

BRB No. 07-0279 BLA

V.K. )  
(Widow of J.F.K.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 ) DATE ISSUED: 12/17/2007  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Respondent ) DECISION and ORDER

Appeal of the Decision and Order Denying Survivor's Benefits of Chief Administrative Law Judge John M. Vittone, Administrative Law Judge, United States Department of Labor.

V.K., Phoenix, Arizona, *pro se*.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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, without the assistance of counsel, appeals the Decision and Order Denying Survivor's Benefits (2001-BLA-0696) of Chief Administrative Law Judge John M. Vittone regarding 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).<sup>1</sup> This is the third time that this case has been before the Board. In its most

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<sup>1</sup> Claimant is the miner's widow. The miner died on December 19, 1974. Director's Exhibit 8. The death certificate indicates that the miner died due to circulatory

recent Decision and Order, the Board addressed a denial of benefits issued by Administrative Law Judge Rudolf L. Jansen. The Board affirmed Judge Jansen's determination that the miner had twenty-three years of coal mine employment and his finding that claimant did not establish invocation of the interim presumption of total disability or death due to pneumoconiosis under 20 C.F.R. §727.203(a)(1)-(4). The Board further held, however, that Judge Jansen did not properly consider the lay testimony of record pursuant to 20 C.F.R. §727.203(a)(5). Accordingly, the Board vacated the denial of benefits and remanded the case to Judge Jansen for reconsideration of this evidence on remand. The Board also instructed Judge Jansen that if he determined that claimant did not establish entitlement to benefits pursuant to 20 C.F.R. Part 727, he was required to address entitlement under 20 C.F.R. Part 410, Subpart D. [*V.K.*] v. *Director, OWCP*, BRB No. 02-0833 BLA (July 31, 2003)(unpub.).

On remand, Judge Jansen again denied benefits. Claimant filed an appeal with the Board, which was dismissed as untimely. [*V.K.*] v. *Director, OWCP*, BRB No. 04-0518 BLA (Mar. 29, 2004)(unpub. Order). Claimant filed a request for modification pursuant to 20 C.F.R. §725.310 (2000).<sup>2</sup> The district director denied claimant's request and the case was transferred to the Office of Administrative Law Judges for a hearing, which was

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failure, acute cor pulmonale, and bronchogenic carcinoma with lobar pneumonia. *Id.* Claimant filed a survivor's claim on November 12, 1975, which was denied by the district director on June 2, 1980. Director's Exhibits 2, 14. Claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges (OALJ) on July 10, 1980. Director's Exhibit 15. After several postponements, the case was remanded on January 16, 1986, to the district director, who was ordered not to return the case to the OALJ until claimant was able to provide a physician's report stating that she was able to appear at the hearing. Director's Exhibits 19, 25, 32, 43, 48, 51, 57, 60. No further action was taken until January 27, 1999, when claimant wrote a letter to the district director concerning her case. Director's Exhibit 63. On January 14, 2000, claimant provided proof that she was able to attend a hearing. Director's Exhibit 72. The district director denied the claim on October 25, 2000, and claimant requested a formal hearing on November 27, 2000. Director's Exhibits 78, 82. The hearing was conducted on April 19, 2002, with claimant present.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). The amended version of 20 C.F.R. §725.310 does not apply to the request for modification in this case, as the claim was pending on January 19, 2001. 20 C.F.R. §725.2.

held before Chief Administrative Law Judge John M. Vittone (the administrative law judge). The administrative law judge credited the miner with twenty-three years of coal mine employment. After reviewing the evidence of record, including claimant's testimony and the affidavits of persons who knew the miner, the administrative law judge found that the prior denial of benefits did not contain a mistake in a determination of fact and denied benefits under Part 727 and Part 410, Subpart D. Claimant's present appeal followed. The Director, Office of Workers' Compensation (the Director), has responded and urges the Board to affirm the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a request for modification with respect to a survivor's claim, the administrative law judge may grant modification based upon the presence of a mistake in a determination of fact in the prior denial. 20 C.F.R. §725.310(a) (2000); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).<sup>3</sup>

Pursuant to Section 727.203(a)(1)-(4), the administrative law judge determined correctly that the record did not contain any chest x-rays, pulmonary function studies, blood gas studies, medical reports, biopsy or autopsy evidence. The administrative law judge rationally concluded, therefore, that claimant did not establish invocation of the interim presumption under Section 727.203(a)(1)-(4). Decision and Order at 7. Accordingly, this finding is affirmed.

Under the terms of Section 727.203(a)(5), when no medical evidence is available in a case involving a deceased miner, the interim presumption can be invoked if "the

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<sup>3</sup> The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 3, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

affidavit of the survivor of [the] miner or other such person with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §727.203(a)(5); *Pekala v. Director, OWCP*, 13 BLR 1-1 (1989). In this case, the record contains written statements submitted by claimant, claimant's testimony in the two hearings conducted with respect to her claim, and a letter submitted by claimant's sister. Claimant stated that the miner suffered from chest pains, cardiovascular disease, and shortness of breath and was rarely able to work after 1958 or 1962 due to his respiratory problems. Director's Exhibits 1, 2, 99 at 42, 44; 2006 Hearing Transcript at 44-45. Claimant's sister indicated in her letter that she recalled that the miner coughed frequently upon returning home from working in the mines. Director's Exhibit 128.

The administrative law judge noted these statements and determined that they "are not credible in light of the entire record." Decision and Order at 8. The administrative law judge concluded, therefore, that claimant did not establish invocation under Section 727.203(a)(5). We affirm the administrative law judge's finding, as it is rational and supported by substantial evidence. *Gessner v. Director, OWCP*, 11 BLR 1-1 (1987); *Kosack v. Director, OWCP*, 7 BLR 1-248 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The administrative law judge concluded correctly that the miner's Social Security Administration records show that the miner worked regularly from 1956 to the last quarter of 1966 and, therefore, contradict any testimony regarding the miner's respiratory problems rendering him unable to work. Decision and Order at 8; Director's Exhibit 4. We affirm, therefore, the administrative law judge's finding that claimant did not establish invocation under Section 727.203(a)(5).

Pursuant to 20 C.F.R. §727.204, a presumption of entitlement to survivor's benefits exists when a miner had at least twenty-five years of coal mine employment before June 30, 1971 and died before April 1, 1978. Although the administrative law judge did not specifically consider whether Section 727.204 is applicable in this case, we hold, as a matter of law, that claimant could not avail herself of the twenty-five year presumption based upon the administrative law judge's determination that the miner had only twenty-three years of coal mine employment. The administrative law judge's finding with respect to the length of the miner's coal mine employment is rational and supported by substantial evidence. The administrative law judge acted within his discretion as fact-finder in determining that claimant's testimony, that the miner might have begun coal mine work in 1930, rather than 1931, was too vague to be credible. Decision and Order at 6; *see Miller v. Director, OWCP*, 7 BLR 1-693 (1985). With respect to claimant's testimony, that the miner worked in coal mining for an Esso gas station between 1954 and 1955, even if the administrative law judge had credited claimant's account, the length of the miner's coal mine employment would still be less than twenty-five years. Similarly, the statement made in a letter submitted by one of the miner's friends, that the miner's coal mine work ended in 1956, in Drawdy, West

Virginia, rather than 1954, conflicts with the miner's Social Security Administration records, which indicate that the miner worked in a foundry and factory in Ohio in 1955 and 1956. Director's Exhibit 4; Claimant's Exhibit 1 at 21. We affirm, therefore, the administrative law judge's finding that claimant did not establish entitlement under Part 727.

In light of claimant's failure to establish entitlement pursuant to Part 727, the administrative law judge considered the claim under the regulations set forth in 20 C.F.R. Part 410, Subpart D, in accordance with the Board's decision in *Muncy v. Wolf Creek Collieries*, 3 BLR 1-627 (1981). The administrative law judge rationally found that the death certificate is insufficient to establish total disability under 20 C.F.R. §410.414, as it was not prepared by a physician and includes no explanation of the conclusions expressed. Decision and Order at 8; Director's Exhibit 8; see *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Based upon the absence of medical evidence in the record and the miner's history of more than fifteen years of coal mine employment, the administrative law judge also considered whether lay testimony supported a finding of total disability under 20 C.F.R. §410.454(b). The administrative law judge acted within his discretion as fact-finder in relying upon his determination at Section 727.203(a)(5) to conclude that this evidence was insufficient to prove that the miner suffered from a totally disabling respiratory or pulmonary impairment. Decision and Order at 8-9. As noted by the Director, although not addressed by the administrative law judge, entitlement under 20 C.F.R. §410.462 is also precluded, as there is no evidence in the record demonstrating that the miner had a chronic respirable disease which contributed to his death. 20 C.F.R. §410.462; see *Hunter v. Director, OWCP*, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986). We affirm, therefore, the administrative law judge's finding that claimant did not establish entitlement under 20 C.F.R. Part 410, Subpart D.

Because we have affirmed the administrative law judge's findings that the evidence of record is insufficient to establish entitlement under Parts 727 and 410, Subpart D, we also affirm his determination that the prior denial of benefits did not contain a mistake in a determination of fact pursuant to Section 725.310 (2000). *Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

Accordingly, the administrative law judge's Decision and Order Denying Survivor's 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