

BRB No. 09-0486 BLA

MARIE TACKETT )  
(Widow of LOT TACKETT) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 BUFFALO MINING COMPANY )  
 ) DATE ISSUED: 01/25/2010  
 Employer-Respondent )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan,  
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia,  
for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5678) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on claimant's request for modification of the denial of 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). Following the miner's death on May 29, 2002, claimant filed a survivor's claim on February 3, 2005. Director's Exhibits 1, 24. Administrative Law Judge Daniel L. Leland issued a Decision and Order denying benefits on January 18, 2007, finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish that

pneumoconiosis contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 45.

On December 3, 2007, claimant filed a timely request for modification. Director's Exhibit 46. Following the district director's denial of claimant's request for modification, claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges.

In a Decision and Order dated March 5, 2009, the administrative law judge credited the miner with thirty-seven years of coal mine employment.<sup>1</sup> Considering the newly submitted evidence in conjunction with the previously submitted evidence, the administrative law judge determined that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), but that the medical opinion evidence did not establish legal pneumoconiosis<sup>2</sup> pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge found that claimant failed to establish a mistake of fact in the prior determination, and denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the issues of the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.<sup>3</sup>

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<sup>1</sup> The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 1-4. 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*).

<sup>2</sup> "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive disease arising out of coal mine employment." A disease "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

<sup>3</sup> The administrative law judge's findings that the miner had thirty-seven years of coal mine employment and that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b),

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). 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 if death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). 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 20 C.F.R. §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 in fact, including whether the ultimate fact of entitlement was wrongly decided. 20 C.F.R. §725.310; 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); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Claimant initially asserts that the administrative law judge failed to give proper consideration to the opinion of Dr. Workman, the miner's treating physician, relevant to the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Contrary to claimant's contention, the administrative law judge properly noted that Dr. Workman, a Board-certified family practitioner, was the miner's treating physician, and considered

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are affirmed as unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the physician's treatment notes together with his final report. Decision and Order at 6 n.14. To the extent that Dr. Workman diagnosed the existence of legal pneumoconiosis,<sup>4</sup> the administrative law judge permissibly found the physician's opinion to be neither reasoned nor documented, because "there is little if any indication that his COPD/CWP diagnosis was based on objective tests or consultations with specialists." Decision and Order at 6 n.14; 20 C.F.R. §718.104(d)(5); see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-441, 21 BLR 2-269, 2-274 (4th Cir. 1997). As this determination is supported by substantial evidence, it is affirmed. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09, 22 BLR 2-162, 2-169-70 (4th Cir. 2000).

Claimant next asserts that, in finding that the evidence is not sufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death, pursuant to 20 C.F.R. §718.205(c), the administrative law judge erred in according greater weight to the opinions of Drs. Repsher, Rosenberg, Castle, Bush, Swedarsky and Oesterling, than to the opinion of Dr. Workman. Claimant further asserts that the administrative law judge failed to give proper consideration to the lay testimony of record. Claimant's Brief at 7-9. Claimant's arguments are without merit.

In considering the medical evidence relevant to the cause of the miner's death pursuant to 20 C.F.R. §718.205(c), the administrative law judge initially noted that the miner's death certificate listed the immediate cause of death as ischemic heart disease, with no other significant conditions listed. Decision and Order at 7; Director's Exhibit 13.

Turning to the autopsy and medical opinion evidence, the administrative law judge accurately found that Dr. Jelic, the autopsy prosector, diagnosed simple coal workers' pneumoconiosis, and emphysema, but did not offer an opinion as to the cause of the miner's death, or the cause of the miner's emphysema. Decision and Order at 7; Director's Exhibit 14. In addition, the administrative law judge found that Drs. Repsher, Rosenberg, and Castle reviewed the medical evidence and autopsy findings, and that Drs. Bush, Swedarsky and Oesterling reviewed the autopsy slides, and unanimously opined that neither coal dust exposure nor coal workers' pneumoconiosis played any role in the

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<sup>4</sup> Dr. Workman's treatment notes list chronic obstructive pulmonary disease, bronchitis, and coal workers' pneumoconiosis among his diagnoses. Claimant's Exhibit 2. In his report dated August 29, 2005, Dr. Workman stated that the miner had a moderately severe pulmonary impairment caused, at least in part, by his coal mine dust exposure. Claimant's Exhibit 1.

miner's death.<sup>5</sup> Decision and Order at 5-7, 13; Director's Exhibits 15, 33, 50, 51; Employer's Exhibits 1-5.

By contrast, the administrative law judge found that only Dr. Workman, the miner's treating physician, opined that coal dust exposure contributed to and hastened the miner's death. Decision and Order at 5, 13; Claimant's Exhibit 1. Specifically, in his report dated August 29, 2005, Dr. Workman indicated that he had treated the miner between August 18, 1994 and April 18, 2002 for a variety of conditions, including chronic obstructive pulmonary disease, heart disease, and type two diabetes. Claimant's Exhibit 2. Dr. Workman also opined that the miner had a moderately severe pulmonary impairment caused, at least in part, by his coal mine dust exposure. When asked whether pneumoconiosis caused or contributed to the miner's death, Dr. Workman responded: "Yes. [The miner] suffered from coal workers' pneumoconiosis which caused him to have chronic dyspnea. This caused increased stress on his heart and contributed to his death." Decision and Order at 5-6; Claimant's Exhibit 1.

Initially, we hold that there is no merit to claimant's contention that the opinions of Drs. Bush, Oesterling, Castle, Rosenberg, Repsher and Swedarsky, that pneumoconiosis played no role in the miner's death, are not credible. Claimant's Brief at 8. The administrative law judge permissibly concluded that, in addition to being highly qualified, Drs. Bush, Oesterling, Castle, Rosenberg, Repsher and Swedarsky offered reasoned and documented opinions in which they set forth the clinical findings, observations and facts on which they based their diagnoses, and explained how the documentation supported their conclusions. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274; Decision and Order at 9 n.18, 10. We, therefore, affirm the administrative law judge's determination to credit the opinions of Drs. Bush, Oesterling, Castle, Rosenberg, Repsher and Swedarsky as within the administrative law judge's discretion, and supported by substantial evidence in the record. *See Compton*, 211 F.3d at 208-09, 22 BLR at 2-169-70; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274; Decision and Order at 9 n.18.

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<sup>5</sup> Drs. Repsher, Rosenberg, and Castle, who are Board-certified pulmonologists, and Drs. Bush and Oesterling, who are Board-certified pathologists, each diagnosed a very mild form of coal workers' pneumoconiosis that did not cause any impairment during the miner's life, and in no way contributed to, caused, or hastened his death. Director's Exhibits 15, 33, 51; Employer's Exhibits 1, 2. Dr. Swedarsky, a Board-certified pathologist, opined that a diagnosis of coal workers' pneumoconiosis could not be made on the tissue reviewed, but that there was "room for opinion on this," and that, in any event, there was no pathologic evidence that any pulmonary process contributed to the miner's death. Director's Exhibit 51; Employer's Exhibit 1 at 24.

There also is no merit to claimant's contention that the administrative law judge erred in failing to credit Dr. Workman's opinion as that of a treating physician, relevant to the cause of the miner's death. Claimant's Brief at 7. The administrative law judge properly noted that Dr. Workman was the miner's treating physician, and fully considered his opinion that pneumoconiosis contributed to the miner's death. Decision and Order at 5-6; Claimant's Exhibits 1, 2. Contrary to claimant's arguments, however, the administrative law judge permissibly concurred with Judge Leland's prior finding that Dr. Workman's opinion is unreasoned, because Dr. Workman merely asserted that coal workers' pneumoconiosis caused dyspnea which, in turn, caused increased stress on the miner's heart, contributing to his death, without explaining the process by which this occurred. See 20 C.F.R. §718.104(d)(5); *Compton*, 211 F.3d at 211, 22 BLR at 2-174; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 6, 10; Claimant's Exhibit 1. Thus, the administrative law judge acted within his discretion in concluding that, despite his status as the miner's treating physician, Dr. Workman's opinion was not a reasoned opinion sufficient to meet claimant's burden of proof to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). See *Hicks*, 138 F.3d at 533, 21 BLR at 2-336.

Finally, we reject claimant's contention that the administrative law judge failed to properly consider the lay testimony that the miner had significant respiratory problems prior to his death. Claimant's Brief at 8. The administrative law judge specifically noted claimant's testimony, and that of the miner's stepson, that the miner had a great deal of difficulty breathing immediately prior to his death, and that he would become out of breath, when working at the tippie or mowing the yard. Decision and Order at 7. Contrary to claimant's assertion, however, as set forth above, the administrative law judge properly analyzed the medical opinions and explained his reasons for both discrediting the opinion of Dr. Workman, the only physician to opine that pneumoconiosis, either legal or clinical, played any role in the miner's death, and for crediting the contrary opinions of Drs. Bush, Oesterling, Castle, Rosenberg, Repsher, and Swedarsky. Decision and Order at 7-13. The regulations provide that 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). As the administrative law judge properly rejected the only supporting medical opinion, and he found that there is other credible medical evidence as to the cause of the miner's death, the administrative law judge properly concluded that claimant could not establish her entitlement to benefits through lay testimony alone. Decision and Order at 7 n.16. Consequently, we affirm the administrative law judge's conclusion that claimant failed to establish that the miner's death was due to pneumoconiosis, and that, therefore, a finding of entitlement is precluded in this case. See 20 C.F.R. §718.205(c); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Trent*, 11 BLR at 1-27.

In light of the foregoing, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact in Judge Leland's prior denial of benefits, and that, therefore, she failed to establish a basis for modification of the prior denial of benefits pursuant to 20 C.F.R. §725.310. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; Decision and Order at 13.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge