BRB No. 08-0415 BLA

I.R. (Widow of W.C.R.) Claimant-Respondent v. W.C.R. TRUCKING and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/29/2009 DECISION and ORDER

Appeal of the Decision and Order – Approval of Modification Request & Award of Survivor Claim of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Dale W. Webb and Roberta A. Paluck (Frankl Miller & Webb, LLP), Roanoke, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Approval of Modification Request & Award of Survivor Claim (07-BLA-5198) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) rendered 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). This case involves claimant's request for modification of the denial of her survivor's claim, filed on August 23, 2001. Director's Exhibit 1. Initially, Administrative Law Judge Pamela Lakes Wood denied benefits on March 21, 2005, because the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 54. Claimant timely requested modification and submitted additional medical evidence. Director's Exhibits 55, 57.

In considering claimant's modification request, the administrative law judge credited the miner with at least twenty-eight years of coal mine employment, as stipulated by the parties.[1] The administrative law judge found that claimant established the existence of clinical coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a), as stipulated by the parties, and found that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c). Consequently, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 in the prior denial of her claim. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding pursuant to Section 718.205(c) and the administrative law judge's finding that a mistake in a determination of fact was made in the prior denial. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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).

[1] The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 2. 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*).

Section 725.310 provides that a party may request modification of an award or denial of benefits within one year, on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in 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 may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." 20 C.F.R. §725.310 (2000); *see 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, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). The administrative law judge on modification must determine whether reopening the claim would render justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 132, 24 BLR 2-56, 2-67-68 (4th Cir. 2007); *see also D.S. v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008).

For survivors' claims filed on or after January 1, 1982, 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. 20 C.F.R. §718.205(c)(1)-(4).[2] 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992).

The miner's death certificate, completed by Dr. Clint Sutherland, listed "Acute MI" as the immediate cause of death; no other causes or conditions were listed. Director's Exhibit 8. Dr. Segen performed an autopsy on the miner and concluded that the miner had, *inter alia*, "not insignificant changes of coal workers' pneumoconiosis." Director's Exhibits 9, 10. Dr. Segen opined that, "While I was not part of [the miner's] management team, I think it safe to assert that his quality of life was compromised by his occupational exposure to coal and [therefore it] was a contributing factor to his death." Director's Exhibit 10.

Dr. Naeye reviewed the autopsy report and slides and other medical evidence, and concluded that the miner's death was unrelated to pneumoconiosis, because the miner did not have pneumoconiosis. Director's Exhibits 48, 72. Instead, Dr. Naeye concluded that

[2] The administrative law judge's findings that claimant did not establish that the miner had complicated pneumoconiosis, and that claimant did not establish that the miner's death was caused by pneumoconiosis or by complications of pneumoconiosis, are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

the miner's death was due to his cardiac problems and the effects of smoking. *Id.* Dr. Naeye stated "categorically" that coal hauling, the work that the miner performed, does not cause lung disease because it exposes the worker to non-toxic coal dust, but not to toxic coal mine dust. Director's Exhibit 51. Dr. Askin reviewed the autopsy report and slides and other medical evidence, and concluded that the miner had "minimal" coal workers' pneumoconiosis and that there was no evidence that coal dust "caused, hastened, or contributed to" the miner's death. Director's Exhibits 72, 73. Dr. Askin stated that the minimal coal workers' pneumoconiosis that was present could not account for the miner's shortness of breath, and he opined that the miner died of heart disease caused by atherosclerosis and of significant emphysema that was most likely related to smoking and "complex genetic factors." *Id*.

Dr. Perper reviewed the autopsy report and slides and other medical evidence, and opined that the miner's "significant and substantial" coal workers' pneumoconiosis, with "causally associated pulmonary emphysema," hastened his death, along with heart disease, by causing pulmonary insufficiency and hypoxemia that contributed to death directly, and indirectly by precipitating or aggravating a cardiac arrhythmia. Director's Exhibits 57, 72. In rendering his opinion, Dr. Perper noted that Dr. Naeye indicated that the miner had smoked cigarettes for twenty to twenty-four years and quit in 1986. *Id.* Dr. Perper stated that the miner's emphysema was due to both his smoking and coal mine employment, which was substantiated by medical studies. *Id*. Dr. Joshua Sutherland reviewed the autopsy report and the miner's medical records, and opined that the miner's pneumoconiosis contributed to his pulmonary hypertension and emphysema and was a "strong contributing factor" in his death. Director's Exhibit 49.

In finding that the miner's death was due to pneumoconiosis, the administrative law judge relied on Dr. Perper's opinion after discounting all the remaining opinions. The administrative law judge discounted Dr. Naeye's opinion because the physician did not diagnose pneumoconiosis, and because his opinion that coal truck drivers cannot develop pneumoconiosis was contrary to the regulations. The administrative law judge discounted Dr. Askin's opinion because his opinion that the miner had minimal coal workers' pneumoconiosis was contrary to the numerical weight of the opinions of Drs. Segen and Perper that the miner had significant coal workers' pneumoconiosis. The administrative law judge discounted Dr. Segen's opinion as to the cause of the miner's death because the doctor did not explain how the miner's coal dust exposure hastened his death, in light of the fact that the miner died within an hour of suffering a heart attack. Further, the administrative law judge discounted Dr. Clint Sutherland's death certificate notation because it was insufficiently reasoned, and discounted Dr. Joshua Sutherland's opinion because it did not reflect an independent analysis by the doctor.

Employer first contends that the administrative law judge erred in discounting Dr. Naeye's opinion because Dr. Naeye did not diagnose pneumoconiosis, and because the

doctor stated that coal truck drivers cannot develop pneumoconiosis.[3] We disagree. The administrative law judge rationally discounted Dr. Naeye's opinion because Dr. Naeye believed that the miner did not have pneumoconiosis, which was contrary to the finding of pneumoconiosis in this case, as stipulated by the parties and supported by all remaining pathologists' opinions of record.[4] *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006): *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *V.M. v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008); Decision and Order at 12; Director's Exhibits 48, 51, 72. Because the administrative law judge provided a valid reason for discounting Dr. Naeye's opinion, we need not address employer's other arguments regarding the administrative law judge's weighing of Dr. Naeye's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Employer next contends that the administrative law judge erred in discounting Dr. Askin's opinion because the doctor did not diagnose significant coal workers' pneumoconiosis, contrary to the numerical weight of the remaining medical opinions of Drs. Perper and Segen, that the miner had significant coal workers' pneumoconiosis. We agree. In discussing and weighing the three remaining opinions of Drs. Askin, Perper, and Segen pursuant to Section 718.205(c), the administrative law judge first considered the physicians' opinions with regard to the severity of the miner's pneumoconiosis and then considered them with regard to whether the miner's death was due to pneumoconiosis. Relying on the fact that two pathologists described the miner's coal workers' pneumoconiosis as significant, the administrative law judge found that the miner had significant coal workers' pneumoconiosis based on the opinions of Drs. Perper and Segen, contrary to Dr. Askin's finding that the miner had minimal pneumoconiosis. Based on the fact that Dr. Askin did not diagnose the miner with significant coal workers' pneumoconiosis, the administrative law judge discounted Dr. Askin's opinion, that the miner's death was unrelated to pneumoconiosis. The administrative law judge then credited Dr. Perper's opinion to find that the miner's death was due to pneumoconiosis.

The administrative law judge erred in relying merely on a numerical count of the evidence to find that the miner had significant coal workers' pneumoconiosis, and thus,

[3] Dr. Naeye's May 4, 2006 report was admitted as a continuation of his assessment previously submitted in the survivor's claim. *See* 20 C.F.R. §725.310(b); *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-228 (2007); Decision and Order at 5 n.5.

[4] In his 2003, 2004, and 2006 reports, Dr. Naeye concluded that the miner's death was due to his cardiac problems and long-term smoking history, but not coal workers' pneumoconiosis. Director's Exhibits 48, 51, 72. Dr. Naeye believed that the miner did not have pneumoconiosis and stood by that belief in all of his opinions. *Id.*

the administrative law judge erred in discounting Dr. Askin's opinion, that the miner's death was not due to pneumoconiosis, because Dr. Askin diagnosed only minimal coal workers' pneumoconiosis. *See Sharpe*, 495 F.3d at 134 n.16, 24 BLR at 2-70-71 n.16; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-273-74 (4th Cir. 1997). Consequently, we vacate the administrative law judge's finding pursuant to Section 718.205(c), and remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must reconsider Dr. Askin's opinion, together with Dr. Perper's opinion, to determine whether claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The administrative law judge should address the comparative credentials of the respective physicians,[5] the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses, in conjunction with the other evidence of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998).

Finally, employer contends that the administrative law judge did not adequately consider whether Dr. Perper understood the extent of the miner's smoking history. The administrative law judge must consider this factor on remand. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. To the extent that Dr. Perper opined that legal pneumoconiosis in the form of emphysema related to coal mine dust exposure hastened the miner's death, the administrative law judge, on remand, must first determine whether all of the relevant medical evidence establishes the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

If, on remand, the administrative law judge determines that the evidence establishes that the miner's death was due to pneumoconiosis, thereby demonstrating a mistake in a determination of fact pursuant to Section 725.310, the administrative law judge must determine whether reopening the claim will render justice under the Act. *Sharpe*, 495 F.3d at 132, 24 BLR at 2-67-68; *D.S.*, 24 BLR at 1-38.

[5] Drs. Naeye, Perper, and Askins are Board-certified pathologists. Director's Exhibits 48, 57, 72. The qualifications of Dr. Segen and of Drs. Joshua and Clint Sutherland are not found in the record.

Accordingly, the administrative law judge's Decision and Order – Approval of Modification Request & Award of Survivor Claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge