BRB No. 02 - 0101 BLA

JOYCE A. BUMGARDNER (Widow of WILLIAM E. BUMGARDNER)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:
OHIO VALLEY COAL COMPANY	)	
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 Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Erik A. Schramm (Hanlon, Duff, Estadt & McCormick Co., LPA), St. Clairsville, Ohio, for claimant.

John C. Artz (Polito & Smock, P.C.), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (00-BLA-1104) of Administrative Law Judge Gerald M. Tierney on a request for modification 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*.[2] The administrative law judge found that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) by stipulation, and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge found, however, that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and thereby, was insufficient to establish a mistake in a determination of fact in the prior decision pursuant to 20 C.F.R. §725.310(2000).[3] Accordingly, the administrative law judge denied the claim.

[1]Claimant is Joyce A. Bumgardner, surviving spouse of the miner, William E. Bumgardner, who died on August 9, 1994. Director's Exhibit 10.

[2]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, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]While 20 C.F.R. §725.310 was amended, the amended regulation applies only to claims filed after January 19, 2001, and thus, is inapplicable to the instant claim.

The relevant procedural history of this claim is as follows: The miner filed a claim with the Department of Labor (DOL) on July 11, 1994. Director's Exhibit 1. The miner died on August 9, 1994. Director's Exhibit 10. Claimant then filed a survivor's claim on August 25, 1994. Director's Exhibit 2. The Office of Administrative Law Judges (OALJ) consolidated both claims. Following a hearing, Administrative Law Judge Michael P. Lesniak issued a Decision and Order dated April 10, 1997. Therein, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(2000) and 718.203(2000), but that the evidence failed to establish total respiratory disability at Section 718.204(c)(1)-(4)(2000) in the miner's claim, and death due to pneumoconiosis pursuant to Section 718.205(c)(2000) in the survivor's claim. Accordingly, the administrative law judge denied both claims. Director's Exhibit 38. Following claimant's appeal, the Board affirmed the administrative law judge's denial of both claims. *Bumgardner v. Ohio Valley Coal Co.*, BRB No. 97-1130 BLA (May 15, 1998)(unpub.). Claimant then filed an appeal with the United States Circuit Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the denial of both claims. *Bumgardner v. Ohio Valley Coal Co.*, No. 98-3753 (6th Cir. July 2, 1999)(unpub.). Claimant then filed the instant motion for modification with the district director concerning only the survivor's claim. The case was subsequently forwarded to the OALJ.[4] Following the administrative law judge's denial of the motion, claimant filed the instant appeal with the Board.

On appeal, claimant challenges the administrative law judge's denial of modification. Claimant alleges that the evidence establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), and asserts that the administrative law judge erred in finding to the contrary. Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) is supported by substantial evidence. Accordingly, employer urges 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 file a response brief.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[4]In her petition for modification, claimant stated there had been a mistake in a determination of fact in the survivor's claim. Director's Exhibit 41.

In a survivor's claim filed after January 1, 1982, claimant must establish the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that the miner's death was due to pneumoconiosis in order to establish entitlement to survivor's benefits. *See* 20 C.F.R. § § 718.202(a), 718.203; 718.205(c); *Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Evidence that pneumoconiosis hastened the miner's death is sufficient to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c)(2), (c)(5).

Claimant challenges the administrative law judge's finding that the evidence failed to establish a mistake in a determination of fact, namely, the evidence failed to establish death due to pneumoconiosis pursuant to Section 718.205(c). Claimant initially asserts that the administrative law judge failed to review and reweigh all of the evidence of record, citing *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999) in support. Claimant argues that the administrative law judge was required to reconsider his prior findings regarding the opinions of Drs. Villaverde, Perper and Reddy. We disagree. The Board has held that the sole ground for modification in a survivor's claim is whether a mistake in a determination of fact is established. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In *Wojtowicz*, the Board held that the administrative law judge has discretion to make this determination in a petition for modification, but that his determination must comport with the requirements of the Administrative Procedure Act. *Id.*[5] We hold that claimant's reliance on *Milliken* is misplaced. The court in *Milliken* held that the administrative law judge has a right to review and reweigh the evidence. The court did not hold that the administrative law judge has a duty to so. *Milliken, supra*. Moreover, *Milliken* involved an administrative law judge who was ruling on a petition for modification of the Decision and Order of *another* administrative law judge. In the instant case, the administrative law judge had before him on modification a Decision and Order of his own. He did not find it necessary to re-address all of the items of evidence, as he noted that his opinion as to the credibility of the individual medical opinions did not change. We hold that this finding was within his discretion. *Wojtowicz, supra*. We reject, therefore, claimant's initial challenge on appeal.

[5]The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); 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).

Claimant next asserts that the administrative law judge erred in failing to find that the evidence establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant argues that it was error for the administrative law judge not to credit the opinions of Dr. Villaverde, the autopsy prosector, Director's Exhibit 11, Dr. Perper, a reviewing pathologist, Claimant's Exhibit 1, and Dr. Reddy, the miner's treating physician. Director's Exhibits 13, 29.[6] We disagree. The administrative law judge found, despite the fact that both Drs. Reddy and Villaverde opined that the miner's death was due in part to pneumoconiosis, that their opinions could not be credited, as they did not contain adequate reasoning. Decision and Order at 3. This finding constitutes a proper exercise of the administrative law judge's discretion. *See Griffith v. Director, OWCP*, 49 F. 3d 184, 19 BLR 2-111 (6th Cir. 1995); *Pettry v. Director, OWCP*, 14 BLR 1-90 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Moreover, it is a finding previously affirmed by the Board, *Bumgardner v. Ohio Valley Coal Co.*, BRB No. 97-1130 BLA (May 15, 1998)(unpub.), slip op. at 4-6, and the United States Court of Appeals for the Sixth Circuit. *Bumgardner v. Ohio Valley Coal Co.*, No. 98-3753, slip op. at 10-11 (6th Cir. July 2, 1999).

Additionally, claimant argues that the administrative law judge erred in crediting the opinions of non-examining physicians over those of examining physicians, and especially the autopsy prosector. We reject this argument. The administrative law judge acknowledged the status of each physician, but properly concluded that the opinions relied upon by claimant were not reasoned. *Infra.* While the administrative law judge may give physicians additional weight due to their status as treating physicians, there is no duty to do so, and the opinions must still be found to be reasoned. *See Griffith, supra; Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Claimant next argues that the administrative law judge did not properly consider Dr. Perper's opinion. As the administrative law judge correctly found, Dr. Perper concluded that the miner died due to pulmonary cancer and that it was "highly probable" that the pulmonary cancer was also a combined result of exposure to coal mine dust containing silica and smoking. Claimant's Exhibit 1. Claimant argues that, contrary to the administrative law judge's finding, the use of the term "highly probable" does not render Dr. Perper's opinion equivocal. We hold that the administrative law judge did not err in finding that an opinion

[6]Both Dr. Villaverde and Dr. Reddy concluded that pneumoconiosis contributed to the miner's death. The administrative law judge rejected both opinions because he found that each doctor failed to provide an adequate explanation for his conclusion. Director's Exhibits 11, 13, 29.

which states a proposition is "highly probable" constitutes an equivocal opinion, as it suggests something less than a statement of certainty. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1988). Moreover, the administrative law judge permissibly discounted Dr. Perper's opinion on the basis that the doctor failed to "discuss the mechanism of the miner's death" and failed to address what factors led him to conclude that coal worker's pneumoconiosis increased the likelihood of the miner's death. Thus, the administrative law judge permissibly found that Dr. Perper's opinion was not reasoned. Decision and Order at 5. *Griffith, supra; Pettry, supra; Clark, supra; Anderson, supra.* We therefore reject claimant's challenges to the administrative law judge's treatment of Dr. Perper's report.

Finally, claimant asserts that the administrative law judge erred in requiring claimant to establish death due to pneumoconiosis by a standard that is higher than that which is required by applicable law. Claimant cites the holding of the United States Court of Appeals for the Sixth Circuit in *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985)[7] in support of her argument. We reject claimant's assertion. Claimant must establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death. Claimant may show that pneumoconiosis was a substantially contributing cause of the miner's death by evidence that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(5), and consistent with the holding in *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Decision and Order at 3. Claimant's reliance upon *Moseley* is misplaced, as *Moseley* was a 20 C.F.R. Part 727 case where, once claimant established a *prima facia* case, the burden shifted to employer to establish that death was not related to pneumoconiosis. *Moseley, supra.* In the instant case, a 20 C.F.R. Part 718 case, claimant bears the burden of establishing that the miner died due to pneumoconiosis pursuant to Section 718.205(c). *Brown, supra; Neeley v. Director, OWCP*, 11 BLR 1-85 (1985). Moreover, the Sixth Circuit in claimant's prior appeal rejected claimant's argument that the burden shifts to employer to establish that the miner's death was not due to pneumoconiosis in this survivor's claim under Part 718. *Bumgardner v. Ohio Valley Coal Co.*, No. 98-3753, slip op. at 9-10 (6th Cir. July 2, 1999).

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[7]In *Moseley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985), the Court held that the interim presumption at 20 C.F.R. Part 727 was rebutted by evidence that the miner did not have pneumoconiosis and was totally disabled due to heart disease, and thus, his disability was unrelated to pneumoconiosis. The court stated that in a Part 727 claim, once claimant establishes invocation of the interim presumption, the burden shifts to employer to rebut the presumption of entitlement. The statutory scheme under 20 C.F.R. Part 718 contains no such presumption, and therefore, does not provide for a shifting of burdens in survivor's claims at 20 C.F.R. §718.205. 20 C.F.R. §718.205(c).

In light of the foregoing, we affirm the administrative law judge's finding that the evidence fails to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). We further affirm the administrative law judge's denial of modification and of survivor's benefits in the instant claim. *See Wojtowicz, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge