BRB No. 09-0134 BLA

R.R. (Widow of J.R.)	)	
Claimant-Petitioner	)	
v.	)	
BOUNTY MINING CORPORATION	)	DATE ISSUED: 08/14/2009
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

R.R., Hurley, Virginia, *pro se*.

David L. Murphy (Murphy Law Offices, PLLC), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits (2007-BLA-5630) of Administrative Law Judge Linda S. Chapman (the administrative law judge) 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). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established that the miner had fifteen years

[1] R.R. is the widow of J.R., a miner who died on May 12, 2006. Claimant filed her application for survivor's benefits on June 5, 2006. Director's Exhibit 2.

of coal mine employment and that employer was the responsible operator. The administrative law judge found, however, that the evidence failed to establish either pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits.[2] Employer urges affirmance of the denial of benefits, although it also asserts, as it did before the administrative law judge, that claimant's request for a hearing was untimely filed. Hearing Transcript at 14; Employer's Brief at 3; *see also* Director's Exhibit 28. The Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive response brief. Instead, he argues that because claimant did not request a hearing within thirty days of the issuance of the district director's Proposed Decision and Order denying benefits, the administrative law judge did not have jurisdiction of this case. The Director notes, however, that claimant's untimely request for a hearing may be construed as a timely petition for modification.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[3] 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).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a

[2] Claimant was represented by counsel before the administrative law judge.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

"substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

At the outset, we address the assertions of employer and the Director that the administrative law judge erred in finding that claimant's request for a hearing was timely and that the administrative law judge did not, therefore, have jurisdiction of this case. The administrative law judge found that claimant's request for a hearing was timely based on the December 29, 2006 date of the Proposed Decision and Order, the fact that claimant did not receive the Proposed Decision and Order until January 10, 2007, and the fact that she requested a hearing on February 10, 2007.[4] Decision and Order at 3 n.3. As noted by the Director, the district director issued a Proposed Decision and Order denying benefits in this case on December 29, 2006, which was served on that date, Director's Exhibit 23, but claimant did not request a hearing until February 10, 2007. Director's Exhibit 24.

A party must request a hearing within thirty days of the date of the issuance of a Proposed Decision and Order. 20 C.F.R. §725.419(a); *see generally W.L. v. Director, OWCP*, BLR , BRB No. 08-0122 BLA (Sept. 30, 2008)(30-day time period for filing response to Proposed Decision and Order commences when service is made on the parties). Consequently, the administrative law judge erred in finding that claimant's request for a hearing was timely. Claimant's request for a hearing was untimely and the administrative law judge did not have jurisdiction of the case. However, claimant's letter of February 10, 2007 requesting a hearing, which was filed within one year of the Proposed Decision and Order, is a timely request for modification. 20 C.F.R. §725.310.[5]

[4] The administrative law judge mistakenly states that claimant requested a hearing on February 10, 2008. This appears to be a clerical error, however, as claimant's letter requesting a hearing is dated February 10, 2007. Director's Exhibit 24.

[5] 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). 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 upon further reflection of the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Consequently, this case is remanded to the district director for modification proceedings.[6] We will not, therefore, address the administrative law judge's findings on the merits. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1329, 12 BLR 2-60, 2-73 (3d Cir. 1988).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the district director for modification proceedings.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[6] Claimant sent an additional medical opinion directly to the Board. By Order dated November 13, 2008, the Board returned this evidence to claimant, informing claimant that she could file a request for modification with the Office of the District Director.