

BRB No. 08-0764 BLA

W.A.	)	
(Widow of W.A.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY,	)	
INCORPORATED	)	DATE ISSUED: 07/09/2009
	)	
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 of Adele Higgins Odegard,  
Administrative Law Judge, United States Department of Labor.

W.A., Jasper, Alabama, *pro se*.

Thomas G. DeLawrence (Maynard, Cooper, & Gale, P.C.), Birmingham,  
Alabama, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Decision and Order (07-  
BLA-5655) of Administrative Law Adele Higgins Odegard (the administrative law

---

<sup>1</sup>Claimant is the surviving spouse of the deceased miner who died on January 17,  
1985. Director's Exhibit 39.

judge) 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).<sup>2</sup> This case involves a survivor’s claim filed on January 22, 1985. In the initial decision, Administrative Law Judge James W. Kerr, Jr., credited the miner with thirty years of coal mine employment<sup>3</sup> and found that the evidence established that the miner suffered from pneumoconiosis arising out of his coal mine employment. However, Judge Kerr found that the evidence did not establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Accordingly, Judge Kerr denied benefits. The Board affirmed Judge Kerr’s denial of benefits.<sup>4</sup> [*W.A.*] *v. Alabama By-Products Corp.*, BRB No. 88-3263 BLA (Apr. 30, 1991)(unpub.).

Since the Board’s affirmance of Judge Kerr’s denial of benefits, claimant has filed numerous requests for modification pursuant to 20 C.F.R. §725.310 (2000).<sup>5</sup> In each instance, claimant’s request for modification was denied.<sup>6</sup> Claimant filed her most recent

---

<sup>2</sup> 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 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

<sup>3</sup> The record reflects that claimant’s coal mine employment was in Alabama. Director’s Exhibit 37. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup> Although claimant filed an appeal with the Eleventh Circuit, the Court dismissed the appeal for “want of prosecution.” [*W.A.*] *v. Alabama By-Products Corp.*, No. 91-7434 (May 27, 1992)(Order)(unpub.).

<sup>5</sup> Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

<sup>6</sup> The procedural history of this case, set forth in the Board’s prior decisions in [*W.A.*] *v. Alabama By-Products Corp.*, BRB No. 96-0124 BLA (May 30, 1996)(unpub.), [*W.A.*] *v. Alabama By-Products Corp.*, BRB No. 97-0861 BLA (Feb. 19, 1998)(unpub.), [*W.A.*] *v. Alabama By-Products Corp.*, BRB No. 02-0239 BLA (Sept. 19, 2002) (unpub.), and [*W.A.*] *v. Alabama By-Products Corp.*, BRB No. 05-0917 BLA (Feb. 28, 2006)(unpub.), is incorporated herein by reference.

request for modification on December 4, 2006. Director's Exhibit 158. In the decision currently before the Board, the administrative law judge found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

The sole ground available for modification of a survivor's claim is a mistake in a determination of fact. *See Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether 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). Consequently, the issue properly before the administrative law judge was whether there was a mistake in a determination of fact regarding the finding that the evidence did not establish that the miner's death was due to pneumoconiosis.

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>7</sup> *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

---

<sup>7</sup>Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

*OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(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); *see Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).

In considering claimant's most recent request for modification, the administrative law judge noted that claimant had not submitted any new evidence regarding the cause of the miner's death. However, the administrative law judge granted claimant's request that she re-examine certain specific items of evidence.

The administrative law judge initially considered whether the evidence established the existence of complicated pneumoconiosis, which would entitle claimant to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304.<sup>8</sup> The only evidence in the record supportive of a finding of complicated pneumoconiosis is Dr. Naeye's initial autopsy report, wherein he diagnosed "complicated coal worker[s'] pneumoconiosis . . . characterized by anthracotic macronodules complicated by severe fibrosis and focal emphysema." Director's Exhibit 6. However, Dr. Naeye subsequently amended his diagnosis, stating in a subsequent letter:

- 
- (3) Where the presumption set forth at §718.304 is applicable.
  - (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
  - (5) 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).

<sup>8</sup> Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung such that (A) an x-ray of the miner's lungs shows a large opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.

I made an error in my diagnosis. The proper diagnosis in this case should have been simple coal worker[s'] pneumoconiosis, macronodular type. Lesions have to reach 20 mm (2 cm) in diameter to receive the diagnosis of complicated coal worker[s'] pneumoconiosis. In this case the largest lesion was 8 mm in diameter.

Please extent [sic] my apology . . . for my error in classifying this case as complicated when in fact it belongs in an intermediate category, "macronodular, simple coal worker[s'] pneumoconiosis." The term macronodular is added to the diagnosis of simple coal worker[s'] pneumoconiosis when lesions exceed 7 mm in diameter.

Director's Exhibit 6.

The administrative law judge noted that, while no specific words are required to establish a diagnosis of complicated pneumoconiosis, a physician must describe a condition "consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards." Decision and Order at 6, quoting *Pittsburg & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 986, 24 BLR 2-72, 2-92 (11th Cir. 2007). The administrative law judge found that Dr. Naeye's opinion did not meet this standard. The administrative law judge noted the largest nodule reported by Dr. Naeye (an eight millimeter nodule) did not qualify under 20 C.F.R. §718.304, which requires a nodule of at least one centimeter (ten millimeters) in diameter.<sup>9</sup> Decision and Order at 6. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that Dr. Naeye's opinion does not support a finding of complicated pneumoconiosis.<sup>10</sup> Consequently, we affirm the administrative law judge's finding that

---

<sup>9</sup> Dr. Naeye's opinion also does not support a finding of "massive lesions." 20 C.F.R. §718.306(b). The term "massive lesions" means lesions revealed on autopsy or biopsy that support a diagnosis of complicated pneumoconiosis. *Pittsburg & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 986, 24 BLR 2-72, 2-91-92 (11th Cir. 2007). Dr. Naeye opined that the miner did not suffer from complicated pneumoconiosis. Director's Exhibit 6.

<sup>10</sup> In his initial Decision and Order dated August 29, 1988, Administrative Law Judge James W. Kerr, Jr., found that Dr. Naeye's opinions did not establish the existence of complicated pneumoconiosis. Director's Exhibit 50. In its 1991 Decision and Order, the Board held, *inter alia*, that:

[A]lthough Dr. Naeye incorrectly stated lesions have to reach [two] centimeters rather than [one] centimeter in size to receive the diagnosis of

claimant is not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. 20 C.F.R. §718.205(c)(3).

The administrative law judge next considered whether the miner's death certificate established that the miner's death was due to pneumoconiosis. Fred Burke, a coroner, completed the miner's death certificate on January 23, 1985, attributing the miner's death to "natural causes (apparent heart attack)." Director's Exhibit 4. Mr. Burke, however, subsequently completed an amended death certificate, indicating that the miner's death from natural causes was due to pulmonary fibrosis with anthracosis and coal workers' pneumoconiosis. Director's Exhibit 39. The administrative law judge properly discredited the miner's amended death certificate because he found that Mr. Burke did not provide any explanation for his findings. See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 7.

The administrative law judge also considered whether Dr. Bailey's opinions established that the miner's death was due to pneumoconiosis. In a letter dated December 6, 1985, Dr. Bailey, the miner's treating physician, addressed the cause of the miner's death:

From [claimant's] description of [the miner's] illness just prior to his death, it *sounded like* he did have bronchitis which resulted in shortness of breath and other respiratory tract symptoms. The infection in his respiratory tract *may have* played a role in exacerbating his cardiac rhythm disturbance which ultimately resulted in his sudden death. This is the only manner in which I can see that his lung disease *could have* contributed significantly to his death. As you know from the pathologic report, there is no doubt that he did have some underlying "black lung" disease. The presence of that type of lung disease would predispose him to more frequent episodes of

---

complicated pneumoconiosis, . . . the physician further stated that the largest lesion in this case was .8 centimeters in diameter, which would be insufficient to establish the existence of complicated pneumoconiosis.

[W.A.] v. *Alabama By-Products Corp.*, BRB No. 88-3263 BLA (Apr. 30, 1991)(unpub.), slip op. at 4. Thus, the Board previously affirmed Judge Kerr's finding that Dr. Naeye's opinions did not support a finding of complicated pneumoconiosis. *Id.*

lung infection such as the bronchitis which he *apparently* developed just prior to his death.

Director's Exhibit 30 (emphasis added).

In a subsequent letter dated August 18, 1986, Dr. Bailey further addressed the cause of the miner's death:

I think that [the miner's] death was related to cardiac rhythm disturbance and not a "heart attack" in that coronary arteries had previously been normal. [The miner] did not have any evidence of pneumoconiosis or "black lung" on his chest x-ray but the pathologic report from the Pathologist shows that he definitely did have pneumoconiosis. His lung disease *appeared to be* chronic bronchitis although it is also obvious that he had underlying pneumoconiosis as evidenced by the findings of the Pathologist. Both of these types of lung disease would predispose him to respiratory tract infections such as the one which he *seemed* to develop prior to his death. The stress on his cardiovascular system caused by the *apparent* pulmonary infection *could conceivably have been* a factor in his death.

Director's Exhibit 103 (emphasis added).

The administrative law judge permissibly found that Dr. Bailey's statements regarding the cause of the miner's death were too equivocal to support a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>11</sup> *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 8-9.

The administrative law judge also considered the remaining medical evidence of record and accurately found that it did not support a finding that the miner's death was due to pneumoconiosis. Decision and Order at 9. Because it is based upon substantial

---

<sup>11</sup> In his initial Decision and Order dated August 29, 1988, Judge Kerr rejected Dr. Bailey's opinions because he found that they were equivocal with respect to the causal connection between the miner's pneumoconiosis and his death. Director's Exhibit 50. In its 1991 Decision and Order, the Board affirmed Judge Kerr's discrediting of Dr. Bailey's opinions on this basis. [*W.A.*] *v. Alabama By-Products Corp.*, BRB No. 88-3263 BLA (Apr. 30, 1991)(unpub.), slip op. at 3. The Board, therefore, previously affirmed Judge Kerr's finding that Dr. Bailey's opinions did not support a finding of death due to pneumoconiosis. *Id.*

evidence, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Moreover, based on our affirmance of the administrative law judge's finding pursuant to Section 718.205(c), we affirm the administrative law judge's finding that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Thus, the administrative law judge properly denied claimant's request for modification.

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

---

BETTY JEAN HALL  
Administrative Appeals Judge