

BRB No. 13-0252 BLA

LINDA ANDERSON)
(Widow of GEROID ANDERSON))
)
 Claimant-Petitioner)
)
 v.)
)
 APPLETON & RATLIFF COAL)
 CORPORATION)
)
 and)
)
 KNOX CREEK COAL CORPORATION c/o) DATE ISSUED: 02/27/2014
 UNDERWRITERS SAFETY & CLAIMS)
)
 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 Request for Modification of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Request for Modification (11-BLA-5199) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).² This is the third time this case has been on appeal to the Board.³

When this case was most recently before the Board, the Board affirmed Administrative Law Judge Joseph E. Kane's rejection of claimant's evidentiary arguments, as well as her argument that she established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Board also affirmed Judge Kane's rejection of the evidentiary challenges employer made on cross-appeal. Accordingly, the Board affirmed Judge Kane's decision denying benefits. *L.A. [Linda Anderson] v. Appleton & Ratliff Coal Corp.*, BRB Nos. 09-0189 BLA and 09-0189 BLA-A (Sept. 2, 2009)(unpub).

On June 28, 2010, claimant filed a timely request for modification. The district director denied claimant's request on October 2, 2010. Claimant requested a hearing, and the case was assigned to Judge Silvain (the administrative law judge) for a formal hearing. The administrative law judge considered the new evidence submitted on modification in conjunction with the evidence previously submitted. He found that claimant established that the miner suffered from clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), but did not establish that the miner suffered from legal pneumoconiosis or that his death was due to

¹ Claimant is the widow of the miner, Geroid Anderson, who died on October 30, 2001. Director's Exhibit 10. Claimant filed this survivor's claim on January 15, 2002. Director's Exhibit 3; Decision and Order at 2.

² Administrative Law Judge Peter B. Silvain, Jr. (the administrative law judge) found that, because this survivor's claim was filed before January 1, 2005, the 2010 amendments to the Act do not affect this case. *See* Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(l))(2012); Decision and Order at 2, 25. As this finding is unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ When this case was most recently before the Board, the full procedural history of the case was incorporated by reference into the Board's decision. *See L.A. [Linda Anderson] v. Appleton & Ratliff Coal Corp.*, BRB Nos. 09-0189 BLA and 09-0189 BLA-A, slip op. at 2 n.2 (Sept. 2, 2009)(unpub.) *citing* *L.A. [Linda Anderson] v. Appleton & Ratliff Coal Corp.*, BRB No. 06-0754 BLA, slip op. at 1-2 (Apr. 26, 2007)(unpub.).

pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.205(c).⁴ The administrative law judge therefore concluded that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's weighing of the medical opinion evidence on the issues of legal pneumoconiosis and death causation. Specifically, claimant contends that the administrative law judge failed to accord appropriate weight to the opinions of the miner's treating physician, Dr. Gibson, and the autopsy prosector, Dr. Dennis. Claimant also contends that the administrative law judge accorded too much weight to the opinions of non-examining physicians. In response to claimant's appeal, employer urges affirmance of the administrative law judge's decision denying benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal.

The Board's scope of review is defined by statute. 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.⁵ 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 (1965).

Because this survivor's claim was filed after January 1, 1982, but before January 1, 2005, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where the miner's death was caused by complications of pneumoconiosis, or where the miner had complicated pneumoconiosis.⁶ 20 C.F.R. §§718.1, 718.202,

⁴ The administrative law judge's finding that the miner had sixteen years of coal mine employment is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

⁵ We 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); Director's Exhibit 1; Decision and Order at 4.

⁶ The administrative law judge found that there is no evidence in the record to establish that the miner had complicated pneumoconiosis. The administrative law judge found that claimant was not entitled to the presumptions contained in 20 C.F.R.

718.203, 718.205(c), 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In order for claimant to establish a basis for modification in this survivor's claim, claimant 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). A claimant need not, however, allege specific error made by the administrative law judge in order to establish a basis for modification. Rather, the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); see *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

Legal Pneumoconiosis

The evidence relevant to the issue of legal pneumoconiosis contains the autopsy report of Dr. Dennis, diagnosing both heart disease and respiratory disease. Director's Exhibit 11. The record also contains the reports of Dr. Gibson, finding that the miner had lung disease due to coal mine employment, Director's Exhibits 31, 49, 57, 117, and the report of Dr. DeLara, stating that the miner's lung disease was due to his coal mine employment, Director's Exhibit 56. Additionally, the record contains the contrary report of Dr. Caffrey, who found that the miner did not have an occupational lung disease, Director's Exhibit 40; the report of Dr. Tomashefski, who reviewed the miner's medical records, found pathological evidence of emphysema, and diagnosed hypertensive cardiomegaly, diffuse interstitial fibrosis and metastatic adenocarcinoma, Director's Exhibit 32; and the report and deposition testimony of Dr. Fino, who found that the miner had chronic obstructive pulmonary disease (COPD) and metastatic lung cancer, but that

§§718.304-718.306. Because claimant does not challenge these findings on appeal, they are affirmed. *Skrack*, 6 BLR at 1-711.

neither of these diseases was related to the miner's coal mine employment. Director's Exhibits 62, 72.

In evaluating this evidence, the administrative law judge agreed with Judge Kane's previous determination⁷ that the medical reports Judge Kane reviewed failed to establish the existence of legal pneumoconiosis. Decision and Order at 28. Specifically, the administrative law judge found that Judge Kane properly concluded that the reports of Drs. Dennis and Tomashefski were insufficient to establish legal pneumoconiosis because, while they found respiratory disease, they did not attribute it to coal mine employment. Decision and Order at 28; Director's Exhibit 11, 32; 20 C.F.R. §718.201. The administrative law judge also noted that, while Drs. Gibson and DeLara diagnosed legal pneumoconiosis, Judge Kane acted properly when he found their opinions unreasoned because they were limited to checking "yes" boxes to a questionnaire, with no accompanying reasoning or explanation. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); Decision and Order at 28 *citing* Director's Exhibit 101 at 16. Considering the sole medical report submitted in support of modification, the administrative law judge found that Dr. Gibson's report of July 26, 2010, was essentially identical to the reports he prepared on March 29, 2003, March 15, 2003, and September 13, 2005, and did not contain any additional evidence or offer any new opinion or reasoning. Decision and Order at 17-18, 28. The administrative law judge therefore properly concluded that Dr. Gibson's new medical opinion "adds nothing to the evidence previously considered by Judge Kane." *See Clark*, 12 BLR 1-155; Decision and Order at 28. Consequently, the administrative law judge properly concluded that the evidence failed to establish legal pneumoconiosis pursuant to Section 718.202(a)(4) and thereby failed to establish that a mistake in a determination of fact had been made pursuant to Section 725.310.

Death Due to Clinical Pneumoconiosis

The evidence relevant to the cause of death contains the miner's death certificate, authored by Dr. Gibson, the miner's treating physician. Dr. Gibson listed myocardial infarction, hypoxia, and lung cancer as the immediate causes of death, but added that "COPD, coal pneumoconiosis [sic] was a significant condition that contributed to the [m]iner's death but was not the underlying cause." Decision and Order at 30; Director's Exhibit 10. The record also contains several reports by Dr. Gibson, that the miner's clinical pneumoconiosis contributed to, or hastened, the miner's death. Decision and

⁷ The administrative law judge adopted the factual summary findings from Administrative Law Judge Joseph E. Kane's June 16, 2006 decision. Decision and Order at 4.

Order at 32; Director's Exhibits 31, 49, 57, 111. Additionally, the record contains the autopsy report of Dr. Dennis, who attributed the miner's death to pulmonary embolus, which caused pulmonary congestion, edema, and cardiac arrhythmia with hypoxia. Dr. Dennis also opined that the miner's death was hastened by anthracosilicosis, because the anthracosilicosis weakened the miner's lungs, making them susceptible to dysplasia and other infectious disease and malignant change. Decision and Order at 30; Director's Exhibit 37. Dr. DeLara also opined that the miner's clinical and legal pneumoconiosis contributed to, and hastened, the miner's death. Decision and Order at 32; Director's Exhibit 56.

In contrast, the record includes the report of Dr. Caffrey, who opined that the miner's death was caused by metastatic lung cancer. Decision and Order at 31; Director's Exhibit 40. The record also contains the report of Dr. Tomashefski, who stated that the miner's minimal simple silicosis did not contribute to, or cause, the miner's death, which was instead due to metastatic adenocarcinoma unrelated to coal mine employment. Dr. Tomashefski opined that the miner would have died at the same time and in the same manner had he never worked in coal mining. Director's Exhibit 31. Finally, the record contains the report of Dr. Fino, who diagnosed the existence of clinical pneumoconiosis, but opined that it did not cause, contribute to, or hasten the miner's death. Dr. Fino opined that the miner died due to lung cancer unrelated to coal mine employment, and that the miner would have died at the same time and in the same manner even if he had never engaged in coal mine employment. Decision and Order at 32; Director's Exhibit 62.

In addressing the relevant evidence of record, the administrative law judge noted that, although Dr. Gibson had personal knowledge upon which to base his opinion concerning the cause of the miner's death, his reports "did not cite to any particular autopsy findings or otherwise explain how the miner's death was hastened by pneumoconiosis." Decision and Order at 32. The administrative law judge noted that they "were merely undocumented answers to questionnaires" lacking "reasoned diagnoses based upon the available medical evidence." Decision and Order at 30, 32. Hence, the administrative law judge properly accorded "little weight" to Dr. Gibson's reports, which he found to be unreasoned and undocumented, on the issue of death causation. *See Clark*, 12 BLR at 1-155.

In considering the death certificate, authored by Dr. Gibson, the administrative law judge agreed with Judge Kane that it was insufficient to establish that the miner's clinical pneumoconiosis hastened his death because Dr. Gibson failed to explain how the miner's death was hastened by pneumoconiosis, and because Dr. Gibson's supplemental reports provided no reasoning or documentation to support such a conclusion. *See Williams*, 338 F.3d at 514, 22 BLR at 2-647-49. Consequently, the administrative law judge properly

found that the death certificate “has little probative value,” and agreed with Judge Kane that it failed to establish that clinical pneumoconiosis hastened the miner’s death. Decision and Order at 29-30.

Turning to the other medical reports, the administrative law judge agreed with Judge Kane that Dr. Dennis’s autopsy report, that clinical pneumoconiosis weakened the miner’s lungs, leading to the development of other conditions like pneumonia and pulmonary embolism, “amounts to little more than a statement that silica is harmful to the lungs and leaves the patient more vulnerable to a pulmonary death.” Decision and Order at 31. The administrative law judge properly found that such a statement did not provide a sufficient explanation to show how pneumoconiosis hastened the miner’s death through a specifically defined process that reduced the miner’s life by an estimable time. *Williams*, 338 F.3d at 514, 22 BLR at 2-647-49; Decision and Order at 11-12, 31.

Similarly, the administrative law judge concurred with Judge Kane’s assignment of “little probative weight” to Dr. DeLara’s opinion, that the miner’s death was hastened by the “underlying pulmonary disease ... of [b]lack [l]ung,” because it was unsupported “with specific medical evidence...[showing] that the miner’s clinical pneumoconiosis hastened his death by an estimable time.” Decision and Order at 32 and n.15.

In contrast, the administrative law judge found, consistent with Judge Kane’s findings, that Dr. Caffrey’s opinion warranted “some probative weight,” despite his failure to diagnose clinical pneumoconiosis, because he explained how the miner’s lung carcinoma, which metastasized to the brain and abdomen, caused the miner’s death. Decision and Order at 31-32; Director’s Exhibit 21; *Clark*, 12 BLR at 1-155. The administrative law judge further agreed with Judge Kane that Dr. Tomashefski’s opinion, that the miner’s silicosis was too minimal to cause respiratory symptoms or death, was entitled to “substantial probative weight” because it was “rational and well explained.” *Clark*, 12 BLR at 1-155. Decision and Order at 32. Similarly, the administrative law judge agreed with Judge Kane’s assignment of substantial probative weight to Dr. Fino’s opinion, as his conclusions were based on the miner’s medical history, which demonstrated that “the rapid onset of the miner’s symptoms was inconsistent with pneumoconiosis, and that prior to his final illness, the miner’s pneumoconiosis produced little or no disability.” Decision and Order at 33. The administrative law judge was therefore “persuaded” by Dr. Fino’s explanation that the miner’s death was not hastened by pneumoconiosis. *Id*; *Williams*, 338 F.3d at 514, 22 BLR at 2-647-49.

In sum, therefore, the administrative law judge properly found that the medical evidence as a whole failed to establish that the miner’s death was due to clinical pneumoconiosis. The administrative law judge, therefore, rationally found that no mistake in a determination of fact was made in Judge Kane’s prior denial of benefits.

We find no merit in claimant's assertion that the administrative law judge "erred by not according proper weight" to the opinion of Dr. Gibson based on his status as the miner's treating physician. Claimant's Brief at 2, 10. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge has broad discretion to determine the credibility of a medical opinion based on the rationale provided by the physician. *See* 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995). The opinions of treating physicians are not presumptively correct or afforded automatic deference in black lung litigation, *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). Rather, they "get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647. Thus, the weight accorded to the opinion of a treating physician is based on the credibility of that opinion in light of its reasoning and documentation. 20 C.F.R. §718.104(d)(5). In this case, the administrative law judge rationally discounted Dr. Gibson's opinion that clinical pneumoconiosis was a significant contributing condition to the miner's death because he found that Dr. Gibson's statements on the miner's death certificate and in his reports were unreasoned. The administrative law judge was not required to accord greater weight to the opinion of Dr. Gibson because he was the miner's treating physician. *See* 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). Further, contrary to claimant's assertion, the opinion of Dr. Dennis is not automatically entitled to greater weight merely because he was the autopsy prosector. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992). Lastly, we reject claimant's contention that the opinions of Drs. Caffrey, Tomashefski, and Fino were not entitled to significant weight because they were non-examining physicians. *Collins v. J&L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999).

Claimant raises no further arguments with respect to the administrative law judge's consideration of the medical evidence.⁸ We affirm, therefore, his findings that

⁸ Claimant generally asserts that her testimony "supports the conclusions set forth by Drs. Dennis, Gibson and DeLara." Claimant's Brief at 10. As the cause of the miner's death is a medical determination, "competent medical evidence" is required to establish that the miner's death was due to pneumoconiosis at Section 718.205. *See* 20 C.F.R. §718.205(c), (d); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1989). In this case, while the administrative law judge reviewed claimant's testimony, he ultimately rejected the medical opinions relied on by claimant, and rationally credited contrary medical evidence as to the cause of the miner's death. Decision and Order at 4. Thus, as entitlement to benefits could not be established through lay testimony alone, claimant's assertion is meritless.

claimant did not establish: that the miner had legal pneumoconiosis pursuant to Section 718.202(a)(4); that the miner's clinical pneumoconiosis caused, substantially contributed to, or hastened, the miner's death pursuant to Section 718.205(c); and that a mistake in a determination of fact was made pursuant to Section 725.310.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge