

BRB No. 12-0294 BLA

DOROTHY L. TRAVIS)
(Widow of LIDDLE TRAVIS))
)
 Claimant-Petitioner)
)
 v.)
)
 WEST KEN COAL COMPANY c/o) DATE ISSUED: 02/27/2013
 ANDALEX RESOURCES)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Dorothy L. Travis, Madisonville, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits on Modification (2009-BLA-5556) of Administrative Law Judge

Joseph E. Kane, rendered on a survivor's claim filed on July 11, 2003, pursuant to the provisions of the Black Lung Benefits Act, as amended. 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ The relevant procedural history is as follows. In a Decision and Order dated July 22, 2008, Administrative Law Judge Daniel F. Solomon denied benefits, finding that claimant failed to prove that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, could not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant filed a timely request for modification of the denial on October 14, 2008, and the district director transferred the case to the Office of Administrative Law Judges, without issuing a proposed decision and order. In a Decision and Order dated February 16, 2012, Judge Kane (the administrative law judge) credited the miner with forty-three years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that there was no mistake in a determination of fact with respect to the prior denial of benefits and, therefore, found that claimant did not establish a basis for modification under 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the denial of her claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ The 2010 amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, do not apply to this claim, as it was filed before January 1, 2005.

² Because the record indicates that the miner's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 110.

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 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). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). 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); see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In order to establish a basis for modification in a survivor's claim, where the denial of benefits related solely to the miner's physical condition at the time of death, the survivor must demonstrate that there was a mistake in a determination of fact in the prior decision. See 20 C.F.R. §725.310; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge has the authority to consider all the evidence for any mistake in a determination of fact, including the ultimate fact of entitlement. See *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994); *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).

In this case, the administrative law judge reconsidered the evidence before Judge Solomon, along with the new evidence submitted by employer on modification,³ and found that claimant failed to establish that the miner suffered from clinical or legal pneumoconiosis.⁴ Specifically, pursuant 20 C.F.R §718.202(a)(1), the administrative law

³ Claimant did not submit any evidence in support of her modification request.

⁴ The regulation at 20 C.F.R. §718.201(a) provides:

"Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

judge noted that the miner's treatment and hospitalization records contain several x-rays, of which there were two positive readings for pneumoconiosis. Decision and Order at 7, 11-12. First, Dr. Hatfield interpreted the March 13, 1984 x-ray as revealing "a fine reticulo-nodular pattern throughout both lung fields that would be consistent with a diagnosis of pneumoconiosis, Category 1p." Director's Exhibit 11 at 96. Second, Dr. Gallo interpreted the September 18, 1984 x-ray as revealing "some background evidence of reticulation compatible with pneumoconiosis, Category 1p." *Id.* at 106. The administrative law judge found that the two treatment x-rays "weigh in favor of a finding of pneumoconiosis." Decision and Order at 16. The administrative law judge also considered three readings of two x-rays dated June 1, 2003 and May 22, 2003, submitted by employer. Employer's Exhibits 5, 111, 117. Drs. Wiot and Rosenberg interpreted the June 1, 2003 x-ray as negative for pneumoconiosis, and Dr. Wiot further interpreted the May 22, 2003 x-ray as negative for pneumoconiosis. *Id.*

As noted by the administrative law judge, Dr. Wiot is dually qualified as a Board-certified radiologist and B reader, and Dr. Rosenberg is a B reader. Decision and Order at 6. The administrative law judge, however, found that the record contains no evidence of the qualifications of either Dr. Hatfield or Dr. Gallo. *Id.* In resolving the conflict in the x-ray evidence, the administrative law judge permissibly assigned the greatest weight to Dr. Wiot's negative readings over the positive readings by Drs. Hatfield and Gallo "whose qualifications are unknown." *Id.* at 16; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (en banc). The administrative law judge also rationally credited the negative x-ray readings by Drs. Wiot and Rosenberg since he found that they were "bolstered by the x-rays in the treatment records, which -- except for those read by Drs. Gallo and Hatfield -- reported no active lung disease." Decision and Order at 16; *see Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). We, therefore, affirm the administrative law judge's finding that claimant failed to establish that the miner had pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1).

20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

Since there is no biopsy evidence of record, we affirm the administrative law judge's finding that claimant is unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 17. Additionally, the administrative law judge found correctly that claimant is unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3), as claimant is not eligible for any of the presumptions set forth in that subsection.⁵ *Id.*

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Leigh, Tuteur and Rosenberg. Director's Exhibits 113, 119, 124. The administrative law judge found that Dr. Leigh, a family practitioner, treated the miner between 1999 and 2003, and was the only physician to diagnose pneumoconiosis. The administrative law judge noted that Dr. Leigh treated the miner for non-respiratory conditions of chest pain, knee pain, a burned foot, and prostate issues.⁶ Decision and Order at 8. Although Dr. Leigh stated in one treatment note that the miner had severe chronic obstructive pulmonary disease, and indicated on the miner's death certificate that "pneumoconiosis" was a cause of the miner's death, the administrative law judge observed that the miner's lungs were "consistently described as clear and free of wheezes, rales and rhonchi" in the treatment record. *Id.* at 11. The administrative law judge determined that Dr. Leigh's opinion was entitled to "no weight" and explained:

I do not find that Dr. Leigh gave a well-reasoned and credible medical opinion on the existence of pneumoconiosis. Dr. Leigh, who is not a Board-certified pulmonologist, but only a family practitioner, revealed that he was not an expert on lung disease, and that he *never treated the [m]iner for his lungs.* (DX 124-14, 46, 57) (see also DX 124 at 65-66) . . .

⁵ The administrative law judge properly determined that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304, as the administrative law judge properly found that there is no evidence establishing that the miner had complicated pneumoconiosis. Decision and Order at 17; *see* 20 C.F.R. §718.304. He also properly found that claimant is not entitled to the presumption at 20 C.F.R. §718.305, based on the filing date of her survivor's claim, and she is not entitled to the presumption at 20 C.F.R. §718.306, since this is not a case where the miner died on or before March 1, 1978. Decision and Order at 17; *see* 20 C.F.R. §§718.305, 718.306.

⁶ The record contains multiple copies of the same medical evidence. Dr. Leigh's treatment records are contained at Director's Exhibits 9, 11, 12, 129. Dr. Leigh completed the miner's death certificate, prepared an opinion letter on March 29, 2004, completed a questionnaire on August 2, 2005, and testified by deposition on October 29, 2007. Director's Exhibits 11a, 99, 108, 124, 125.

Moreover, Dr. Leigh stated that he was unfamiliar with the [m]iner's coal mine employment and smoking histories, which also subtracts from the probative value of his opinions. Finally, Dr. Leigh gave no reasons for his diagnosis of pneumoconiosis, but only stated that he relied on Dr. Gallo, which is not a well[-] reasoned medical opinion. For all these reasons, I give no weight to Dr. Leigh's medical opinion regarding pneumoconiosis.

Decision and Order at 18 (emphasis added).

Based on our review of the evidence of record, we conclude that the administrative law judge acted within his discretion in finding that Dr. Leigh's opinion was not sufficiently reasoned to satisfy claimant's burden of proof. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge permissibly assigned no weight to Dr. Leigh's opinion, that the miner had clinical pneumoconiosis, since it was based solely on the positive x-ray reading by Dr. Gallo, whose credentials are not of record, as discussed *supra* at 4, and the miner's symptom of shortness of breath. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18.

The administrative law judge also rationally found that Dr. Leigh's opinion, that the miner had legal pneumoconiosis, in the form of chronic obstructive pulmonary disease, was not credible since Dr. Leigh did not know the length of the miner's coal mine work history or the length and extent of the miner's smoking history.⁷ *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark*, 12 BLR at 1-155. Additionally, the administrative law judge properly took into consideration Dr. Leigh's qualifications, in deciding the weight to assign her opinion. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005); Decision and Order at 18.

Because the administrative law judge has discretion to determine the credibility of the medical experts, we affirm his findings with respect to Dr. Leigh. *See Wolf Creek*

⁷ Dr. Leigh testified that she was unaware of the miner's coal mine employment history other than knowing that the miner "worked in the coal mines for several years." Director's Exhibit 108 at 11-12. Dr. Leigh further testified that she was not aware of how long the miner smoked, but knew he stopped smoking twenty years prior to her treatment. *Id.* at 57-58. The administrative law judge determined that the miner had forty-three years of above ground coal mine employment and a smoking history "one and one-half packs-per day" for forty years, from 1938 to 1978. Decision and Order at 4-5.

Collieries v. Director, OWCP [Stephens], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Since Dr. Leigh's is the only medical opinion supportive of claimant's burden of proof, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).⁸

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if her evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because claimant failed to establish that the miner suffered from pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310, and affirm the denial of survivor's benefits. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

⁸ Because we affirm the administrative law judge's credibility determinations with regard to Dr. Leigh, it is not necessary that we address his findings with regard to Drs. Rosenberg and Tuteur, as neither physician diagnosed pneumoconiosis.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge