

BRB No. 98-0764 BLA

WILMA J. BALLARD)
(o/b/o and Widow of WILLIAM E.)
BALLARD))

Claimant-Petitioner)

v.)

WESTMORELAND COAL COMPANY)

Employer-)

Respondent)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)

Party-in-Interest)

DATE ISSUED: 8/24/99

DECISION AND ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Wilma J. Ballard, Big Stone Gap, Virginia, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order (97-BLA-1657) of Administrative Law Judge Edward J. Murty, Jr. denying benefits on a miner's claim and 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). The administrative law judge determined that this case involves a request for modification of the Decision and Order - Denying Benefits of Administrative Law Judge John C. Holmes, dated September 23, 1996, pursuant to 20 C.F.R. §725.310.³ The administrative law judge found that claimant

¹Claimant is the widow of the miner, William E. Ballard, who died on May 10, 1989. Director's Exhibit 7. The miner filed his most recent claim on January 18, 1989. Director's Exhibit 85. Claimant filed her application for survivor's benefits on January 6, 1990. Director's Exhibit 1. Both claims are presently pending.

²Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

³The miner, William E. Ballard, filed his initial application for benefits on November 20, 1974. Director's Exhibit 83. Administrative Law Judge Julius A. Johnson, in a Decision and Order dated February 9, 1982, awarded benefits contingent upon the miner ceasing his coal mine employment within one year of the Decision and Order. *Id.* However, the miner did not cease his coal mine employment and, therefore, benefits were denied on March 20, 1983. *Id.*

The miner filed a second claim on December 13, 1985. Director's Exhibit 84. Pursuant to claimant's motion, Administrative Law Judge Nicholas J. Laezza granted the miner's motion to withdraw the claim on March 17, 1988. *Id.*

The miner filed his third claim, the current claim, on January 18, 1989. Director's Exhibit 85. The miner died on May 10, 1989, while his claim was still pending. Director's Exhibit 7. Claimant, the widow of the miner, filed a survivor's claim on January 6, 1990. Director's Exhibit 1. The two claims were consolidated at the January 9, 1992 hearing before Administrative Law Judge John C. Holmes. See Director's Exhibit 61; see also Director's Exhibit 49. Pursuant to a Decision and Order issued on March 23, 1992, Judge Holmes denied benefits in both the miner's and survivor's claims. Initially, Judge Holmes found the autopsy evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). However, he found that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). In addition, Judge Holmes found that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20

could not establish a change in the deceased miner's condition and, therefore, in order to establish modification, claimant must establish a mistake in a determination of fact. Reviewing the medical evidence of record, the administrative law judge found that there was no medical evidence which establishes that the miner was not capable of performing his usual coal mine employment. 20 C.F.R. §718.204(c). In addition, the administrative law judge found that the medical evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c). Consequently, the administrative law judge found the evidence of record insufficient to establish a mistake in a determination of fact in both the miner's claim and the survivor's claim. 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's motion for modification in both the miner's claim and the survivor's claim. In response to claimant's *pro se* appeal, employer urges affirmance of the denial of modification on both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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

C.F.R. §718.205(c). Accordingly, Judge Holmes found that claimant failed to establish entitlement to benefits in both the miner's claim and her survivor's claim. Director's Exhibits 64, 85. Claimant appealed Judge Holmes's Decision and Order - Denying Benefits to the Board. By Order dated June 25, 1992, the Board acknowledged claimant's appeal, but dismissed the appeal as having been untimely filed. *Ballard v. Westmoreland Coal Co.*, BRB No. 92-1680 BLA (June 25, 1992)(Order)(unpub.); Director's Exhibit 67.

Claimant filed a request for modification on July 29, 1992. Director's Exhibit 68. In a Decision and Order - Denying Benefits issued on September 23, 1996, Judge Holmes denied claimant's request for modification finding that the newly submitted evidence was insufficient to establish entitlement to benefits. Director's Exhibit 88. In particular, Judge Holmes found that the credible new evidence supported the findings in his previous decision. *Id.* Claimant filed her current request for modification on December 30, 1996. Director's Exhibit 89.

incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Modification may be established under Section 725.310 by a showing of a change of conditions or a mistake in a determination of fact. In considering whether a claimant has established a change in conditions, an administrative law judge must consider all of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the new evidence is sufficient to establish at least one of the elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In addition, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that a claimant’s general allegation of error is sufficient to require the administrative law judge to consider the entire record in addressing whether there was a mistake in a determination of fact. 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

After consideration of the administrative law judge’s Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge’s denial of claimant’s motion for modification in both the miner’s claim and the survivor’s claim. Initially, we affirm the administrative law judge’s finding that there was no basis on which to demonstrate a change in conditions as there can be no change in the deceased miner’s condition, Decision and Order at 2, inasmuch as the miner died on May 10, 1989, before his most recent claim had been denied, see Director’s Exhibits 64, 85, and because claimant was not eligible to file a survivor’s claim until after the miner’s death. Consequently, based on the facts of this case, modification cannot be sustained based upon a change in conditions because it is not possible for one of the adjudicated conditions to change. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); see generally *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987) *reh’g denied*, 484 U.S. 1047 (1988).

Furthermore, we affirm the administrative law judge’s determination that claimant has not established a mistake in a determination of fact in either the miner’s claim or the survivor’s claim. With respect to the miner’s claim, the administrative law judge reasonably found that the evidence of record failed to establish a mistake in a determination of fact with respect to the existence of total respiratory disability under Section 718.204(c).⁴ Decision and Order at 2. A review

⁴As the administrative law judge correctly noted, Judge Holmes, in his 1992 Decision and Order, found the existence of pneumoconiosis established by the autopsy evidence pursuant to Section 718.202(a)(2). Decision and Order at 2; see Director’s Exhibits 64, 85.

of the record indicates that the administrative law judge properly found that the pulmonary function studies and blood gas studies yielded non-qualifying values⁵ and, therefore, are insufficient to demonstrate total disability.⁶ Decision and Order at 2; Director's Exhibits 9, 13, 48, 83-85, 87; 20 C.F.R. §718.204(c)(1), (c)(2).

Moreover, the administrative law judge reasonably found that there was no medical opinion evidence which supports a finding that the miner lacked the pulmonary capacity to perform his usual coal mine employment. Decision and Order at 2. A review of the record shows that none of the medical reports opine that the miner was totally disabled or provide diagnoses from which the administrative law judge could infer that the miner was not capable of performing his usual coal mine employment. Director's Exhibits 25, 45, 46, 48, 54-56, 58, 59, 70, 71, 87, 94; see *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Consequently, we affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish total respiratory disability pursuant to Section 718.204(c) and, thus, a mistake in a determination of fact. See *Taylor, supra*; see also *Jessee, supra*; *Nataloni, supra*.

⁵A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(c)(1), (c)(2).

⁶Additionally, the record is devoid of evidence of cor pulmonale with right sided congestive heart failure and, therefore, claimant has not demonstrated a total respiratory disability pursuant to Section 718.204(c)(3), as a matter-of-law. 20 C.F.R. §718.204(c)(3); see *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

With respect to the survivor's claim, we affirm the administrative law judge's finding that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis.⁷ Decision and Order at 2. As the administrative law judge correctly found, the lone opinion supportive of a finding that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause of the miner's death, was the July 1993 supplemental letter of Dr. Tabor. Decision and Order at 2; Director's Exhibit 70; see also Director's Exhibits 8, 25, 45, 46, 48, 54-56, 58, 59, 71, 87, 94. However, the administrative law judge reasonably exercised his discretion as trier-of-fact in finding that Dr. Tabor failed to explain adequately his 1993 opinion, that pneumoconiosis was a major contributing cause of the miner's death, particularly, in light of the doctor's contradictory conclusion, implicit in the miner's death certificate.⁸ Decision and Order at 2; compare Director's Exhibit 70 with Director's Exhibit 7; see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); see also *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Inasmuch as the administrative law judge reasonably accorded no weight to the opinion of Dr. Tabor, the only evidence supportive of a finding that the miner's death was due pneumoconiosis, we affirm the administrative law judge's finding that claimant has failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). 20 C.F.R. §718.205(c); *Lafferty, supra*; *Addison, supra*; see also *Sumner v. Blue Diamond Coal Corp.*, 12 BLR 1-74 (1988). Moreover, since the administrative law judge reasonably found that the evidence was insufficient to establish that the

⁷Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when claimant meets her burden of establishing that the miner's death was due to pneumoconiosis arising out of coal mine employment, where pneumoconiosis was a substantially contributing cause of the miner's death, where death was caused by complications of pneumoconiosis, or where complicated pneumoconiosis is established. 20 C.F.R. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that if pneumoconiosis hastens death in any way, it is a substantially contributing cause of death pursuant to Section 718.205(c)(2). *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), cert. denied, 113 S.Ct. 969 (1993); see generally *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

⁸ On the death certificate, Dr. Tabor stated that the immediate cause of the miner's death was pneumonia, due to common variable immunodeficiency, with other significant conditions being the miner's cancer of the stomach. Director's Exhibit 7. He did not mention pneumoconiosis.

miner's death was due to pneumoconiosis, we affirm his finding that there was no mistake in a determination of fact pursuant to Section 725.310. *See Addison, supra; Sumner, supra; see also Jessee, supra; Nataloni, supra.*

Since claimant has failed to establish either a change in conditions or a mistake in a determination of fact in this case involving a request for modification, an award of benefits is precluded in both the miner's claim and the survivor's claim. *See Jessee, supra; Nataloni, supra.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge