BRB No. 05-0802 BLA

PHYLLIS HANNAH (Widow of WILLIAM HANNAH) Claimant-Petitioner v. MOUNTAINTOP RESTORATION, INC. and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/14/2006 DECISION and ORDER

Appeal of the Decision and Order – Denial of Modification of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, PSC, Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1], widow of the miner, appeals the Decision and Order – Denial on Modification (03-BLA-0227) of Administrative Law Judge Thomas F. Phalen, Jr. on both

[1] The miner filed his claim for benefits on September 13, 1986, which was denied by the district director on January 28, 1997. Director's Exhibits 1, 17. Claimant

a miner's and 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 of *et seq*. (the Act). The parties stipulated to, and the administrative law judge found, at least ten years of coal mine employment. Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found that claimant's intention was to request modification of both her survivor's claim and the miner's claim. The administrative law judge also found that there can be no change in the miner's physical condition as the miner is deceased, and therefore, modification cannot be established through a change in conditions. The administrative law judge, therefore, found that to establish modification, the claimant must show a mistake in a determination of fact in the prior denial. In considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge found that claimant failed to establish a mistake in a determination of fact in the prior denial, as the evidence was insufficient to establish the

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requested a formal hearing on March 17, 1997. Director's Exhibit 18. The miner died on April 14, 1997. Director's Exhibit 96 at 164. The district director denied reconsideration on October 7, 1997. Director's Exhibit 62. Claimant filed a claim for survivor's benefits on July 16, 1997, which was denied by the district director on October 7, 1997. Director's Exhibits 37, 63. Claimant requested a formal hearing on November 8, 1997. Director's Exhibit 64. Judge Roketenetz consolidated the miner's and survivor's claims and denied benefits in both claims in a Decision and Order dated July 26, 1999, based on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 82. In a Decision and Order dated September 21, 2000, the Board affirmed Judge Roketenetz's denial of benefits based on claimant's failure to establish the existence of pneumoconiosis, and denied reconsideration on December 20, 2000. Director's Exhibits 85, 86. Claimant filed the instant claim for survivor's benefits on January 26, 2001. Director's Exhibit 88. Claimant requested withdrawal of her prior 1997 claim on April 17, 2001, which the district director granted on September 25, 2001. Director's Exhibit 91. Employer sought a hearing, and Administrative Law Judge Joseph E. Kane denied claimant's request for withdrawal and remanded the case to the district director for modification proceedings on February 6, 2003. Director's Exhibit 95. On April 7, 2003, the district director issued a Proposed Decision and Order denying benefits for failure to establish a mistake in fact. Director's Exhibit 96 at 5. Claimant requested a formal hearing on April 15, 2003 and the case was transferred to the Office of Administrative Law Judges on July 1, 2003. Director's Exhibits 96 at 4, 97.

[2] Although claimant's modification request was filed January 26, 2001, after the effective date of the amended regulations, the administrative law judge found that the evidentiary limitations of Section 725.310(b) do not apply as there was no final denial of the miner's 1996 claim or the 1997 original survivor's claim. Decision and Order at 4-5.

existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant. Accordingly, benefits were denied in both the miner's and the survivor's claim.

On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis and death due to pneumoconiosis at 20 C.F.R. §§718.202(a) and 718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not participate in this appeal.

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 applicable law, they are binding upon this Board and may not be disturbed. 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 (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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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*).

To establish entitlement to survivor's benefits, claimant must prove 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor's claim filed on or after January 1, 1982, as in the instant claim, death will be considered to be 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 irrebuttable presumption provided at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-11 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Modification may be based upon a mistake in a determination of fact. In reviewing the record as a whole 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 v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Claimant contends that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[3] Claimant specifically contends that the administrative law judge erred by failing to accord Dr. Sundaram's opinion probative weight as claimant's treating physician. Claimant also contends that the administrative law judge failed to consider reports by Drs. Sundaram that were submitted and considered by Judge Roketenetz in the prior claim.[4]

Upon review of the medical opinions considered by Judge Roketenetz, the administrative law judge agreed with Judge Roketenetz that the opinion of Dr. Sundaram, claimant's treating physician, and the only physician to diagnose pneumoconiosis, was not well- reasoned or well-documented, as Dr. Sundaram 1) relied in part on his own positive x-ray interpretations that were reread as negative by more qualified physicians; 2) at one point reported no smoking history and an inaccurate employment history; and 3) partially based his diagnosis of pneumoconiosis on an invalidated pulmonary function study conducted after the miner's diagnosis of lung cancer. As the administrative law judge's treatment of Dr. Sundaram's opinion is supported by substantial evidence, we affirm it. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Decision and Order at 12.

The administrative law judge next considered the five newly submitted medical reports of Dr. Sundaram, dated July 30, 1999, November 1, 1999, June 5, 2002, March 29, 2003 and January 29, 2004. Director's Exhibit 96 at 3, 32, 45, 134; Claimant's Exhibit 1. Although Dr. Sundaram diagnosed pneumoconiosis in all of the reports, the administrative law judge rationally found these newly submitted medical reports not well-reasoned or well-documented as they contain the same deficiencies as Dr. Sundaram's previously submitted reports. *Eastover Mining Co.*, *supra*; *Clark*, *supra*; *Fields*, *supra*; *Stark*, *supra*; *King*, *supra.* Decision and Order at 12.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to a treating

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[3] We affirm the administrative law judge's findings that pneumoconiosis is not established at 20 C.F.R. §718.202(a)(1)-(a)(3), as claimant does not challenge these findings on appeal. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] These records consist of hospital records with admission dates of August 27, 1996, November 5, 1996, a report dated October 16, 1996, and reports included in Director's Exhibit 78, dated December 17, 1997, January 24, 1998, and April 2, 1998.

physician and that a treating physician's opinion should be weighed based on its "power to persuade." *Eastover Mining Co.* 338 F.3d at 523, 22 BLR at 2-647. As discussed, *supra*, the administrative law judge rationally found Dr. Sundaram's opinion was not well-reasoned or well-documented. *Clark*, *supra*; *Fields*, *supra*; *Stark*, *supra*; *King*, *supra.* Thus, under these circumstances, contrary to claimant's contention, the administrative law judge was not compelled to credit Dr. Sundaram's opinion based on his status as claimant's treating physician. Further, contrary to claimant's contention, the administrative law judge considered all of Dr. Sundaram's reports that were submitted and considered by Judge Roketenetz in the previous claim.

As the administrative law judge properly refused to credit the opinions of Dr. Sundaram, the only physician whose findings support claimant's burden at 20 C.F.R. §718.202(a)(4), the administrative law judge properly found claimant did not establish the existence of pneumoconiosis thereunder.

In light of the foregoing, we affirm the administrative law judge's finding that there was no mistake in a determination of fact in Judge Roketenetz's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See* 20 C.F.R. §725.310 (2000).

Because claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement in both a miner's and survivor's claim pursuant to 20 C.F.R. Part 718, a finding of entitlement thereunder is precluded. *Trumbo*, *supra*; *Trent*, *supra*; *Perry*, *supra*.

Accordingly, the administrative law judge's Decision and Order – Denial of Modification is 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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BETTY JEAN HALL
Administrative Appeals Judge