BRB No. 13-0248 BLA

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| PATRICIA K. EDWARDS<br>(Widow of CHARLEY M. EDWARDS) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| | ) | DATE ISSUED: 02/24/2014 |
| EMPIRE MINING COMPANY | ) | |
| and | ) | |
| OLD REPUBLIC INSURANCE COMPANY | ) | |
| Employer/Carrier-<br>Respondents | ) | |
| 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 Second Modification Request of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Patricia K. Edwards, Wise, Virginia, *pro se*.

Laura Metkoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order – Denial of Second Modification Request (2011-BLA-5711) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge), rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on August 17, 2004.[2] Director's Exhibit 2.

In a Decision and Order dated March 29, 2007, Administrative Law Judge Pamela Lakes Wood credited the miner with ten and one-quarter years of coal mine employment,[3] and found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Wood denied benefits.

Upon review of claimant's appeal, the Board affirmed Judge Wood's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement. Accordingly, the Board affirmed the denial of benefits. *P.E.* [*Edwards*] *v. Empire Mining, Inc.*, BRB No. 07-0867 BLA (July 16, 2008)(unpub.).

Claimant timely requested modification pursuant to 20 C.F.R. §725.310, which the district director denied, in a Proposed Decision and Order that became final on August 28, 2009. Director's Exhibits 67, 70, 74. On August 11, 2010, claimant timely filed a second request for modification and submitted additional evidence. Director's Exhibit 75. The district director denied modification and claimant requested a hearing, which was held before the administrative law judge on April 10, 2012. Director's Exhibits 77, 79, 82.

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[1] Ron Carson, the Program Director at 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).

[2] Because claimant filed her claim before January 1, 2005, recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case. Unless otherwise indicated, the relevant version of all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

On February 8, 2013, the administrative law judge issued his Decision and Order – Denial of Second Modification Request, which is the subject of the current appeal. The administrative law judge credited the miner with "just less than" ten years of coal mine employment, Decision and Order at 9, and found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Finding that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer/carrier responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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 Co*., 12 BLR 1-176, 1-177 (1989). The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b)[4]; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, and before January 1, 2005, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(b)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish

[4] After the administrative law judge issued his decision, the Department of Labor revised 20 C.F.R. §718.205, effective October 25, 2013. The provisions at 20 C.F.R. §718.205(c) that were applied by the administrative law judge are now set forth at 20 C.F.R. §718.205(b). 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.205(b)).

any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

A party may request modification of an award or denial of benefits within one year of the prior decision. 20 C.F.R. §725.310(a). The sole basis available for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *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." *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, 18 BLR 2-26 (4th Cir. 1993).

In finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge correctly found that the record contains no positive x-ray interpretations. Specifically, the administrative law judge considered that Dr. Navani, a Board-certified radiologist, interpreted an October 23, 1985 x-ray as "0/1" under the ILO classification system, an interpretation that does not constitute evidence of pneumoconiosis. 20 C.F.R. §718.102(b); Director's Exhibits 1, 52. Additionally, the administrative law judge accurately found that none of the multiple x-ray interpretations contained in the miner's hospitalization and treatment records was positive for pneumoconiosis. Decision and Order at 17; Director's Exhibits 10, 11, 52. We therefore affirm the administrative law judge's finding that claimant failed to meet her burden of proof at 20 C.F.R. §718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Turning to the autopsy evidence under 20 C.F.R. §718.202(a)(2), the administrative law judge accurately found that Dr. Robertson, the autopsy prosector, diagnosed squamous cell carcinoma, emphysematous changes, and moderate to severe anthracosis. Decision and Order at 18; Director's Exhibit 11. In a supplemental letter, Dr. Robertson stated that the autopsy findings were "consistent with coal workers[']pneumoconiosis." Director's Exhibit 67. In contrast, Dr. Crouch reviewed the autopsy report and the slide specimens taken during the autopsy, and opined that the miner's lung tissue showed coal dust deposition only, with no evidence of pneumoconiosis.[5] Decision and Order at 18-19; Director's Exhibit 52. Finding that both physicians conducted microscopic evaluations of the miner's lung tissue and were "equally well qualified" in Anatomic Pathology, Decision and Order at 20, the administrative law judge found that their conflicting diagnoses "rendered the autopsy evidence inconclusive" as to the

[5] Dr. Crouch agreed with Dr. Robertson's diagnosis of carcinoma of the lung. Director's Exhibit 52.

existence of pneumoconiosis. *Id*. Because the administrative law judge reasonably considered the physicians' qualifications and the documentation underlying their opinions, we affirm his determination that claimant did not meet her burden to establish the existence of pneumoconiosis based on the autopsy evidence, pursuant to 20 C.F.R. §718.202(a)(2). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge considered whether the evidence established the existence of complicated pneumoconiosis, thereby entitling claimant to invoke the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.[6] Pursuant to 20 C.F.R. §718.304(a), the administrative law judge accurately noted that several x-ray interpretations contained in the miner's treatment records described a lung mass that was approximately seven centimeters in diameter, but did not diagnose a large opacity of pneumoconiosis. Director's Exhibits 10, 11, 52; Decision and Order at 17. Pursuant to 20 C.F.R. §718.304(b), the administrative law judge correctly found that the autopsy evidence did not establish the existence of "massive lesions" pursuant to 20 C.F.R. §718.304(b), as neither Dr. Crouch, nor Dr. Robertson, diagnosed massive lesions, progressive massive fibrosis, or described masses of pneumoconiosis that would appear as greater-than-one-centimeter opacities if seen on a chest x-ray. *See E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); Decision and Order at 19. The administrative law judge also considered whether complicated pneumoconiosis was established by other diagnostic methods, pursuant to 20 C.F.R. §718.304(c). As the administrative law judge accurately found, multiple CT scan interpretations in the miner's treatment records

[6] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which: (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) 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, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *see E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(en banc).

identified a large mass in the miner's right lung, but none of those interpretations identified the mass as pneumoconiosis.[7] Director's Exhibits 11, 52, 75.

Substantial evidence supports the administrative law judge's finding that claimant did not establish that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c). Therefore, we affirm the administrative law judge's determination that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis.[8]

In considering whether claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical reports of Drs. Paranthaman, Prince, and Wheatley, the miner's death certificate, and multiple treatment notes and hospitalization records.

Dr. Paranthaman examined the miner in 1985 and diagnosed him with "early changes of coal workers' pneumoconiosis," based on an "0/1" reading of the October 23, 1985 chest x-ray. Director's Exhibits 1, 52. Dr. Paranthaman also diagnosed chronic bronchitis due to heavy cigarette smoking and, "to a lesser extent," coal mine dust exposure. *Id*. The administrative law judge reasonably found that Dr. Paranthaman's diagnosis of early coal workers' pneumoconiosis was entitled to diminished probative weight because it was based on the "0/1" x-ray reading that did not constitute evidence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000); *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Further, the administrative law judge permissibly discounted Dr. Paranthaman's diagnosis of legal pneumoconiosis,[9] because the physician did not explain the basis for his conclusion that the miner's chronic bronchitis was related to coal mine dust exposure. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

[7] A review of the record does not disclose a medical report or treatment record that diagnosed the miner with complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(c).

[8] The remaining presumptions listed at 20 C.F.R. §718.202(a)(3) are inapplicable to this claim filed after June 30, 1982, and before January 1, 2005. *See* 20 C.F.R. §§718.305, 718.306.

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

In addition, the administrative law judge rationally discounted Dr. Prince's June 23, 2005 diagnosis of coal workers' pneumoconiosis, because it was based solely on the autopsy results, which the administrative law judge found to be inconclusive for the existence of pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174. Further, the administrative law judge permissibly found that Dr. Wheatley's March 23, 2005 diagnosis of pneumoconiosis was not well-reasoned, because the physician "failed to discuss the basis for his conclusion." Decision and Order at 34; *see Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Additionally, the administrative law judge correctly found that the reports and treatment notes of Drs. Prince and Wheatley contained diagnoses of chronic obstructive pulmonary disease and asthmatic bronchitis, but that neither physician related those conditions to coal mine dust exposure. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Decision and Order at 34. Similarly, the administrative law judge accurately found that another treating physician, Dr. Shukla, did not provide an opinion regarding the etiology of the chronic obstructive pulmonary disease that he diagnosed in his treatment notes. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); Decision and Order at 33. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence, treatment records, and the miner's death certificate[10] did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Trumbo*, 17 BLR at 1-88-89 and n.4.

Finally, the administrative law judge weighed all of the evidence together, and reasonably found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Compton*, 211 F.3d at 211, 22 BLR at 2-174; Decision and Order at 35. We therefore affirm that finding, and the administrative law judge's determination that claimant did not establish a mistake of fact in the prior determination that she did not establish pneumoconiosis. *See* 20 C.F.R. §725.310; *see Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *Wojtowicz*, 12 BLR at 1-164. Because claimant did not establish the existence of pneumoconiosis, a necessary element of entitlement in a survivor's claim under Part 718, she did not establish entitlement to benefits. *See Trent*, 11 BLR at 1-27.

[10] The death certificate indicates that the miner died on July 8, 2004, of metastatic lung cancer. Director's Exhibit 9.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge