BRB Nos. 10-0293 BLA
and 10-0567 BLA

CATHERINE A. WEBB (o/b/o and Widow of WILLIAM W. WEBB)	)	
Claimant-Respondent	)	
v.	)	
U.S. STEEL MINING COMPANY, INCORPORATED	)	
and	)	
U.S. STEEL CORPORATION/WELLS FARGO	)	DATE ISSUED: 04/26/2011
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Employer's Petition for Modification and the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Employer's Petition for Modification (2008-BLA-5453) of an award of benefits in a miner's claim[1] and the Decision and Order Awarding Benefits (2010-BLA-5576) in a survivor's claim of Administrative Law Judge Thomas M. Burke.[2] Both the miner's claim, filed on August 9, 2001, and the survivor's claim, filed on February 3, 2009, were filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[3]

In the initial decision in the miner's claim, issued on February 11, 2004, Administrative Law Judge Daniel L. Leland credited the miner with at least thirty years of qualifying coal mine employment pursuant to the parties' stipulation, and adjudicated the claim pursuant to the regulatory provisions at 20 C.F.R. Part 718. Judge Leland found that, although the evidence of record was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b), the miner failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

Pursuant to the miner's request for modification, Administrative Law Judge Richard A. Morgan determined, in a Decision and Order dated October 20, 2006, that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c). Thus, Judge Morgan found that the miner had established a change in conditions pursuant to 20 C.F.R. §725.310

[1] Claimant is the widow of the miner, who died on January 5, 2009. Claimant filed for survivor's benefits on February 3, 2009, and is pursuing the miner's claim on behalf of his estate. Director's Exhibits 3, 11.

[2] By Order dated July 13, 2010, the Board consolidated employer's appeals in BRB Nos. 10-0293 BLA and 10-0567 BLA for purposes of decision only.

[3] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in the miner's case, as his claim was filed prior to January 1, 2005. Director's Exhibit 2.

since Judge Leland's previous denial of benefits. Accordingly, Judge Morgan granted modification and awarded benefits in the miner's claim.

Employer initially appealed Judge Morgan's decision, but later withdrew its appeal in order to pursue modification proceedings. By Order dated January 30, 2007, the Board granted employer's motion and dismissed employer's appeal. Employer filed a petition for modification with the district director, alleging a mistake in a determination of fact, and the case was ultimately assigned to Administrative Law Judge Thomas M. Burke (the administrative law judge). The administrative law judge conducted a *de novo* review of the record, including both the original evidence and the new evidence submitted by the parties on modification, and found no mistake in a determination of fact. Accordingly, the administrative law judge denied employer's request for modification pursuant to 20 C.F.R. §725.310, and upheld the award of benefits to the miner. Subsequently, in a Decision and Order issued on June 10, 2010, the administrative law judge determined that claimant, the miner's widow, was automatically entitled to survivor's benefits pursuant to the recent amendments to the Act under Section 1556 of the Patient Protection and Affordable Care Act of 2010 (PPACA), based on the miner's lifetime award of benefits.

On appeal, in BRB No. 10-0293 BLA, employer challenges the administrative law judge's denial of modification in the miner's claim, arguing that the weight of the evidence of record is insufficient to support a finding of pneumoconiosis and disability causation at 20 C.F.R. §§718.202(a), 718.204(c). In BRB No. 10-0567 BLA, employer challenges the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits under Section 1556 of the PPACA. Claimant responds, urging affirmance of the award of benefits in both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief in the miner's claim, but urges affirmance of the award of survivor's benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Turning first to the denial of employer's request for modification in the miner's claim, after consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In reviewing the x-ray evidence at Section 718.202(a)(1), the administrative law judge correctly noted that in the prior decision, Judge Morgan considered seven interpretations of three x-rays taken on October 10, 2001, October 9, 2002, and February 20, 2004. Noting the progressive nature of pneumoconiosis, Judge Morgan accorded greatest weight to the February 20, 2004 x-ray on the grounds that it was the most recent x-ray and it had been read as positive for pneumoconiosis by three dually-qualified Board-certified radiologists and B readers, Drs. Cappiello, Binns and Gogineni, with no conflicting interpretations.[5] Decision and Order at 9. Considering the evidence submitted on modification, the administrative law judge reviewed the negative interpretation of an x-ray dated April 25, 2007, by Dr. Zaldivar, a B reader; the negative interpretation of an x-ray dated August 11, 2008, by Dr. Gogineni, a dually-qualified physician; and the positive interpretation of the August 11, 2008 x-ray by Dr. Ahmed.[6] Decision and Order at 4, 9; Claimant's Exhibit 1; Employer's Exhibits 1, 4. Finding that Dr. Zaldivar, a B reader, was less qualified than the physicians who provided the earlier positive x-ray interpretations, and that Dr. Gogineni had been inconsistent in interpreting the radiographic evidence of record, the administrative law judge permissibly concluded that employer failed to meet its burden of establishing that Judge Morgan's prior finding of clinical pneumoconiosis in the miner's claim was incorrect. Decision and Order at 10; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1983).

We reject employer's assertion that the administrative law judge applied an incorrect legal standard and erroneously found no mistake in a determination of fact under Section 725.310 based on the x-ray evidence. The issue of whether the newly submitted evidence, considered in conjunction with the previously submitted evidence of

[5] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(1)(ii)(C). The terms "A reader" and "B-reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

[6] The administrative law judge determined that Dr. Ahmed's reading lacked probative value, as the doctor's qualifications were not of record. Decision and Order at 10 n.4.

record, establishes a mistake in a determination of fact or a change in conditions is for the administrative law judge, as trier-of-fact, to determine.[7] *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). As the administrative law judge conducted a complete analysis of the evidence and provided valid reasons for his credibility determinations, we affirm his finding that employer's submission, on modification, of additional negative x-ray readings was not sufficient to establish a mistake of fact in the determination that the x-ray evidence of record established the existence of pneumoconiosis at Section 718.202(a)(1).

Employer next asserts that the administrative law judge erred in crediting Dr. Mullins's diagnosis of pneumoconiosis at Section 718.202(a)(4) over the contrary opinions of Drs. Zaldivar and Hippensteel, submitted by employer in support of modification. Further, employer contends that the administrative law judge erred in failing to credit the newly-submitted negative CT scan by Dr. Zaldivar over the positive x-ray evidence. Employer's Brief at 9-11. Employer's arguments lack merit. Noting that Drs. Zaldivar and Hippensteel are B readers, the administrative law judge acted within his discretion in according diminished weight to their opinions because they relied, in part, on negative x-ray and CT scan readings to conclude that the miner did not have clinical pneumoconiosis, contrary to the administrative law judge's finding that there was no mistake in the prior determination that the existence of pneumoconiosis was established through x-ray evidence. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 11. Further, the administrative law judge was not required to accord controlling weight to the negative CT scan interpretation by Dr. Zaldivar. *See* C*onsolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002); *Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). As the administrative law judge provided a valid reason for according little weight to the opinions of Drs. Zaldivar and Hippensteel, we affirm his finding that employer failed to establish a mistake in the prior determination of fact that pneumoconiosis was established at Section 718.202(a)(4).

Similarly, we reject employer's argument that the administrative law judge erred in crediting Dr. Mullins's opinion, that the miner's total disability was due, in part, to pneumoconiosis, over the contrary opinions of Drs. Zaldivar and Hippensteel at Section 718.204(c). As the administrative law judge found that Dr. Mullins's opinion was

[7] Employer did not allege a change in conditions herein, but submitted new evidence in support of its allegation of a mistake in a determination of fact under 20 C.F.R. §725.310.

supported by its underlying documentation, while Drs. Zaldivar and Hippensteel failed to diagnose pneumoconiosis, contrary to the administrative law judge's findings, we affirm his finding that employer failed to demonstrate a mistake of fact in the determination that disability causation was established. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Because employer, as the proponent of the request for modification, has failed to demonstrate a mistake in a determination of fact, as required by Section 725.310, we affirm the administrative law judge's denial of modification and award of benefits.

Turning to the survivor's claim, the administrative law judge determined that the claim met the requirements for derivative entitlement pursuant to the recent amendments to the Act precipitated by the PPACA.[8] The administrative law judge determined that Judge Morgan's award of benefits to the miner had become final when the Board granted employer's request for dismissal of its appeal, and that the survivor's claim was filed after January 1, 2005 and was pending on or after March 23, 2010. Thus, rather than decide the case on its merits, the administrative law judge determined that claimant was automatically entitled to benefits under Section 422(*l*).

Employer contends that the administrative law judge erred in interpreting amended Section 422(*l*) as providing automatic entitlement to survivor's benefits, arguing that such an interpretation is in conflict with other sections of the Act, and that retroactive application thereof denies employer due process and constitutes an unconstitutional taking of private property. Employer's Brief at 6, 8-9; Employer's Reply Brief at 4. Employer also asserts that, because the miner's entitlement to benefits remains in controversy in this modification proceeding, the miner's award of benefits is not final and, therefore, application of the amended provision is premature. Employer further maintains that it is the date of filing of the miner's claim, rather than the date of filing of the survivor's claim, that determines whether or not the amendments apply to the claim. Alternatively, employer requests that the Board hold this case in abeyance pending resolution of the lawsuit filed in the United States District Court for the Northern District

[8] The recent amendments to the Act apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010). Section 1556 of Public Law No. 111-148 amended Section 422(*l*) of the Act, to provide that a qualified survivor is automatically entitled to benefits without having to establish that the miner's death was due to pneumoconiosis, if the miner filed a successful claim and was receiving benefits at the time of his death. 30 U.S.C. §932(*l*), amended by Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)).

of Florida challenging the constitutionality of the PPACA. Employer's Brief at 9-13; Employer's Reply Brief at 5.

As correctly noted by the Director, this Board, finding no due process violation, has expressly interpreted amended Section 422(*l*) to provide that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-200 (2010)(recon. denied). Amended Section 422(*l*) is not rendered ambiguous and unenforceable by earlier, contradictory provisions of the Act, as Section 422(*l*) is the latest pronouncement of Congress and, thus, is controlling. Director's Brief at 2-7; *see U.S. v. Posadas*, 296 U.S. 497, 503 (1936); *see also* 1A Norman A. Singer, SUTHERLAND STATUTORY CONSTRUCTION §22.22 (7th ed. 2010). Further, as this Board has held that the operative date for determining eligibility for survivors' benefits under amended Section 422(*l*) is the date that the survivor's claim was filed, not the date that the miner's claim was filed, we reject employer's argument to the contrary. *Stacy v. Olga Coal Co*., BLR , BRB No. 10-0113 BLA (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). As we have affirmed the administrative law judge's denial of modification of the miner's award of benefits, we also affirm the administrative law judge's finding that amended Section 422(*l*) is applicable herein and that claimant, as an eligible survivor whose claim was filed after January 1, 2005 and remained pending on March 23, 2010, is derivatively entitled to benefits. *Stacy*, slip op. at 7; *see* 30 U.S.C. §932(*l*).[9]

[9] We deny employer's request to hold this case in abeyance pending the resolution of challenges to the constitutionality of Pub. L. 111-148. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010)(recon. denied).

Accordingly, the administrative law judge's Decision and Order Denying Employer's Petition for Modification in the miner's claim and his Decision and Order Awarding Benefits in the survivor's claim are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge