

BRB No. 08-0321 BLA

K.C. )  
(Widow of B.C.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
POND CREEK MINING COMPANY ) DATE ISSUED: 12/16/2008  
 )  
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 – Denial of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

K.C., Monaville, West Virginia, *pro se*.

BEFORE: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order – Denial of Benefits (05-BLA-6241) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) rendered on a 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>2</sup> Pursuant to claimant’s request for modification of the denial of

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<sup>1</sup> Claimant is the widow of the miner, who died on September 22, 2000. Director’s Exhibit 7.

<sup>2</sup> This survivor’s claim, filed on December 7, 2000, was denied by Administrative Law Judge Thomas F. Phalen, Jr. on February 14, 2003. Director’s Exhibits 1, 30. Judge Phalen found pneumoconiosis established by autopsy evidence pursuant to 20 C.F.R.

her survivor's claim, the administrative law judge found that no mistake in a determination of fact was made in the prior denial.<sup>3</sup> Accordingly, benefits were denied.

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.<sup>4</sup> *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *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 supported by substantial evidence. 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). Employer and the Director, Office of Workers' Compensation Programs, are not participating in this appeal.

To establish entitlement to benefits in a survivor's claim, claimant must establish that the miner had pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that his death was due to pneumoconiosis. 20 C.F.R. §§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). In a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis or if the irrebuttable presumption of death due to pneumoconiosis is applicable because complicated pneumoconiosis has been established at 20 C.F.R. §718.304. 20 C.F.R. §718.205(c). 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). In order to be entitled to modification in a

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§718.202(a)(2) and that it arose out of the miner's coal mine employment pursuant to 20 C.F.R. §718.203. He denied benefits, however, because the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant appealed. The Board affirmed the denial of benefits on December 12, 2003. Director's Exhibit 38.

<sup>3</sup> By agreement of the parties, the case was decided on the record. *See* Hr. Tr. at 4-6.

<sup>4</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

survivor's claim, the party requesting modification must establish that the prior decision contained a mistake in a determination of fact. 20 C.F.R. §725.310(2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230-231, 18 BLR 2-290, 2-294 (6th Cir. 1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In his February 14, 2003 decision denying benefits in the survivor's claim, Administrative Law Judge Thomas F. Phalen, Jr. found that the evidence established pneumoconiosis and that it arose out of coal mine employment. Judge Phalen, however, denied benefits because he found that the evidence failed to establish that pneumoconiosis caused the miner's death pursuant to Section 718.205(c). Thus, in order to establish a basis for modification, claimant must show that Judge Phalen erred in finding that the miner's death was not due to pneumoconiosis. *Wojtowicz*, 12 BLR at 1-164.

On modification, the administrative law judge reviewed the evidence considered by Judge Phalen and the newly submitted evidence and found that Judge Phalen did not make a mistake in a determination of fact when he found that the miner's death was not due to pneumoconiosis. The administrative law judge properly found that none of the evidence submitted by claimant on modification established that the miner's death was due to pneumoconiosis.<sup>5</sup> The administrative law judge also properly determined that claimant failed to establish that Judge Phalen erred in finding that the evidence before him failed to establish death due to pneumoconiosis pursuant to Section 718.205(c).<sup>6</sup> Decision and Order at 5. We, therefore, affirm the administrative law judge's finding that the evidence of record failed to establish death due to pneumoconiosis. In light of our affirmance of the administrative law judge's findings under Section 718.205(c), we affirm the administrative law judge's determination that claimant has failed to establish a mistake in a determination of fact in the prior denial of her claim for survivor's benefits pursuant to Section 725.310 (2000). *See Worrell*, 27 F.3d at 230-231, 18 BLR at 2-294; *Wojtowicz*, 12 BLR at 1-164.

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<sup>5</sup> Claimant's new evidence consisted of x-rays and a 1988 state decision awarding benefits to the miner based on a finding of partial disability, with the accompanying medical record.

<sup>6</sup> The administrative law judge noted that Judge Phalen properly found that: the miner's death certificate did not list pneumoconiosis as a factor in the miner's death; the autopsy prosector did not discuss the cause of the miner's death; and the medical opinion evidence of record did not establish death due to pneumoconiosis. Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge