BRB No. 99-0431 BLA

ZELLA BLALOCK (Widow of ARTHUR LEWIS BLALOCK)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Zella Blalock, Clinton, Tennessee, *pro se*.

Jeffrey S. Goldberg, (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (98-BLA-0910) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) denying modification in a duplicate miner's claim and denying benefits in a

[1]Claimant is the widow of the miner, Arthur Lewis Blalock, who died on March 2, 1997. Director's Exhibits 82, 84.

survivor's 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).[2] The administrative law judge credited the miner with about six years of coal mine employment and adjudicated both the miner's duplicate claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found the newly submitted evidence

[2]The miner filed his initial claim with the Social Security Administration (SSA) on December 10, 1970. Director's Exhibit 16. This claim was denied by the SSA on March 3, 1971 and August 10, 1973. *Id*. Further, on June 10, 1979, the SSA again denied the miner's claim and informed the miner that his claim was being forwarded to the Department of Labor (DOL). *Id.* However, while the miner's 1970 claim was pending before the SSA, the miner filed another claim with the DOL on April 8, 1975, which merged with the miner's 1970 claim. *Id*. After several administrative denials by the DOL, Administrative Law Judge Edward J. Murty, Jr. issued a Decision and Order denying benefits on December 11, 1981. *Id*. The bases of Judge Murty's denial were the miner's failure to establish the existence of pneumoconiosis and total disability. *Id*. Further, on February 2, 1982, Judge Murty denied the miner's request for reconsideration. *Id*. Inasmuch as the miner did not pursue this claim any further, the denial became final. The miner filed his most recent claim with the DOL on April 15, 1985. Director's Exhibit 1. On March 30, 1988, Administrative Law Judge E. Earl Thomas issued a Decision and Order denying benefits because the miner failed to establish a material change in conditions, Director's Exhibit 21, which the Board affirmed, *Blalock v. Director, OWCP*, BRB No. 88-1506 BLA (Oct. 19, 1990)(unpub.). The Board also denied the miner's request for reconsideration. *Blalock v. Director, OWCP*, BRB No. 88-1506 BLA (Order)(June 18, 1991)(unpub.). In response to the miner's August 31, 1991 letter disagreeing with the Board's denial of his claim, Director's Exhibit 33, the Board remanded the case to the district director to consider modification pursuant to 20 C.F.R. §725.310. *Blalock v. Director, OWCP*, BRB No. 88-1506 BLA (Order)(July 29, 1993)(unpub.). On September 5, 1995, Judge Thomas issued a Decision and Order denying benefits based on the miner's failure to establish modification. Director's Exhibit 54. Judge Thomas also denied the miner's request for reconsideration. Director's Exhibit 56. On October 12, 1995, the miner filed a letter disagreeing with Judge Thomas' denial of benefits, Director's Exhibit 57, which the DOL construed as a request for modification, Director's Exhibit 59. Administrative Law Judge Christine McKenna issued a Decision and Order denying benefits, which the Board affirmed, *Blalock v. Director, OWCP*, BRB No. 97-0605 BLA (Dec. 4, 1997)(unpub.). On September 5, 1997, claimant filed her survivor's claim, Director's Exhibit 84, which the DOL also construed as a request for modification in the miner's claim, Director's Exhibit 83.

insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge concluded that the evidence was insufficient to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and thus, he denied benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found that, even assuming that the miner suffered from coal workers' pneumoconiosis, the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address the administrative law judge's findings with respect to the miner's duplicate claim. In considering whether claimant established a basis for modification of Administrative Law Judge Christine McKenna's denial of benefits, the administrative law judge should have considered whether the newly submitted evidence on modification is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. Nonetheless, we hold that the administrative law judge's error in this regard is harmless in view of the administrative law judge's proper determination that the newly submitted evidence on modification is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a

material change in conditions pursuant to 20 C.F.R. §725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994). The miner's previous claim was denied because he failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 16. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309, and thus, a change in conditions at 20 C.F.R. §725.310, the newly submitted evidence on modification must support a finding of either the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(c).

We affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) since the newly submitted x-ray readings of record are negative for pneumoconiosis. Director's Exhibits 87-89. We also affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since there is no biopsy or autopsy evidence of record. In addition, we hold as a matter of law that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because the miner filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Further, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the newly submitted reports of Drs. Bingham and Thompson.[3] In the "Past Medical History" section of his June 5, 1996 report,

[3]The administrative law judge stated that "there was the report of a normal pulmonary function study from Dr. Swann, who nonetheless diagnosed pneumoconiosis." Decision and Order at 4. The record indicates that Dr. Swann's March 18, 1976 report was previously submitted into the record with respect to a prior miner's claim. Director's Exhibit 16. Nonetheless, inasmuch as the administrative law judge discredited Dr. Swann's opinion because he found that "a diagnosis of pneumoconiosis based solely on a normal pulmonary function test is not credible," Decision and Order at 4, we hold that the administrative law judge's error in considering this opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-

Dr. Thompson found that the miner suffered from chronic bronchitis and other breathing problems secondary to black lung diagnosed in 1970. Director's Exhibit 87. Similarly, in the "Past Medical History" section of his February 17, 1997 report, Dr. Thompson found that the miner suffered from black lung disease with resultant chronic bronchitis and other breathing problems. Director's Exhibit 87. Further, Dr. Bingham found that it is possible that some of the miner's symptoms are due to exposure to coal mining. Director's Exhibit 88. The administrative law judge properly discredited the opinion of Dr. Thompson because he found it to be not well reasoned.[4] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, the administrative law judge properly discredited the opinion of Dr. Bingham because he found it to be equivocal.[5] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Therefore, since the administrative law judge properly discredited the only medical opinions of record that could support a finding of pneumoconiosis, we hold

---

18 (6th Cir. 1994).

[4]The administrative law judge observed that "[a]lthough Dr. Thompson, the miner's treating oncologist, does mention pneumoconiosis, this appears to be based on the history that was reported to him rather than on his own medical opinion." Decision and Order at 4. The administrative law judge stated that "[t]o the extent that [Dr. Thompson's] notations of black lung disease might be considered diagnostic of that disease, they are completely unexplained and thus would not be credible in any event." *Id*. The Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of nontreating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The Sixth Circuit has also indicated, however, that this principle does not alter the administrative law judge's duty, as fact-finder, to evaluate the credibility of the treating physician's opinion. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the present case, the administrative law judge rationally found that Dr. Thompson's opinion is insufficient to establish the existence of pneumoconiosis because he found it to be not well reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

[5]The administrative law judge observed that "Dr. Bingham, who was the miner's family physician, stated only that it is possible some of his symptoms were due to coal mining." Decision and Order at 4. The administrative law judge stated that "[t]his unexplained and imprecise speculation is not a diagnosis of pneumoconiosis." *Id*.

that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. Since the record contains no newly submitted pulmonary function study evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1). Further, since the newly submitted arterial blood gas study dated October 19, 1993 did not yield qualifying[6] values, Director's Exhibit 88, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(2). Director's Exhibit 88. Additionally, we hold as a matter of law that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since the record does not contain evidence of cor pulmonale with right sided congestive heart failure.

Finally, we address the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). The administrative law judge correctly stated that "no physician has offered an opinion that the miner has a totally disabling respiratory or pulmonary impairment." Decision and Order at 5. Neither Dr. Bingham nor Dr. Thompson rendered an opinion with respect to the issue of total disability. Director's Exhibits 87, 88. Therefore, since none of the physicians opined that claimant suffered from a disabling respiratory or pulmonary impairment, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since the newly submitted evidence on modification is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), we hold that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Ross, supra*. Consequently, we hold that

[6]A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(2).

substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Furthermore, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The alj's finding that "the evidence fails to establish...a mistake in a determination of fact" is based on his review of all of the evidence of record. Decision and Order at 5. Therefore, we affirm the administrative law judge's denial of benefits in the miner's claim.

Next, we address the administrative law judge's findings with respect to the survivor's claim. Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[7] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). In *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993), the Sixth Circuit held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c) in a case in which the disease actually hastens his death.

The administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge correctly stated that "the only evidence regarding the cause of [the miner's] death is from Dr. Thompson." Decision and Order at 3. The death certificate signed by Dr. Thompson lists prostate cancer as the cause of the miner's death. Director's Exhibit 82. Therefore, since the record contains no evidence that

---

[7]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c).

the miner's death was hastened by pneumoconiosis, we hold that substantial evidence supports the administrative law judge's finding that the miner's death was not due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Brown, supra*.

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986), we affirm the administrative law judge's denial of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order denying modification in the miner's duplicate claim and denying benefits in the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge