was made in concluding that the x-ray evidence of record did not establish pneumoconiosis. As the administrative law judge's determination is rational and supported by substantial evidence, and claimant has not otherwise challenged the administrative law judge's weighing of the x-ray evidence, we affirm his determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and therefore, a mistake in a determination of fact under Section 725.310 (2000). 20 C.F.R. §§718.202(a)(1), 725.310 (2000); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994) (*en banc*); Decision and Order at 7. Likewise, claimant's contention that the administrative law judge "may have selectively analyzed" the x-ray evidence is also rejected. Claimant has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal that he engaged in a selective analysis of the x-ray evidence. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-4 (2004).

In challenging the administrative law judge's determination pursuant to Section 718.202(a)(4), claimant argues that the administrative law judge erred in failing to credit the medical opinion of Dr. James, who regularly diagnosed coal workers' pneumoconiosis during his treatment of the miner. Claimant additionally contends that, pursuant to 20 C.F.R. §718.104(d), the administrative law judge erred in failing to accord determinative weight to the opinion of Dr. James, based on his status as the miner's treating physician.

Initially, we note that, because the miner's claim was filed on April 24, 1997 and the survivor's claim was filed February 9, 1999, the regulation regarding the consideration of treating physicians, set forth in Section 718.104(d), is inapplicable to the instant case because this provision applies only to claims filed after January 19, 2001. 20 C.F.R. §§718.101(b), 718.104. Hence, we reject claimant's argument that the administrative law judge erred in not assessing the credibility of the opinion of Dr. James, the miner's treating physician, pursuant to the factors articulated in Section 718.104(d). Notwithstanding, however, Dr. James's status as the miner's treating physician is a

⁷ In his September 27, 2000 Decision and Order, the administrative law judge considered twenty-one interpretations of fifteen chest x-ray films, with three interpretations read as positive and eighteen read as negative for pneumoconiosis. The administrative law judge credited the interpretations by the majority of the physicians with superior radiological expertise, as well as the overall weight of the evidence, to conclude that the x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). Director's Exhibit 27 at 12.

relevant factor in assessing the credibility of his opinion. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), *citing Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993) (opinions of treating physicians are not automatically presumed to be correct but, should be properly weighed and credited); Decision and Order at 5.

In assessing the credibility of the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge cited specific factors that detracted from the probative value of Dr. James's opinion. Specifically, the administrative law judge noted that "Dr. James did not make a diagnosis of pneumoconiosis until the miner was hospitalized in the fall of 1996, notwithstanding his treatment of the miner from 1991." Decision and Order at 8. The administrative law judge also accorded less weight to the opinion of Dr. James as he provided no basis for his diagnosis of pneumoconiosis other than the medical history described by the miner. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003); *Groves*, 277 F.3d at 836, 22 BLR at 2-330; Decision and Order at 8. Further, the administrative law judge found that Dr. James's statement, contained in a two-line report dated June 21, 1999, confirming the presence of pneumoconiosis based on a chest x-ray showing a new density in the right upper lobe of the miner's lungs, did not entitle the doctor's opinion to preferential weight because the doctor's conclusion lacked a sufficient rationale. 20 C.F.R. §718.202(a)(4); *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo*, 17 BLR at 1-88-89; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 8; Director's Exhibit 10. Accordingly, the administrative law judge rationally found that Dr. James's opinion was not well-reasoned and therefore entitled to little weight at Section 718.202(a)(4).

Instead, the administrative law judge credited the May 3, 2005 report of Dr. Broudy, the only newly submitted medical opinion in this request for modification. The administrative law judge noted that Dr. Broudy, who examined the miner on April 6, 1993 and on September 30, 1997, submitted documented reports detailing his physical examination findings and explaining how the accompanying diagnostic test results supported his conclusion that the miner's pulmonary disease was chronic obstructive airways disease attributable to cigarette smoking, rather than pneumoconiosis or the inhalation of coal mine dust. Decision and Order at 8; Director's Exhibit 60. Because the administrative law judge properly considered the previously submitted medical opinions in conjunction with the newly submitted opinion, we affirm the administrative law judge's finding that "the overall weight of the medical opinion evidence" failed to establish that a mistake in a determination of fact was made in the prior decision with respect to Section 718.202(a)(4).

Accordingly, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a) as this

finding was rational, contained no reversible error, and was supported by substantial evidence. The administrative law judge, therefore, properly found that claimant failed to establish a basis for modifying the denial of both the miner's claim and the survivor's claim by demonstrating a mistake in a determination of fact.⁸ See 20 C.F.R. §725.310 (2000); *Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁸ Our affirmance of the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) obviates the need to address claimant's argument that the administrative law judge erred in failing to find death due to pneumoconiosis under Section 718.205(c).