

BRB No. 08-0861 BLA

B.C.)
(Widow of V.C.))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 08/11/2009
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Request for Modification (07-BLA-5897) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) on a survivor's claim¹ filed pursuant to the provisions of Title IV of the Federal

¹ Claimant is the surviving spouse of the miner, who died on June 24, 2001. Director's Exhibit 12. Claimant filed her application for survivor's benefits on December 19, 2001. Director's Exhibit 3.

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In the initial Decision and Order issued on April 27, 2006, Administrative Law Judge Thomas F. Phalen, Jr., adjudicating the claim pursuant to 20 C.F.R. Part 718, found that the evidence of record established that the miner² worked in qualifying coal mine employment for seventeen years. Judge Phalen found, however, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. Director's Exhibit 90.

Claimant appealed the denial of benefits to the Board and employer filed a cross-appeal. While her appeal was pending, however, claimant filed a request for modification on November 3, 2006. Director's Exhibits 103, 104. Accordingly, the Board, by order dated November 17, 2006, dismissed claimant's appeal and remanded the case to the district director for modification proceedings. In addition, pursuant to the request of the Director, Office Workers' Compensation Programs (the Director), the Board dismissed Bethenergy Mines, Incorporated as a party to the instant case, and accordingly, dismissed employer's cross-appeal.³ [*B.C.*] *v. Bethenergy Mines, Inc.*, BRB Nos. 06-0616 BLA and 06-0616 BLA-A (Nov. 17, 2006) (unpub. Order); Director's

² The miner filed an application for benefits on October 7, 1985, which was denied by Administrative Law Judge Charles W. Campbell. Judge Campbell's denial of benefits was affirmed by the Board. [*V.C.*] *v. Bethenergy Mines, Inc.*, BRB No. 90-2146 BLA (Sep. 1, 1992) (unpub.); Director's Exhibit 1. Subsequent to the Board's affirmance of the denial, the miner filed petitions for modification on September 11, 1992 and on May 9, 1996. Both modification requests were denied by an administrative law judge, and subsequently, affirmed by the Board. Director's Exhibit 1. Administrative Law Judge J. Michael O'Neill rendered the last adjudication on the miner's claim, finding that the miner failed to establish a basis for modification of the denial of benefits, based on his failure to establish total disability. The Board affirmed this decision. [*V.C.*] *v. Bethenergy Mines, Inc.*, BRB No. 98-1506 BLA (Jan. 31, 2000) (unpub.); Director's Exhibit 1.

³ The Board also held that claimant's original appeal of the April 27, 2006 Decision and Order rendered by Administrative Law Judge Thomas F. Phalen, Jr. could be reinstated provided that claimant specifically requested such reinstatement within thirty days of the issuance of the Decision and Order on the request for modification. The Board noted further, in the event that the administrative law judge denied modification and claimant wished the Board to consider not only her original appeal, but also whether the denial of modification was erroneous, a Notice of Appeal of the decision denying modification would have to be filed, in addition to the request for reinstatement. [*B.C.*] *v. Bethenergy Mines, Inc.*, BRB No. 06-0616 BLA and 06-0616 BLA-A (Nov. 17, 2006) (unpub. Order); Director's Exhibit 50.

Exhibit 50. On May 7, 2007, the district director denied claimant's request for modification because the evidence failed to establish pneumoconiosis. Director's Exhibit 106. On May 21, 2007, claimant requested a hearing on the district director's denial of her modification request.

Adjudicating claimant's request for modification pursuant to 20 C.F.R. §725.310, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), and therefore, failed to demonstrate a mistake in a determination of fact in the prior denial.⁴ Because claimant failed to establish a basis for modification, the administrative law judge denied benefits on the survivor's claim.

On appeal, claimant argues that the administrative law judge erred in failing to find pneumoconiosis, and therefore, modification based on the opinion of Dr. Gibson, the miner's treating physician. The Director responds, urging affirmance of the administrative law judge's decision denying modification.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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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.

⁴ The sole ground available for modification in a survivor's claim is that a mistake in a determination of fact was made in the administrative law judge's prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

⁵ We affirm the administrative law judge's findings that claimant failed to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2) and (3) since these determinations are 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 on Modification at 8, 9.

§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).⁶

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, 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); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Claimant argues that the administrative law judge erred in discounting the opinion of Dr. Gibson, the miner's treating physician, who opined that the miner suffered from both clinical and legal pneumoconiosis, to find that pneumoconiosis was not established at Section 718.202(a)(4). Specifically, claimant contends that Dr. Gibson's opinion should have been given determinative weight because Dr. Gibson treated the miner for approximately nineteen years and based his diagnosis of pneumoconiosis on his numerous records and reports showing his treatment of the miner. Claimant asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Caffrey because he had access to the autopsy evidence, since Dr. Gibson also had access to the autopsy evidence.

A physician's status as the miner's treating physician is a relevant factor for the administrative law judge to consider in assessing the credibility of the opinion. The opinions of treating physicians are not, however, automatically entitled to greater weight because they are the opinions of treating physicians. Rather, they are only entitled to additional weight based on their power to persuade. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *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).

In considering the medical opinion evidence on the issue of pneumoconiosis at Section 718.202(a)(4), the administrative law judge noted that Dr. Gibson, who found that the miner had both clinical and legal pneumoconiosis, "treated the miner from

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

November 17, 1982 to April 31, 2001.” Decision and Order on Modification at 5; Claimant’s Exhibit 2. The administrative law judge, however, properly accorded less weight to the opinion of Dr. Gibson, even though his diagnosis of pneumoconiosis was based on treatment, observation, physical examinations, employment history, and diagnostic test results, because the opinion of Dr. Caffrey was better reasoned. Specifically, the administrative law judge assigned greater weight to the opinion of Dr. Caffrey, that the miner did not have clinical or legal pneumoconiosis, as Dr. Caffrey reviewed all of the miner’s medical records, including those of Dr. Gibson, noting that multiple medical records were devoid of any documentation of pneumoconiosis and that the miner’s autopsy slides showed “only a minimal amount of black pigment deposition.” 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 on Modification at 9; Director’s Exhibit 17. Accordingly, the administrative law judge properly found that the opinion of Dr. Caffrey constituted a better-reasoned opinion and permissibly found that Dr. Gibson’s opinion was not entitled to determinative weight in this case. *See Williams*, 338 F.3d at 514, 22 BLR at 2-647; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Decision and Order on Modification at 9. We, therefore, reject claimant’s argument. Claimant has not otherwise challenged the administrative law judge’s credibility determinations.⁷ We, therefore, affirm the administrative law judge’s determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as this finding is rational, contains no reversible error, and is supported by substantial evidence.

Because claimant has failed to satisfy her burden to establish the existence of pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge’s finding that claimant failed to establish a basis for modifying the denial of the survivor’s claim by demonstrating a mistake in a determination of fact. *See* 20 C.F.R. §725.310; *Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Trumbo*, 17 BLR at 1-87-88.

⁷ Claimant cites to the opinions of Drs. DeLara and Dennis, who found pneumoconiosis. Claimant fails, however, to identify any error in the administrative law judge’s finding rejecting these opinions as insufficiently reasoned. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

Accordingly, the Decision and Order Denying Request for Modification 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