BRB No. 99-1326 BLA

BARBARA ANN MENSER (Widow of NORMAN MENSER)	)	
Claimant	)	
v.	)	
WEBSTER COUNTY COAL CORPORATION	)	DATE ISSUED:
and	)	
MAPCO, INCORPORATED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Rudolph L. Jansen, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer and carrier.

Jennifer U. Toth (Judith E. Kramer, Acting 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:

Employer appeals the Decision and Order (99-BLA-0608) of Administrative Law Judge Rudolf L. Jansen awarding benefits on a 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). The administrative law judge credited the miner with twenty-three and one-half years of qualifying coal mine employment, accepted employer's concession that the miner had pneumoconiosis arising out of his coal mine employment, and determined that claimant, the miner's widow, filed a timely request for modification pursuant to 20 C.F.R. §725.310 from the prior denial of her claim.[1] The administrative law

[1]The administrative law judge determined that the miner died on July 17, 1989, and that claimant filed her survivor's claim for benefits on August 7, 1989, Director's Exhibit 1. Decision and Order at 3. Following a denial of her claim by Administrative Law Judge Bernard J. Gilday on December 6, 1991, Director's Exhibits 46, 52, the Board vacated Judge Gilday's findings pursuant to 20 C.F.R. §718.205(c) and remanded the case for further consideration, Director's Exhibit 77. *Id.* On remand, due to Judge Gilday's unavailability, the case was assigned to Administrative Law Judge Robert D. Kaplan. In a Decision and Order issued on December 5, 1996, Judge Kaplan denied benefits, finding that while the record supported a finding of the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), the record failed to demonstrate that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Director's Exhibit 83. On appeal, the Board affirmed Judge Kaplan's findings. *Menser v. Webster County Coal Corp.*, BRB No. 97-0545 BLA (Dec. 23, 1997)(unpub.); Director's Exhibit 96. Claimant filed her petition for modification on September 22, 1998. Decision and Order at 3; Director's Exhibit 97.

judge found that claimant established a mistake in a determination of fact pursuant to Section 725.310, based on his finding that the weight of the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings pursuant to Sections 725.310 and 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, taking no position on the merits of the claim but urging the Board to reject employer's arguments regarding modification pursuant to Section 725.310.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer initially contends that this case reflects an abuse of the modification procedures authorized by Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a) and implemented at Section 725.310, and that the administrative law judge erred in finding that claimant filed a timely and valid request for modification pursuant to Section 725.310. Specifically, employer asserts that claimant's letter of September 22, 1998 did not constitute a petition for modification because it merely reflected a general attempt to appeal the earlier denial of her claim by Administrative Law Judge Robert D. Kaplan, as affirmed by the Board. Employer maintains that claimant's letter was untimely filed because it was not sent within one year of Judge Kaplan's denial of the claim on December 5, 1996, and employer argues that claimant did not allege a valid basis for modification, *i.e.*, a mistake in any of Judge Kaplan's determinations of fact; rather, claimant merely submitted hospital records which both predated the miner's death and were similar to those which Judge Kaplan had found insufficient to establish that the miner's death was due to pneumoconiosis. Employer also contends that Judge Jansen erred in refusing to transfer this case to Judge Kaplan for adjudication, and employer asserts that Judge Jansen was bound by Judge Kaplan's credibility determinations. Employer's arguments are without merit.

A claimant may timely request modification of the denial of a claim by the administrative law judge within one year after the conclusion of appellate proceedings. *See Garcia v. Director, OWCP*, 12 BLR 1-24 (1988). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized that the standard for what constitutes a request for modification is very low, *see The Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942 (6th Cir. 1999), and that a claimant need not specifically

plead a mistake of fact or change in conditions, *see Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). The intended purpose of modification is to vest the fact-finder with broad discretion to correct mistakes, whether demonstrated by wholly new evidence, cumulative evidence, or after further reflection upon the evidence initially submitted, *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), and the fact-finder has the discretion to grant modification, where desirable in order to render justice under the Act, *see Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *Blevins v. Director, OWCP*, 683 F.2d 139, 4 BLR 2-104 (6th Cir. 1982), if a party merely alleges that the ultimate fact of entitlement was wrongly decided. *See Hunt, supra; Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *see also Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The fact-finder is not bound by previous credibility determinations, but has the authority to rethink prior findings of fact and to reconsider all evidence for any mistake in fact or change in conditions. *See Hunt, supra; Worrell, supra*.

In the present case, claimant's letter to the district director satisfied the "very low" standard for what constitutes a valid request for modification, *see Milliken, supra*, as it asserted claimant's entitlement to survivor's benefits, indicated that she was appealing the latest denial of her claim, enclosed new records from the miner's hospitalizations, and requested that the district director "review these as soon as possible and reconsider my claim." Director's Exhibit 97. Upon transfer of the case to the Office of Administrative Law Judges, the case was assigned to Judge Jansen for adjudication, and as the Director correctly maintains that there is no provision in Section 22 or the implementing regulations which requires the original fact-finder, if available, to adjudicate subsequent modification requests, we reject employer's contention that Judge Jansen erred in declining to transfer this case to Judge Kaplan. Judge Jansen acknowledged that a mistake in a determination of fact was the sole ground for modification in a survivor's claim because there cannot be a change in the deceased miner's condition, and he properly conducted a *de novo* review of all the evidence of record. Decision and Order at 4; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Inasmuch as claimant's letter of September 22, 1998, was sent to the district director within one year of the Board's affirmance, on December 23, 1997, of Judge Kaplan's denial of benefits, we affirm the administrative law judge's finding that claimant filed a timely and valid request for modification pursuant to Section 725.310, as supported by substantial evidence and in accordance with law. 33 U.S.C. §922; 20 C.F.R. §725.310; *Milliken, supra; Garcia, supra.*

Turning to the merits, employer argues that, in finding the evidence sufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge failed to provide valid reasons for according determinative weight to the opinions of Drs. Pitzer and Taylor and for discounting the contrary opinions of Drs. Naeye, Caffrey,

Lane, Broudy, Fino, Anderson and Kleinerman, thereby improperly substituting his credibility determinations for those of Judge Kaplan. We disagree. After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed as there is no reversible error contained therein. In evaluating the medical opinions of record, the administrative law judge properly reviewed the qualifications of the physicians and the underlying bases for their conclusions, and determined that the opinions of pulmonologists Drs. Broudy, Fino and Anderson, as well as the opinions of reviewing pathologists, Drs. Naeye, Caffrey, Lane and Kleinerman, conflicted with the opinion of the autopsy prosector, Dr. Pitzer, and the miner's treating physician, Dr. Taylor, with regard both to the severity of the miner's pneumoconiosis and the cause of his death. While Dr. Pitzer opined that the cause of death was severe coal workers' pneumoconiosis with interstitial fibrosis and respiratory failure, and Dr. Taylor opined that pneumoconiosis was a significant condition contributing to the miner's death from pulmonary fibrosis and mucus plugging, the remaining physicians concluded that the miner's pneumoconiosis was too mild to have contributed to his death. The administrative law judge determined that the autopsy resulted in twelve slides, and that the reviewing pathologists all referenced a different number of slides which contained sections of lung tissue, *i.e.*, Dr. Naeye referenced six, Dr. Caffrey referenced seven, Dr. Lane referenced two and Dr. Kleinerman referenced four. In view of the conflict between the reviewing pathologists' opinions and the prosector's ultimate conclusion that the pneumoconiosis found on autopsy was severe and caused the miner's death, the administrative law judge concluded that a real question existed as to how many slides actually contained lung tissue, whether the slides were representative of the total lung condition, and whether the slides were properly prepared and stored. Since the reviewers each referenced a different number of lung tissue slides and the record raised questions regarding the extent to which the slides reviewed were actually valid samples, the administrative law judge reasonably discounted the opinions of Drs. Naeye, Caffrey, Lane and Kleinerman, finding that the reliability of the opinions was undermined because he could not be certain as to whether the reviewers in fact obtained a complete picture of the autopsy evidence. Decision and Order at 13-16; *see generally Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 BLR 1-103 (1979).[2]

[2]While employer correctly argues that the record contains no affirmative evidence that

In evaluating the opinions of the pulmonologists who did not personally review the autopsy slides, the administrative law judge found that the report of Dr. Broudy was not primarily geared toward determining the cause of the miner's death and did not indicate whether Dr. Broudy believed that the miner had pneumoconiosis, as conceded by employer. Further, while Dr. Broudy stated that he reviewed Dr. Pitzer's autopsy report, the administrative law judge noted that he apparently confused it with Dr. Naeye's report, as Dr. Broudy incorrectly summarized Dr. Pitzer's findings. For these reasons, and because Dr. Broudy's conclusions regarding the cause of death were equivocal, the administrative law judge permissibly accorded the opinion less weight. Decision and Order at 15; *see generally Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hutchens, supra*. Similarly, the administrative law judge gave less weight to the opinion of Dr. Anderson because while the physician concluded that pneumoconiosis had nothing to do with the miner's death, his opinion that the miner "most likely" died a cardiovascular death was equivocal, and he relied in part on the reports of other physicians which the administrative law judge discredited. Decision and Order at 10, 16; Director's Exhibits 36, 99; *see Justice, supra; Hutchens, supra*. The administrative law judge also gave less weight to Dr. Fino's opinion as he determined that Dr. Fino relied extensively on the autopsy reviews of Drs. Caffrey, Naeye and Lane, which the administrative law judge discounted, and incorrectly stated that anthracosis was not a disease such as pneumoconiosis, contrary to Dr. Pitzer's description. Decision and Order at 15, 16; Director's Exhibit 33 at 12, 29, 30; Director's Exhibit 37; *see* 20 C.F.R. § 718.201. Additionally, the administrative law judge rejected, as inconsistent with the Act, Dr. Fino's position that once a miner leaves the mine with normal pulmonary function study results, he will not develop pneumoconiosis with any functional impairment at a later date, and thus rejected Dr. Fino's conclusion that since the miner's lung function was normal in 1987, it was also normal at the time of his death in 1989 and that the miner did not die a respiratory death. Decision and Order at 9, 15-16; Director's Exhibit 37; *see generally*

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the autopsy samples were tainted, not representative of the total lung condition and/or not properly prepared and stored, and that the holding in *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 BLR 1-103 (1979), does not establish a mandatory standard governing the reinterpretation of lung tissue samples, *see Kerstetter v. Director, OWCP*, 9 BLR 1-42 (1986), the administrative law judge could reasonably conclude that the opinions of the reviewing pathologists were undermined for the reasons he expressed above.

Woodward v. Director, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Johnson v. Peabody Coal Co.*, 26 F.3d 618, 18 BLR 2-244 (6th Cir. 1994); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995).

The administrative law judge acknowledged that all of the reviewing physicians had impressive credentials, but reasonably found that Dr. Pitzer provided the most reliable opinion regarding the extent of the miner's pneumoconiosis, and had an advantage over the other doctors in ascertaining the cause of the miner's death. Contrary to employer's arguments, the administrative law judge did not mechanically credit Dr. Pitzer's opinion based solely on his status as autopsy prosector; rather, the administrative law judge determined the credibility and weight of the contrary opinions, and provided an adequate rationale for his conclusion that Dr. Pitzer's gross examination provided him with an advantage over the other physicians under the particular facts of this case. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). After determining that Dr. Pitzer was a Board-certified pathologist who had practiced his specialty for approximately twenty-six years, the administrative law judge found that, considering the uncertainty associated with the slide review by the other physicians, Dr. Pitzer, who viewed the body in its entirety and saw the whole picture as to the condition of the miner's chest, had the best opportunity to make a reasoned evaluation of the miner's lung condition, thus his opinion was entitled to determinative weight. Decision and Order at 12, 16-17; *see Urgolites, supra; Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *United States Steel Corp. v. Oravetz*, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982). The administrative law judge properly found that Dr. Pitzer's opinion was not rendered unreliable due to the fact that the physician was unaware of the miner's employment and medical histories, as the administrative law judge determined that Dr. Pitzer's awareness in conducting the gross examination would have been heightened by the fact that the autopsy was requested for purposes of a black lung evaluation. Decision and Order at 17; *see Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The administrative law judge also permissibly credited the opinion of Dr. Taylor based on his status as the miner's treating physician, as he found that Dr. Taylor was in a position to observe the miner's total health condition during the years immediately preceding his death, having had some involvement with the miner since at least 1980 and close involvement with the miner's health maintenance from l985 until his death. Decision and Order at 17; *see generally Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge determined that the conclusions of Drs. Pitzer and Taylor were buttressed by claimant's testimony and the hospital records which documented a long period of respiratory failure prior to the miner's death, and acted within his discretion in finding that because the weight of the evidence established that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c),[3] *see Griffith v.*

[3]We need not address employer's allegations of error in the administrative law judge's alternate bases for according less weight to the opinions of Drs. Naeye, Caffrey, Lane,

Director, OWCP, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993), a previous mistake in a determination of fact was made in concluding that the miner's death was not at least hastened by his pneumoconiosis. Decision and Order at 17-18; *see Hunt, supra; Worrell, supra.* The administrative law judge's findings pursuant to Sections 718.205(c) and 725.310 are affirmed, as they are supported by substantial evidence. Consequently, we affirm the administrative law judge's award of benefits.

Lastly, employer asserts that, under the Board's reasoning in *Hampton v. Cumberland Mountain Services Corp.*, BRB No. 99-0186 BLA (May 31, 2000)(unpub.), this case must be remanded for the administrative law judge to render an explicit determination as to whether granting modification would render justice under the Act. We disagree. In *Hampton*, the Board noted that the administrative law judge criticized employer's failure to adequately defend the claim initially and its attempt to obtain modification of the prior award of benefits based on evidence which employer should have developed and timely submitted prior to the original adjudication of the claim. It appeared, however, that the administrative law judge felt compelled to automatically grant modification and deny benefits upon finding that, because the record on modification did not establish the existence of pneumoconiosis, employer established that the ultimate fact of entitlement was mistakenly decided. *Hampton*, slip op. at 3-4. While the Board generally affirms an administrative law judge's granting or denial of modification where no abuse of discretion is demonstrated, inasmuch as it appeared in *Hampton* that the administrative law judge failed to recognize that his modification authority was discretionary, and that he was to exercise his discretion after balancing the interest in obtaining a "correct" result against the need for finality in decision making, the Board remanded the case for the administrative law judge to determine whether reopening

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Kleinerman, Broudy, Fino and Anderson, as the administrative law judge provided at least one valid reason for discounting these opinions and according determinative weight to the contrary opinion of Dr. Pitzer, and any error that does not affect the disposition of the case is harmless. *Belcher v. Director, OWCP*, 895 F.2d 244, 13 BLR 2-273 (6th Cir. 1989); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

the claim would render justice under the Act, based on all the facts presented. *Hampton*, slip op. at 4-5; *see Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), *aff'd*, No. 99-1954 (4th Cir. Dec. 8, 2000)(unpub.). By contrast, in the present case, the administrative law judge acted within his discretion in granting modification after finding that the weight of the evidence originally submitted was sufficient to establish entitlement, *see Worrell, supra,* and we cannot discern an abuse of the administrative process by claimant in seeking modification. *See Banks, supra; McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge