



BRB No. 19-0056 BLA

DORIS SLOAN )  
(Widow of GURSTLE L. SLOAN) )  
) )  
Claimant-Respondent )  
) )  
v. )  
) )  
DRUMMOND COMPANY, )  
INCORPORATED )  
) )  
Employer-Petitioner )  
) )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
) )  
Party-in-Interest )

DATE ISSUED: 12/03/2019

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for claimant.

Will A. Smith and Katherine A. Collier (Maynard Cooper & Gale), Birmingham, Alabama, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits on Modification (2016-BLA-05995) of Administrative Law Judge Lystra A. Harris on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of the denial of a survivor's claim filed on November 13, 2006, and is before the Board for the third time.

In the initial decision, Administrative Law Judge Adele Higgins Odegard found the evidence did not establish pneumoconiosis and denied benefits. 20 C.F.R. §718.202. After Judge Odegard denied claimant's motion for reconsideration, claimant filed an appeal with the Board. The Board vacated the denial of benefits, remanding the case with instructions to address whether claimant could invoke the Section 411(c)(4) presumption of death due to pneumoconiosis.<sup>2</sup> See *Sloan v. Drummond Co.*, BRB No. 10-0448 BLA (Apr. 28, 2011) (unpub.).<sup>3</sup>

On remand, Judge Odegard found the evidence did not establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b). She therefore found claimant could not invoke the Section 411(c)(4) presumption. Judge Odegard further found claimant did not establish complicated pneumoconiosis and thus could not invoke the irrebuttable presumption of death due to pneumoconiosis. 30 U.S.C. §921(c)(3). She also found the evidence did not establish pneumoconiosis. 20 C.F.R. §718.202. Assuming the miner suffered from pneumoconiosis, she found the evidence did not establish the miner's death was due to the disease. 20 C.F.R. §718.205. Accordingly, she denied benefits.

Claimant timely moved for reconsideration. Judge Odegard again found the evidence did not establish total disability, precluding claimant from invoking the Section 411(c)(4) presumption. However, upon reconsideration, she found the autopsy evidence established clinical pneumoconiosis. 20 C.F.R. §718.202(a)(2). But Judge Odegard further found the evidence did not establish the miner's death was due to clinical pneumoconiosis and again denied benefits. 20 C.F.R. §718.205.

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<sup>1</sup> Claimant is the widow of the miner, who died on June 5, 2006. Director's Exhibit 12.

<sup>2</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis where the evidence establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

<sup>3</sup> The Board subsequently denied claimant's motion for reconsideration. *Sloan v. Drummond Co.*, BRB No. 10-0448 BLA (Sept. 30, 2011) (Order) (unpub.).

Pursuant to claimant's second appeal, the Board affirmed Judge Odegard's findings claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions. *Sloan v. Drummond Co.*, BRB No. 13-0285 BLA, slip op. at 3-8 (Oct. 2, 2014) (unpub.). The Board further affirmed her finding the evidence did not establish the miner's death was due to pneumoconiosis and affirmed Judge Odegard's denial of benefits.

Claimant timely requested modification. 20 C.F.R. §725.310. In a Decision and Order Denying Benefits on Modification (Decision and Order on Modification) dated September 21, 2018, Administrative Law Judge Lystra A. Harris (hereinafter, the administrative law judge) found no mistake of fact in Judge Odegard's determination claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions. She further found the evidence did not establish a mistake of fact in Judge Odegard's finding the evidence did not establish the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). The administrative law judge therefore denied modification. 20 C.F.R. §725.310.

On appeal, claimant contends the administrative law judge improperly excluded evidence she submitted in support of her modification request. Claimant also contends the administrative law judge erred in finding the evidence did not establish the miner's death was due to pneumoconiosis. Employer submitted as its response brief the closing brief it previously submitted to the administrative law judge, arguing claimant's modification request should be denied. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Denying Benefits on Modification if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

### **Modification**

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. 20 C.F.R. §725.310(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (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." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404

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<sup>4</sup> The miner's coal mine employment occurred in Alabama. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

U.S. 254, 256 (1971); see *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 242 (11th Cir. 1987). Moreover, a party need not submit new evidence because an administrative law judge has the authority “to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” *O’Keeffe*, 404 U.S. at 256.

Benefits are payable on survivors’ claims when the miner’s death is due to pneumoconiosis. See 20 C.F.R. §718.1, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner’s death will be considered due to pneumoconiosis if claimant invokes the presumptions at Sections 411(c)(3) or 411(c)(4), or establishes that pneumoconiosis was a substantially contributing cause of the miner’s death. 20 C.F.R. §§718.205(b)(1)-(4), 718.304, 718.305.

### **The Section 411(c)(3) Presumption**

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, establish an irrebuttable presumption that a miner’s death was due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 20 C.F.R. §718.304. The administrative law judge must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. See *Pittsburg & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 983 (11th Cir. 2007); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The administrative law judge accurately noted Judge Odegard found the x-ray, CT scan, and autopsy evidence did not establish complicated pneumoconiosis. Decision and Order on Modification at 10-11. The administrative law judge found no mistake of fact in Judge Odegard’s findings.<sup>5</sup> Decision and Order on Modification at 10-11.

Claimant alleges no specific error in the administrative law judge’s acceptance of Judge Odegard’s weighing of the previously submitted evidence. See *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 1-120 (1987). Because claimant provides the Board with no basis upon which to review the administrative law judge’s determinations, we affirm the administrative law judge’s finding that claimant did not establish a mistake of fact in Judge Odegard’s finding that the

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<sup>5</sup> As noted *supra*, the Board affirmed Judge Odegard’s findings. 20 C.F.R. §718.304(a)-(c); *Sloan*, BRB No. 13-0285 BLA, slip op. at 4-6.

evidence did not establish complicated pneumoconiosis, thereby precluding claimant from invoking the Section 411(c)(3) presumption. 20 C.F.R. §718.304; *see* 20 C.F.R. §802.211(b); *Sarf*, 10 BLR at 1-120.

Claimant, however, contends the administrative law judge improperly excluded new evidence she submitted in support of her modification request. Claimant's Brief at 20-26. Claimant submitted Dr. DePonte's interpretations of a September 13, 2005 x-ray and an April 4, 2005 CT scan. Dr. DePonte interpreted both the x-ray and the CT scan as positive for complicated pneumoconiosis. The administrative law judge found this evidence untimely, but found good cause established for its submission because it was responsive to Dr. Rosenberg's June 5, 2017 report that employer submitted just prior to the twenty-day deadline before the hearing. 20 C.F.R. §725.456(b)(2), (3). However, upon review of employer's motion for reconsideration of her ruling, the administrative law judge found Dr. DePonte's interpretations were not responsive to Dr. Rosenberg's report and excluded them. January 3, 2018 Order on Reconsideration at 2; Decision and Order on Modification at 5.

Claimant contends the administrative law judge erred in excluding Dr. DePonte's interpretations, asserting they are responsive to Dr. Rosenberg's report. Claimant's Brief at 23. We need not resolve this issue, however, because the administrative law judge found that even if she considered this evidence, it does not assist claimant in establishing complicated pneumoconiosis. The administrative law judge noted Dr. DePonte identified a Category A large opacity in the miner's right lower lobe on the September 13, 2005 x-ray and the April 4, 2005 CT scan. Decision and Order on Modification at 10 n.4. The administrative law judge, however, found the autopsy evidence called into question Dr. DePonte's readings, which she noted did not reveal a "large opacity of pneumoconiosis."<sup>6</sup> *Id.* An administrative law judge may permissibly accord the greatest weight to the autopsy evidence as the most reliable evidence regarding the existence of complicated pneumoconiosis.<sup>7</sup> *See Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman*

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<sup>6</sup> The Board previously affirmed Judge Odegard's determination the autopsy evidence did not establish complicated pneumoconiosis. *Sloan v. Drummond Co.*, BRB No. 13-0285 BLA, slip op. at 4-5 (Oct. 2, 2014) (unpub.). The current administrative law judge found no mistake of fact in Judge Odegard's determination. Decision and Order on Modification at 10-11.

<sup>7</sup> The administrative law judge noted Dr. DePonte was the only physician to identify a large opacity of pneumoconiosis on x-ray. Decision and Order on Modification at 10 n.4. She also noted another physician, Dr. Meyer, reviewed the April 4, 2005 CT scan, opining the right lower lobe nodule was not a manifestation of coal mine dust exposure. *Id.*; Director's Exhibit 111.

*v. Director, OWCP*, 7 BLR 1-688 (1985). Claimant does not challenge the administrative law judge's determination that Dr. DePonte's interpretations, even if considered, do not establish complicated pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm this finding.

### **The Section 411(c)(4) Presumption**

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found Judge Odegard did not make a mistake in a determination of fact in finding claimant failed to establish the miner had a totally disabling respiratory or pulmonary impairment and therefore could not invoke the Section 411(c)(4) presumption.<sup>8</sup> 30 U.S.C. §921(c)(4). Claimant alleges no specific error in the administrative law judge's acceptance of Judge Odegard's weighing of the previously submitted evidence. *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120.

The administrative law judge also considered new evidence, notably Dr. Smith's treatment notes and claimant's testimony at the June 27, 2017 hearing. Decision and Order on Modification at 12. The administrative law judge specifically considered Dr. Smith's notation that oxygen was ordered as part of the miner's care plan and claimant's testimony that the miner was on home oxygen. Director's Exhibit 105. The administrative law judge found this evidence did not support a finding that the miner was totally disabled from a respiratory standpoint. *Id.* at 11.

Dr. Smith's treatment notes indicate the doctor prescribed oxygen for the miner on May 17, 2016, less than one month before his death from multiple organ failure. Director's Exhibit 105. As the administrative law judge noted, Dr. Rosenberg explained that toward the end of the miner's life, he was in hospice care, suffering from multiple organ dysfunction and extensive colon cancer. Decision and Order on Modification at 8-9; Employer's Exhibit 1. She further noted that Dr. Rosenberg opined that, before the terminal events surrounding his death, the miner was not disabled from a pulmonary

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<sup>8</sup> The Board previously affirmed Judge Odegard's determination the evidence did not establish total disability. *Sloan*, BRB No. 13-0285 BLA, slip op. at 4-5.

standpoint.<sup>9</sup> *Id.* The administrative law judge also noted that Dr. Rosenberg explained that the miner's supportive care at the end of his life included oxygen and antibiotics. *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Smith's prescription of oxygen one month before the miner's death does not establish that the miner was totally disabled. *See* 20 C.F.R. §718.204(a) (providing that a nonpulmonary or nonrespiratory condition shall only be considered in determining whether a miner was totally disabled if it "causes a chronic respiratory or pulmonary impairment"). Claimant's testimony only supports a finding that the miner was on home oxygen, a fact the administrative judge found did not support a finding of total disability. We therefore affirm the administrative law judge finding there was no mistake of fact in Judge Odegard's determination the evidence did not establish total disability, thereby precluding claimant from invoking the Section 411(c)(4) presumption.

### **Death Due To Pneumoconiosis**

Where the presumptions at Sections 411(c)(3) or 411(c)(4) cannot be invoked, a miner's death will be considered due to pneumoconiosis if it was a substantially contributing cause of the miner's death, meaning that it hastened the miner's death. 20 C.F.R. §718.205(b)(1)-(4); *see Cornelius*, 508 F.3d at 980-81.

After reviewing the evidence, the administrative law judge found Judge Odegard did not make a mistake in finding the evidence did not establish the miner's death was due to pneumoconiosis. Decision and Order on Modification at 11-12. Although claimant generally contends that Dr. Okoye's autopsy report and the miner's death certificate establish the miner's death was due to pneumoconiosis, Claimant's Brief at 15-20, she alleges no specific error in the administrative law judge's acceptance of Judge Odegard's weighing of this evidence.<sup>10</sup> *See Cox*, 791 F.2d at 446; *Sarf*, 10 BLR at 1-120. We therefore affirm the administrative law judge's finding there was no mistake of fact in Judge Odegard's finding the evidence did not establish the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b).

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<sup>9</sup> Dr. Rosenberg explained an effort was made during the miner's hospice care to make him "comfortable." Employer's Exhibit 1 at 6.

<sup>10</sup> The Board previously affirmed Judge Odegard's finding that Dr. Okoye's opinion was not well-reasoned and was therefore insufficient to establish the miner's death was due to pneumoconiosis. *Sloan*, BRB No. 13-0285 BLA, slip op. at 9-10. The Board further affirmed Judge Odegard's finding the miner's death certificate, standing alone, did not establish the miner's death was due to pneumoconiosis. *Id.*

In light of our affirmance of the administrative law judge's determination that claimant did not establish a mistake of fact in the denial of her survivor's claim, we affirm the denial of modification. 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Modification is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge