BRB No. 07-0348 BLA

E. H. (Widow of R. H.) Claimant-Petitioner v. PEABODY COAL COMPANY and PEABODY INVESTMENTS, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/31/2008 DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Richard Mills, Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Laura Metcoff Klaus and Mark E. Solomons (Greenberg Traurig, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2005-BLA-5271) of Administrative Law Judge Richard Mills 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).[1] Claimant filed her application for benefits on October 6, 2003. In a Proposed Decision and Order issued on June 9, 2004, the district director denied benefits because claimant did not establish any of the elements of entitlement. Director's Exhibit 25. On August 6, 2004, claimant filed a timely request for modification of the denial of benefits. Director's Exhibit 26. The district director determined that claimant did not file additional evidence in support of her request for modification and reiterated that claimant was not entitled to benefits. Director's Exhibit 28. The case was referred to the Office of Administrative Law Judges and the administrative law judge conducted a hearing on June 8, 2006.

Based on the parties' stipulation, the administrative law judge found that employer is the responsible operator and credited the miner with establishing nineteen years of coal mine employment, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge further found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), or that pneumoconiosis caused, contributed to or hastened the miner's death at 20 C.F.R. §718.205(c). The administrative law judge concluded, therefore, that claimant did not prove a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and denied benefits accordingly.

On appeal, claimant contends that the administrative law judge did not properly consider the evidence relevant to Sections 718.202(a)(1), (a)(4), 718.203(b) and 718.205(c)(1), (c)(2), (c)(5). Employer responds that "the result reached was correct," but agrees with claimant that remand is necessary, as "the [administrative law judge's] decision is not sufficiently explained to satisfy the requirements of the Administrative Procedure Act (APA)," 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer's Letter Brief at 1. Employer also contends that the administrative law judge erred in finding Dr. Chung's opinion reasoned and documented. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal.[2]

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[1] Claimant is the widow of the miner, who died on July 27, 2003. Director's Exhibit 9.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that employer is the responsible operator, his finding of nineteen years of coal mine employment, his determination that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3), and his determination that the evidence did not support a finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. 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 benefits in a survivor's claim, the 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, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner had complicated pneumoconiosis, the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(c)(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(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).[3] Failure to establish 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, 1-27 (1987).

Pursuant to Section 725.310, a claimant may, within a year of a final order, request modification of a denial of benefits. In this case involving a survivor's claim, the sole ground available for granting modification is that a mistake in a determination of fact was made in the prior denial of benefits. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge has the authority "to reconsider all the evidence for any mistake of fact," including whether the "ultimate fact" of entitlement was wrongly decided. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Under Section 718.202(a)(1), the administrative law judge indicated that the newly submitted x-ray evidence consisted of negative readings of a film dated April 27, 1995, performed by Dr. Renn, a B reader, and Dr. Wiot, a Board-certified radiologist and B reader. Decision and Order at 7; Employer's Exhibits 5, 6. The administrative law judge determined that the existence of pneumoconiosis was not established at Section 718.202(a)(1), stating that "[i]n viewing the newly offered evidence with the evidence

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the miner's coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

previously in the record, I find the preponderance of negative x-ray readings outweigh[s] the positive readings." Decision and Order at 10.

Claimant argues on appeal that the administrative law judge erred in failing to consider the positive interpretation of the April 27, 1995 x-ray performed by Dr. Johnson, a B reader, and a positive reading of a film dated March 27, 2003, performed by Dr. Wiot. Claimant's Brief at 3, 8, 9; Director's Exhibit 12; Employer's Exhibit 7. Although these contentions have merit, in part, as discussed below, any omission by the administrative law judge does not constitute error requiring remand. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

On the Evidence Summary Form filed with the administrative law judge prior to the hearing on claimant's modification request, claimant identified Dr. Johnson's 1/0 reading of the April 27, 1995 film as affirmative evidence. As claimant asserts, the administrative law judge admitted this x-ray at the hearing, but did not explicitly address it in his Decision and Order. Hearing Transcript at 35-37. The administrative law judge's failure to specifically reference Dr. Johnson's reading does not alter the fact that his ultimate finding, based upon a consideration of the quantity of x-ray evidence and the qualifications of the readers, that the preponderance of the x-ray evidence is negative for pneumoconiosis, is correct. The x-ray interpretations admitted into the record consist of the positive reading of the April 27, 1995 film performed by Dr. Johnson, a B reader, which claimant identified as its single affirmative x-ray evidence in support of her request for modification, the negative reading of the same x-ray by Dr. Renn, a B reader, which was offered by employer on modification as affirmative evidence, and the negative reading of this film by Dr. Wiot, a Board-certified radiologist and B reader, which was designated by employer as rebuttal evidence on modification. Director's Exhibits 12, 25; Employer's Exhibits 5, 6.

In addition, we are not persuaded that claimant has sufficiently identified error in the administrative law judge's treatment of Dr. Wiot's interpretation of the x-ray dated March 27, 2003, such that the administrative law judge's finding under Section 718.202(a)(1) must be vacated. Upon employer's proffer of evidence at the hearing, the administrative law judge admitted Dr. Wiot's 1/0 reading of an x-ray dated March 27, 2003 x-ray and recognized its designation as part of Employer's Exhibit 7. In his Decision and Order, however, the administrative law judge struck Employer's Exhibit 7 because it exceeded the limitations applicable to evidence developed on modification under Section 725.310(b).[4] Claimant asserted before the administrative law judge that

[4] 20 C.F.R. §725.310(b) provides in relevant part that:

although the x-ray report was submitted by employer, Dr. Wiot's 1/0 reading is evidence favorable to claimant and counter to employer's evidence.[5] Hearing Transcript at 9; Claimant's Post-Hearing Brief at 2. On appeal, claimant reiterates this contention. Claimant's Brief at 3, 8, 9. Claimant does not allege error, however, in the administrative law judge's decision to exclude Dr. Wiot's x-ray interpretation on the ground that its admission would violate the evidentiary limitations in 20 C.F.R. §725.414(a). Moreover, despite maintaining that Dr. Wiot's reading supports her claim, claimant did not ask the administrative law judge to admit it as part of her affirmative or rebuttal evidence on modification. Accordingly, we affirm the administrative law judge's exclusion of Dr. Wiot's reading of the March 23, 2003 film. We also affirm, therefore, the administrative law judge's finding that claimant has not established a mistake of fact in the prior determination that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis, as the preponderance of readings is negative for pneumoconiosis. *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); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp*., 8 BLR 1-211 (1985).

Under Section 718.202(a)(4), the administrative law judge summarized the newly submitted evidence, consisting of a CT scan interpretation that was negative for pneumoconiosis, the medical opinion in which Dr. Chung diagnosed pneumoconiosis, and the contrary medical opinion of Dr. Tuteur. The administrative law judge indicated that the medical opinions of Drs. Chung and Tuteur were well-documented and well-reasoned and then stated that "[i]n reviewing these two opinions and the CT scan with the other medical reports in the record, the [c]laimant has not shown, by a preponderance of the evidence, that the [m]iner had pneumoconiosis" under Section 718.202(a)(4).

> [T]he claimant and the operator, or group of operators or the fund, as appropriate, shall each be entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414.

20 C.F.R. §725.310(b).

[5] Dr. Wiot indicated that although he was required to classify the March 23, 2003 film as positive for simple pneumoconiosis under the ILO system, it was his opinion that the markings on the film were not representative of coal workers' pneumoconiosis. Employer's Exhibit 7.

Similarly, when assessing the evidence relevant to Section 718.205(c)(1), (c)(2), the administrative law judge summarized Dr. Chung's opinion, that pneumoconiosis was a contributing cause of the miner's death, and Dr. Tuteur's contrary opinion, and determined that both opinions were well-reasoned and well-documented. The administrative law judge concluded that "[i]n weighing these opinions with the evidence of record, I find that [c]laimant has not established, by a preponderance of the evidence, that her husband's death was caused or contributed to by pneumoconiosis pursuant to Section 718.205(c)." Decision and Order at 12.

Claimant argues that the administrative law judge's findings under Sections 718.202(a)(4) and 718.205(c)(1), (c)(2), cannot be affirmed, as the administrative law judge did not thoroughly consider the medical opinion evidence. Claimant also contends that the administrative law judge erred in failing to address Dr. Chung's status as the miner's treating physician pursuant to 20 C.F.R. §718.104(d). Employer characterizes claimant's allegations as an argument that the administrative law judge violated the terms of the APA in setting forth his findings, and agrees that remand is required. Upon review of the arguments raised by the parties on appeal, the relevant evidence, and the administrative law judge's findings, we hereby vacate the administrative law judge's findings under Sections 718.202(a)(4) and 718.205(c)(1), (c)(2), (c)(5). Because the administrative law judge did not specifically identify the previously submitted evidence that he considered and did not set forth his conclusions regarding the weight he accorded to this evidence or his rationale with respect to his consideration of this evidence or the newly submitted evidence, he did not comply with the APA's requirement that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), *see Wojtowicz*, 12 BLR at 1-165. We also find merit in claimant's contention that the administrative law judge did not address the relationship between the miner and Dr. Chung, his treating physician, and did not consider whether Dr. Chung's opinion was entitled to substantial weight on the issues of the existence of pneumoconiosis and death due to pneumoconiosis as the terms of Section 718.104(d) require.

On remand, the administrative law judge must reconsider whether claimant has proven that the denial of her claim contained a mistake in a determination of fact pursuant to Section 725.310. Thus, the administrative law judge must weigh the newly submitted medical evidence, in conjunction with the previously submitted evidence, to ascertain whether claimant has established the existence of pneumoconiosis at Section 718.202(a)(1) or (a)(4), and that pneumoconiosis caused, contributed to, or hastened the miner's death at Section 718.205(c)(1), (c)(2), (c)(5). *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1983). In weighing the medical opinion of Dr. Chung, the administrative

law judge must consider the factors described in Section 718.104(d) and determine whether, based on those factors, Dr. Chung's opinion is entitled to substantial weight with respect to the relevant issues. The administrative law judge must identify the relevant evidence, set forth his findings with respect to this evidence, and explain how he arrived at these findings.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge