BRB Nos. 09-0794 BLA
09-0794 BLA-A
09-0795 BLA
and 09-0795 BLA-A

LORENE BUCKLEN (o/b/o and Widow of KERMIT BUCKLEN)	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
JEWELL SMOKELESS COAL CORPORATION	)	DATE ISSUED: 08/27/2010
Employer-Respondent Cross-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Lorene Bucklen, Raven, Virginia, *pro se*.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Sarah M. Hurley (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel, and employer cross-appeals the Decision and Order (08-BLA-5540, 08-BLA-5541) of Administrative Law Judge Linda S. Chapman denying modification on claims 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).[2] This case involves a miner's claim filed on November 4, 1980, and a survivor's claim filed on October 1, 2001. The Board has consolidated both appeals for purposes of decision only.[3]

Procedural History

The miner's claim is before the Board for the sixth time. The Board previously set forth the full procedural history of the miner's claim.[4] The survivor's claim is before the Board for the second time.

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[1] Claimant is the surviving spouse of the deceased miner, who died on June 18, 2001. Director's Exhibit 9.

[2] The Department of Labor has amended the regulations implementing 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). These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2010). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, the Board will cite to the 2000 edition of the Code of Federal Regulations.

[3] By Order dated May 12, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Claimant, employer, and the Director, Office of Workers' Compensation Programs (the Director), have responded. They correctly state that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to either claim because the claims were filed before January 1, 2005. Moreover, the Director notes that, although the amendments do not affect the miner's claim, since the miner's claim was filed on November 4, 1980, the Section 411(c)(4) presumption that was reinstated by Section 1556 has always been applicable to that claim. *See* 20 C.F.R. §718.305(e).

[4] *Bucklen v. Jewell Smokeless Coal Corp.*, BRB No. 00-1069 BLA (Oct. 31, 2001) (unpub.).

In a Decision and Order on Remand issued on July 17, 2000, Administrative Law Judge Stuart A. Levin found that, although the miner was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis contained in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, employer established rebuttal of the presumption by demonstrating that the miner did not suffer from pneumoconiosis. Judge Levin, therefore, determined that there was no mistake of fact in the previous denials of benefits, and he denied the miner's request for modification pursuant to 20 C.F.R. §725.310 (2000).[5] Pursuant to the miner's appeal, the Board affirmed Judge Levin's denial of benefits. *Bucklen v. Jewell Smokeless Coal Co.*, BRB No. 00-1069 (Oct. 31, 2001) (unpub.).

While his appeal was pending before the Board, the miner died on June 18, 2001. Director's Exhibit 9. Claimant filed her survivor's claim on October 1, 2001. Additionally, following the Board's decision affirming the denial of benefits on the miner's claim, claimant timely requested modification in the miner's claim, alleging a mistake in a determination of fact in the previous denials.

In a Decision and Order dated April 4, 2005, Administrative Law Judge Edward Terhune Miller considered both claims. In regard to the survivor's claim, Judge Miller found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Judge Miller, therefore, denied benefits in the survivor's claim. In regard to claimant's request for modification of the miner's claim, Judge Miller agreed with Judge Levin that the miner was entitled to invocation of the Section 718.305 presumption that he was totally disabled due to pneumoconiosis. Judge Miller, however, found that there was no mistake of fact in regard to Judge Levin's finding that employer rebutted the Section 718.305 presumption by establishing that the miner did not suffer from pneumoconiosis. Judge Miller, therefore, denied claimant's request for modification of the miner's claim.

Pursuant to claimant's appeal, the Board affirmed Judge Miller's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in the survivor's claim. *Bucklen v. Jewell Smokeless Coal Corp.*, BRB Nos. 05-0593 BLA and 05-0593 BLA-A (Feb. 15, 2006) (unpub.). The Board, therefore, affirmed Judge Miller's denial of the survivor's claim. *Id.* The Board also affirmed Judge Miller's finding that claimant failed to establish a basis for modification, pursuant to 20 C.F.R. §725.310 (2000), in the miner's claim. *Id.* The Board, therefore, affirmed

[5] The revisions to 20 C.F.R. §725.310 do not apply to claims, such as the miner's, that were pending on January 19, 2001.

Judge Miller's denial of benefits in the miner's claim.[6] *Id.* Pursuant to claimant's appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. *Bucklen v. Jewell Smokeless Coal Corp.*, No. 06-2294 (4th Cir. July 10, 2007) (unpub.).

Claimant's Current Requests for Modification

Claimant timely requested modification on August 20, 2007, challenging the denial of both claims. Director's Exhibit 70. In a Decision and Order dated July 23, 2009, Administrative Law Judge Linda S. Chapman (the administrative law judge) found that there was not a mistake in a determination of fact in regard to Judge Miller's denial of either claim. Consequently, the administrative law judge denied claimant's requests for modification in both claims.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in response to claimant's appeals. Employer has filed a cross-appeal in both the miner's claim and survivor's claim appeals, arguing that the administrative law judge should have summarily denied claimant's requests for modification because reopening the claims is not in the interest of justice. Employer also contends that, in the 2005 decision denying benefits, Judge Miller erred in excluding Dr. Castle's 2003 opinions from the record in the survivor's claim.[7] In response, the Director contends that the administrative law judge's acceptance of claimant's requests for modification "is supported by substantial evidence and should not be disturbed." Director's Response Brief at 4. The Director also urges the Board to reject employer's contention that Judge Miller erred in excluding Dr. Castle's 2003 opinions from the record in the survivor's claim.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are

[6] The Board denied claimant's motion for reconsideration. *Bucklen v. Jewell Smokeless Coal Corp.*, BRB Nos. 05-0593 BLA and 05-0593 BLA-A (Nov. 9, 2006) (Order) (*en banc*) (unpub.).

[7] Judge Miller excluded Dr. Castle's June 19, 2003 and July 18, 2003 opinions from consideration in the survivor's claim because he found that Dr. Castle "inextricably linked" his opinions to physicians' opinions that were admissible only in the miner's claim. *See* 20 C.F.R. §725.414(a)(3)(i).

rational, and are in accordance with applicable law.[8] 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).

The Survivor's Claim

Benefits are payable on survivors' claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993).

Section 725.310 provides that a party may request modification of an award or denial of benefits within one year, on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The sole basis available for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). 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); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In this case, the administrative law judge considered whether there was a mistake in a determination of fact regarding Judge Miller's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

In his 2005 Decision and Order, Judge Miller noted that autopsy evidence is the most reliable diagnostic evidence of coal workers' pneumoconiosis. Consequently, Judge Miller focused upon the opinion of Dr. Turjman, the autopsy prosector, and the opinions of Drs. Perper, Crouch, and Tomashefski, who reviewed the miner's autopsy slides. Drs. Turjman and Perper opined that the miner suffered from both simple and complicated pneumoconiosis, as well as emphysema caused by coal mine dust exposure. By contrast, Drs. Crouch and Tomashefski opined that the miner did not suffer from pneumoconiosis,

[8] The record reflects that the miner's coal mine employment was in Virginia and West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

or any disease arising out of his coal mine dust exposure. Drs. Crouch and Tomashefski opined that the miner suffered from emphysema and associated interstitial fibrosis due to cigarette smoking. In considering the conflicting evidence, Judge Miller found that the opinions of Drs. Crouch and Tomashefski, that the miner did not suffer from pneumoconiosis or any disease arising out of his coal mine dust exposure, were entitled to the greatest weight based upon their superior qualifications, and because they provided the best-reasoned opinions of record. Judge Miller also considered the opinions of Drs. Forehand and Mitchell, but accorded less weight to their respective diagnoses of pneumoconiosis because they were based entirely on Dr. Turjman's autopsy findings, which Judge Miller found unreliable. Consequently, Judge Miller found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Pursuant to claimant's 2005 appeal, the Board held that Judge Miller "permissibly accorded determinative weight to the opinions of Drs. Crouch and Tomashefski as he found these physicians offered well reasoned and documented opinions and in light of their superior credentials in the field of pathology."[9] *Bucklen v. Jewell Smokeless Coal Corp.*, BRB Nos. 05-0593 BLA and 05-0593 BLA-A, slip op. at 7-8 (Feb. 15, 2006) (unpub.). The Board also held that Judge Miller permissibly discounted the opinions of Drs. Forehand and Mitchell, "since these physicians relied solely on Dr. Turjman's unreliable autopsy report in reaching their diagnoses." *Id.* at 7. The Board, therefore, affirmed Judge Miller's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in the survivor's claim. As previously noted, the Fourth Circuit affirmed the Board's decision.

Claimant did not submit any new evidence in support of her request for modification in the survivor's claim. The only new evidence in the record, submitted by employer, is Dr. Castle's October 23, 2008 report. Based upon a review of the evidence, Dr. Castle opined that the miner did not suffer from pneumoconiosis, but had tobacco smoke-induced emphysema.

In finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, the administrative law judge stated:

I have thoroughly reviewed all of the medical evidence of record, including

[9] The Board held that Judge Miller, in finding that Drs. Crouch and Tomashefski possessed superior credentials in the field of pathology, permissibly relied on the physicians' "associations with academic and large medical institutions in positions of high responsibility." *Bucklen v. Jewell Smokeless Coal Corp.*, BRB Nos. 05-0593 BLA and 05-0593 BLA-A, slip op. at 7 (Feb. 15, 2006) (unpub.).

> the medical evidence considered by Judge Miller, and the newly submitted evidence, and I find that [claimant] has not established a mistake of fact in Judge Miller's determinations in the survivor's claim. Judge Miller found that [claimant] had not carried her burden to establish the existence of pneumoconiosis, based on his extensive review of the medical reports, and comprehensive weighing of the credentials of the pathologists who prepared autopsy reports. He based this finding on an inclusive, broad, and detailed discussion of the medical evidence before him, and credited the reasoned opinions of Drs. Tomashefski and Crouch, who concluded that [the miner] did not have any form of coal workers' pneumoconiosis. Having thoroughly scrutinized the evidence and Judge Miller's analysis, I can find no mistake of fact in his findings or analysis. Reviewing all of the evidence of record as a whole, I find no mistake in a determination of fact by Judge Miller in his April 4, 2005 Decision and Order regarding [claimant's] survivor's claim.

Decision and Order at 5 (footnote omitted).

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Thus, we affirm the administrative law judge's denial of claimant's request for modification in her survivor's claim.

The Miner's Claim

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of 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*).

As there can be no change in the miner's condition, the issue properly before the administrative law judge was whether there was a mistake in a determination of fact regarding Judge Miller's denial of the miner's claim. *See Wojtowicz*, 12 BLR at 1-164. An administrative law judge has the authority to reconsider all of the evidence for any mistake of fact. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

In his 2005 Decision and Order, Judge Miller initially noted his agreement with Judge Levin's finding that the miner was entitled to the rebuttable presumption at Section 718.305 that he was totally disabled due to pneumoconiosis. However, based upon his weighing of the autopsy evidence, as discussed, *supra*, Judge Miller found that employer

established that the miner did not suffer from pneumoconiosis, thereby establishing rebuttal of the Section 718.305 presumption. The Board affirmed Judge Miller's finding that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000) in the miner's claim, a holding that was affirmed by the Fourth Circuit.

Claimant did not submit any new evidence in support of her request for modification in the miner's claim. The only new evidence in the record, submitted by employer, is Dr. Castle's October 23, 2008 report.

In finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) in the miner's claim, the administrative law judge stated:

> I find that [claimant] has not established a mistake of fact in Judge Miller's determinations as to [the miner's] claim. Again, I have considered the evidence submitted in connection with this claim, and I find no mistake of fact in Judge Miller's findings or analysis. Judge Miller concluded that there was no mistake of fact by Judge Levin in his determination that while [claimant] was entitled to the presumption at §718.305, the Employer rebutted this presumption by establishing by a preponderance of the evidence that [the miner] did not have coal workers' pneumoconiosis. Judge Miller also found no mistake of fact in Judge Levin's conclusion that [claimant] did not established [sic] a change in conditions since the previous denial. Reviewing all of the evidence of record as a whole, I find that no mistake in a determination of fact by Judge Miller in his April 4, 2005 Decision and Order regarding living miner's claim.

Decision and Order at 5 (footnote omitted).

Because it is based upon substantial evidence, the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) is affirmed. We, therefore, affirm the administrative law judge's denial of claimant's request for modification in the miner's claim.

Consequently, we affirm the administrative law judge's denial of benefits in both claims. In light of our affirmance of the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim, we need not address employer's contentions of error raised in its cross-appeals. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

Accordingly, the administrative law judge's Decision and Order denying benefits 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