

BRB No. 01-0952 BLA

BRENDA L. JAMISON)	
(Widow of EDWARD L. JAMISON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
OLGA COAL COMPANY)	DATE ISSUED:
)	
Employer-Respondent)	
)	
WEST VIRGINIA COAL-WORKERS')	
FUND)	
)	
Carrier)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Denying Modification of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Frederick M. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0903) of Administrative Law Judge John C. Holmes denying benefits on a 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 In this appeal of the denial of claimant's request for modification of the denial of

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2001). All citations

her survivor's claim, the administrative law judge found that employer did not dispute that the miner had simple pneumoconiosis caused by coal dust exposure, but concluded that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

Claimant contends that because the existence of pneumoconiosis as well as its debilitating effect and its contribution to the miner's disabling respiratory impairment were established in the miner's claim, employer was collaterally estopped from relitigating those issues in the survivor's claim. Thus, claimant contends that the administrative law judge did not have the discretion to disregard the final determination of the prior administrative law judge and substitute his own determination on the issue of the miner's disability. Claimant also contends that the administrative law judge erred in discrediting the opinion of the miner's treating physician in favor of employer's physicians on the issue of death due to pneumoconiosis. Employer has not responded. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

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).

To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of 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, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Further, if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, “there is no need for a smoking gun factual error, changed conditions or startling new evidence”), to modify the denial of benefits. *See Jessee, supra*.

Claimant, citing *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999), first argues that the administrative law judge erred in concluding that the findings of the previous administrative law judge, as to the existence of pneumoconiosis and total disability in the miner’s claim,² were not binding in the survivor’s claim and, therefore, precluded employer from relitigating these issues. Contrary to claimant’s argument, however, the doctrine of collateral estoppel does not apply to the issue of total disability inasmuch as it is not a necessary element which must be established in a survivor’s claim. *See* 20 C.F.R. §718.205(c); *see also Hughes, supra*. Accordingly, we reject claimant’s argument regarding the determinative effect of a finding of total disability in a miner’s claim on a survivor’s claim.

Regarding the issue of whether the prior administrative law judge’s finding of the existence of pneumoconiosis is binding in this survivor’s claim, estoppel obviously cannot apply to bar relitigation of the issue of the existence of pneumoconiosis because the issuance of *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) changed the standard from that applicable in 1990 when the miner was awarded benefits. Further, in any case, we note that the administrative law judge found that “[e]mployer does not dispute that the claimant’s husband had simple pneumoconiosis, caused by coal dust exposure...” Decision and Order at 11. Accordingly, we turn to whether the administrative law judge properly found that claimant failed to establish that the miner’s death was hastened by pneumoconiosis.

Claimant contends that the administrative law judge mischaracterized the opinion of Dr. Cardona and erred in according it less weight than the opinions of employer’s physicians.

² On January 22, 1990, the miner was awarded benefits on a claim filed August 25, 1982. The miner died May 24, 1998. Claimant filed this survivor’s claim on June 8, 1998. Director’s Exhibits 1, 6.

Specifically, claimant asserts that the medical opinion evidence supports a finding that pneumoconiosis hastened the miner's death because Dr. Cardona, the miner's treating physician, in consultation with the miner's pulmonologist and urologist, opined that the miner's death from prostate cancer was hastened because the miner's cancer could not be vigorously treated in light of the miner's pneumoconiosis.

The administrative law judge rejected, as speculative and unreliable, claimant's argument that pneumoconiosis hastened the miner's death because the miner's cancer could not be treated as vigorously as it would have been if the miner had not had lung disease, inasmuch as Dr. Cardona had stated that in some cases pulmonary impairment would preclude radiation treatment while, in this case, the doctors treating the miner's cancer, Dr. Schor, an oncologist, and Mounzer, an urologist, specifically recommended radiation treatment. Director's Exhibits 9, 10, 11, 30. This was rational. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 94 (1988). Further, the administrative law judge rationally accorded little weight to Dr. Cardona's opinion because he found that Dr. Cardona never indicated what type of treatment was excluded because of claimant's pneumoconiosis or how the lack of this treatment hastened the miner's death. Claimant's Exhibit 2. As further support for his finding, the administrative law judge noted that he found no medical opinions in the record stating that the miner should not receive radiation or other cancer treatment because of his pneumoconiosis. In fact, the administrative law judge found that the record showed that radiation treatment was discussed, recommended, and administered. Director's Exhibits 9, 10, 11, 30. Likewise, the administrative law judge noted that Dr. Schor, the oncologist, who treated the miner for cancer and signed the death certificate listed metastatic prostate cancer as the cause of death without diagnosing either chronic obstructive pulmonary disease or pneumoconiosis as a contributing cause. Director's Exhibit 6. The administrative law judge found this omission particularly noteworthy since the Virginia death certificate form provides a space for the treating physician to identify "[o]ther significant conditions contributing to death'..." and the physician left this space blank. Decision and Order at 14. Thus, the administrative law judge permissibly accorded less weight to Dr. Cardona's opinion and more weight to the opinions of Drs. Renn and Fino, pulmonary specialists, who found that the miner's pneumoconiosis did not cause, contribute to, or hasten the miner's death in any manner as these opinions were well-documented and reasoned. This was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Accordingly, the Decision and Order - Denying Modification of the administrative law judge on this denial of a survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge