BRB No. 07-0749 BLA

L.I. (o/b/o and as Widow of J.H.I.)	)	
Claimant-Petitioner	)	
v.	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 07/24/2008
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

L.I., MacArthur, West Virginia, *pro se*.[1]

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington D.C., for employer.

[1] On May 30, 2007, S.F. Raymond Smith of the firm Rundle and Rundle, L.C., filed a notice of appeal on claimant's behalf. On August 20, 2007 the Board received a letter from the firm stating that the firm would no longer be handling black lung claims. In response, the Board issued an Order stating that it would consider claimant to be proceeding without the assistance of counsel in this case. [*L.I.*] *v. Eastern Associated Coal Corp.*, BRB No. 07-0749 BLA (Dec. 14, 2007) (unpub. Order).

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

PER CURIAM:

Claimant[2] appeals the Decision and Order-Denial of Survivor Claim; Award of Modification Request and Denial of Disability Claim (2005-BLA-6271) (the Decision and Order) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) on claims 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).[3] The administrative law judge found that the parties stipulated to a coal mine employment history of at least twenty-five years.

The administrative law judge first considered the survivor's claim and found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that, even if the evidence established the existence of the disease, there was no credible evidence that established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on the survivor's claim.

Turning to the miner's claim, the administrative law judge noted that he initially awarded benefits on the claim because he found the existence of pneumoconiosis was established based on Dr. Cinco's uncontradicted autopsy report of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Considering the newly submitted evidence submitted by employer, in conjunction with the earlier evidence, pursuant to employer's modification request at 20 C.F.R. §725.310, however, the administrative law judge found that he had made a mistake in a determination of fact when he found that the autopsy

[2] Claimant is the surviving spouse of the miner, who died on January 12, 2004.

[3] The miner filed a claim for benefits on April 26, 2001. The miner died on January 12, 2004. On March 14, 2004, claimant filed a survivor's claim. The administrative law judge awarded benefits on the miner's claim on January 6, 2005. The administrative law judge found the existence of pneumoconiosis established by uncontradicted autopsy evidence, that the miner was totally disabled based on blood gas study and medical opinion evidence, and that the miner's total disability was due to pneumoconiosis based on Dr. Rasmussen's opinion. Subsequent to that award, employer sought modification and submitted Dr. Naeye's review of the autopsy slides. Employer's request for modification on the miner's claim and claimant's survivor's claim were consolidated.

evidence established pneumoconiosis at Sections 718.202(a)(2) and 725.310.[4] The administrative law judge, therefore, granted employer's request for modification and proceeded to consider all of the evidence in the miner's claim. The administrative law judge concluded that that evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, benefits on the miner's claim were denied.

On appeal, claimant asserts, generally, that benefits should have been awarded on both claims. Employer responds, urging that the denial of benefits on both claims be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief.[5]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

In order to establish entitlement to benefits in a living miner's claim, a miner must establish that he suffers from pneumoconiosis at 20 C.F.R. §718.202(a); that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203; that he is totally disabled by pneumoconiosis at 20 C.F.R. §718.204(b), (c). *See* 20 C.F.R. §725.202(d).

To establish entitlement to survivor's benefits, in addition to establishing that the miner had pneumoconiosis that arose out of coal mine employment, claimant must establish 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);

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[4] Because the miner was deceased, the administrative law judge noted that a finding of modification based on a change in conditions was not available. 20 C.F.R. §725.310(a) *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[5] As the administrative law judge's length of coal mine employment determination does not adversely affect claimant and is unchallenged by the other parties, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] We will apply the law of the United States Court of Appeals for the Fourth Circuit as the miner's most recent coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Neeley v. Director, OWCP, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis 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 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(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); *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

The Survivor's Claim

The administrative law judge first considered claimant's survivor's claim and concluded that claimant was unable to establish entitlement to benefits, thereunder.[7] In finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge considered the seventeen readings of the fifteen x-rays of record, which were included in the miner's treatment records. The administrative law judge concluded that there were two positive x-rays, those of April 2, 1997 and April 3, 1997, because they were only read as positive. The administrative law judge concluded that the x-rays taken February 5, 1982, February 19, 1982, September 19, 1982, November 14, 2001, November 21, 2001 and November 25, 2001, were negative, as those x-rays were only read as negative. The administrative law judge further found that while the x-rays of the January 17, 2001, June 19, 2001, July 10, 2001, November 27, 2001, February 13, 2002, and March 14, 2003 were read as showing "interstitial changes fibrosis or scarring," they were not positive for pneumoconiosis

[7] In considering the survivor's claim, the administrative law judge considered the evidentiary limitations at 20 C.F.R. §725.414 and correctly noted that the Board's holding in *Keener v. Peerless Eagle Co.*, 23 BLR 1-229 (2007)(*en banc*) required that the parties in a survivor's claim specifically designate the evidence from the prior miner's claim that was to be considered in the survivor's claim. *Keener*, 23 BLR at 1-240. In the instant case, the administrative law judge considered the following evidence, which was considered in the miner's claim and designated by claimant for consideration in the survivor's claim: the pathology report of Dr. Cinco; the miner's death certificate signed by Dr. Patel; Dr. Patel's treatment notes; and Dr. Rasmussen's October 31, 2001 pulmonary examination and related x-rays and pulmonary tests. In addition, the administrative law judge admitted treatment records, including x-rays, evidence which is not subject to the evidentiary limitations. 20 C.F.R. §725.414(a)(4). Employer designated for consideration the following evidence: Dr. Crouch's pathology report as its one permissible autopsy report and the assessments of Drs. Naeye and Zaldivar as "its two case-in-chief medical opinions." Decision and Order at 4; 20 C.F.R. §725.414(a)(3)(i).

because the interpretations "did not specifically attribute pulmonary markings to pneumoconiosis," *i.e.*, the x-rays were not classified for pneumoconiosis under the ILO/U-C standards. *See* 20 C.F.R. §718.102(b); Decision and Order at 11. Lastly, the administrative law judge found that because the x-ray of October 31, 2001, was read as positive by Dr. Patel and as negative by Dr. Scatarige, similarly-credentialed readers, it was "inconclusive" as to the existence of pneumoconiosis. Decision and Order at 11. In light of the foregoing, the administrative law judge properly concluded that the overall weight of the x-ray evidence was negative and did not establish the existence of pneumoconiosis at Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *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); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985); *see generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Next, the administrative law judge found that the autopsy evidence of record failed to support a finding of pneumoconiosis at Section 718.202(a)(2). The administrative law judge found that the relevant evidence consisted of the following: the autopsy report of Dr. Cinco, the autopsy prosector, who was also a Board-certified pathologist, who diagnosed the presence of pulmonary anthracosilicosis and coal workers' pneumoconiosis; the report of Dr. Crouch, a Board-certified anatomic pathologist, who reviewed the miner's lung tissue samples and opined that there was no evidence of pneumoconiosis; and the report of Dr. Naeye, a Board-certified anatomic and clinical pathologist, who reviewed the miner's lung tissue samples, opining that the small amount of black pigment present was insufficient to support a diagnosis of pneumoconiosis, but that the miner suffered from fibrosis unrelated to the inhalation of coal mine dust, Employer's Exhibits 1, 5. The administrative law judge found that since all three of these pathologists were Board-certified, they were similarly qualified. The administrative law judge concluded that the autopsy opinions of Drs. Crouch and Naeye outweighed the sole contrary opinion of Dr. Cinco, and that the weight of the autopsy evidence, therefore, established "that the microscopic examination of the lung tissue samples did not show the requisite fibrotic reaction to the scattered deposits of coal dust in [the miner's] lungs." Decision and Order at 9. As the opinion of an autopsy prosector is not automatically entitled to greater weight merely because of the autopsy prosector's status, *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992), the administrative law judge rationally concluded that the weight of the autopsy evidence did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(2).[8] 20 C.F.R. §718.202(a)(2); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994),

[8] The administrative law judge noted that because he determined that the preponderance of the definitive microscopic assessments showed the absence of coal dust related fibrotic reaction, Dr. Cinco's gross autopsy findings of coal dust-related fibrotic lesions had diminished probative value. Decision and Order at 9.

aff'g Greenwich Collieries v. Director, OWCP, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Thus, we affirm the administrative law judge's decision that claimant failed to establish pneumoconiosis pursuant to Section 718.202(a)(2).

Further, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(3) as the administrative law judge properly found that the presumptions provided therein were not applicable. 20 C.F.R. §§718.202(a)(3), 718.304, 718.305, 718.306.

Next, in determining that the medical opinion evidence of record did not support a finding of pneumoconiosis at Section 718.202(a)(4), the administrative law judge considered 1) the opinion of Dr. Patel, the miner's treating physician, who diagnosed coal workers' pneumoconiosis; 2) the opinion of Dr. Rasmussen, who diagnosed coal workers' pneumoconiosis, as well as emphysema and fibrosis due to coal mine employment and cigarette smoking; and 3) the opinion of Dr. Zaldivar, who found that the miner did not suffer from pneumoconiosis, but suffered from idiopathic pulmonary fibrosis, unrelated to coal mine dust exposure.

The administrative law judge properly found that, notwithstanding Dr. Patel's status as the miner's treating physician, his opinion was not entitled to dispositive weight because it was based, in part, on positive x-ray evidence, which was contrary to the administrative law judge's finding that the weight of the x-ray evidence was negative for pneumoconiosis, and because he did not review the entirety of the evidence of record, specifically the pathology evidence. 20 C.F.R. §718.104(d)(5); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (credibility of medical opinion is for administrative law judge to determine); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Similarly, the administrative law judge rationally rejected the opinion of Dr. Rasmussen because Dr. Rasmussen did not consider the pathology evidence of record. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Instead, the administrative law judge properly found that the opinion of Dr. Zaldivar was entitled to greater weight as it was most consistent with the underlying documentation of record. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Consequently, we hold that the administrative law judge properly found that the medical opinion evidence did not establish pneumoconiosis at Section 718.202(a)(4).

In light of the foregoing, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a) in the survivor's claim. *See Compton*, 211 F.3d at 211, 22 BLR at 2-174. Because claimant has

failed to establish pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement in a survivor's claim, entitlement to benefits on the survivor's claim is precluded, *Trumbo*, 17 BLR at 1-87-88. Thus, we need not address the administrative law judge's finding regarding death due to pneumoconiosis at Section 718.205(c). Accordingly, the administrative law judge's denial of benefits on the survivor's claim is affirmed.

The Miner's Claim

The administrative law judge noted that the issue before him on the miner's claim was whether he had made a mistake in finding pneumoconiosis established based on the uncontradicted autopsy report of Dr. Cinco, and in awarding benefits on the miner's claim. Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310 (2000), authorizes the modification of an award or denial of benefits based, in pertinent part, upon a mistake in a determination of fact. Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

Pursuant to its request for modification on the miner's claim, employer submitted the autopsy report of Dr. Naeye and the 2006 deposition of Dr. Zaldivar. The administrative law judge considered the new autopsy report, along with the previously submitted report of Dr. Cinco, and the x-ray evidence and medical opinion evidence to determine whether employer established a basis for modification.[9]

The administrative law judge found that while Drs. Cinco and Naeye both possessed "similar [B]oard certification," they reached opposite conclusions as to whether the autopsy evidence established pneumoconiosis. Decision and Order at 20. The administrative law judge concluded that "the professional dispute" between the

[9] As we noted in our discussion of the survivor's claim, the record also contains an autopsy report by Dr. Couch. Employer's Exhibit 2. The administrative law judge did not consider this report in his evaluation of modification on the miner's claim as he determined that the report exceeded the evidentiary limitations for modification requests at 20 C.F.R. §725.310(b). Pursuant to that section, each party is allowed "one additional item of evidence in each of the evidentiary categories." Decision and Order at 18; 20 C.F.R. §725.310(b). Dr. Naeye's autopsy report constituted employer's autopsy evidence on modification. 20 C.F.R. §725.310(b). In addition, the administrative law judge admitted Dr. Zaldivar's deposition as employer's one medical opinion. 20 C.F.R. §725.310(b).

physicians "render[ed] the autopsy evidence inconclusive on the presence of pneumoconiosis" at Section 718.202(a)(2). Because this evidence was in equipoise, the administrative law judge properly found that he erred in previously finding pneumoconiosis established based on the autopsy evidence. Consequently, the administrative law judge found that he made a mistake in a determination of fact in his previous award of benefits, and found that employer was entitled to modification. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28 (4th Cir. 1993).

Considering all of the x-ray evidence of record, *see* discussion, *supra*, the administrative law judge rationally found that it did not support a finding of pneumoconiosis at Section 718.202(a)(1).[10] Likewise, in considering the medical opinion evidence of record at Section 718.202(a)(4), the administrative law judge rationally found that such evidence did not establish pneumoconiosis. In reaching this determination, in addition to the evidence considered in the survivor's claim, *see* discussion, *supra*, the administrative law judge considered the medical report of Dr. Branscomb,[11] who opined that the miner suffered from coronary artery disease, but not pneumoconiosis or any impairment related to coal mine employment. The administrative law judge permissibly found here that, as in the survivor's claim, the opinions of Drs. Patel and Rasmussen, diagnosing clinical coal workers' pneumoconiosis, were of "diminished probative value," Decision and Order at 22, as both physicians based their conclusions primarily on positive x-ray interpretations, although the weight of such evidence was determined by the administrative law judge to be negative for the existence of the disease. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). The administrative law judge also permissibly found that while Dr. Rasmussen presented a probative diagnosis of "legal" pneumoconiosis, the opinion was outweighed by the contrary opinions of Drs. Zaldivar and Branscomb that claimant's pulmonary impairment was unrelated to coal mine employment. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

[10] While he again reviewed the evidence pursuant to employer's request for modification on the miner's claim, the administrative law judge's analysis of the x-ray evidence mirrored his analysis of such evidence in the survivor's claim as the record evidence was the same.

[11] Dr. Branscomb's opinion was part of the evidence submitted by employer during the initial adjudication of the miner's claim. The administrative law judge did not admit it in the survivor's claim, however, as it exceeded the number of medical reports allotted to employer. 20 C.F.R. §410.414(a)(3)(i).

Accordingly, we affirm the administrative law judge's finding that the entirety of the relevant evidence of record did not support a finding of pneumoconiosis at Section 718.202(a) on the miner's claim, as the administrative law judge considered all the relevant evidence and provided affirmable bases for crediting and/or discrediting such evidence. *See Compton*, 211 F.3d at 209-210, 22 BLR at 170-171. Since the evidence of record does not establish pneumoconiosis, a requisite element of entitlement pursuant to Part 718, we must affirm the denial of benefits on the miner's claim and we need not address other elements of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Accordingly, the administrative law judge's Decision and Order-Denial of Survivor Claim; Award of Modification Request and Denial of Disability Claim 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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BETTY JEAN HALL
Administrative Appeals Judge