BRB No. 08-0798 BLA

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| T.B. o/b/o S.B.<br>(Widow of J.B.)<br><br>Claimant-Petitioner<br><br>v.<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Respondent | ) | DATE ISSUED: 07/28/2009<br><br>DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Joseph G. Greco, Jr., Nesquehoning, Pennsylvania, for claimant.

Heather A. Vitale (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (07-BLA-0017) of Administrative Law Judge Janice K. Bullard rendered on 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).[2] This claim, which was filed on

[1] T.B. is pursuing the claim of his deceased mother, S.B., who was the miner's widow. Director's Exhibit 59.

[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

November 30, 2000, has been before the Board previously.[3] It is now being considered pursuant to claimant's second request for modification of the denial of benefits. In this decision we shall discuss that procedural history related to the administrative law judge's denial of claimant's second request for modification.

In a Decision and Order Denying Benefits on Modification issued on October 26, 2005, the administrative law judge found that claimant established six and one-half years of coal mine employment. The administrative law judge further found that the medical evidence did not establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.205(c). Director's Exhibit 55. Accordingly, the administrative law judge denied modification and denied benefits. Pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings of six and one-half years of coal mine employment, and that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The Board, therefore, affirmed the administrative law judge's finding that claimant did not establish a mistake in a determination of fact, and affirmed the denial of benefits on modification. [*T.B. o/b/o S. B.*] *v. Director, OWCP,* BRB No. 06-0216 BLA (July 26, 2006)(unpub.); Director's Exhibit 60.

Subsequently, claimant's son submitted a letter to the Office of Workers' Compensation Programs, dated October 11, 2006, that was treated as a second request for modification. *See* 20 C.F.R. §725.310 (2000); Director's Exhibits 61, 66. No new evidence was submitted with the second modification request. The claim was referred to the Office of Administrative Law Judges on June 11, 2007. Director's Exhibit 67.

After reviewing the record, the administrative law judge found that there was no mistake in a determination of fact in the prior denial. The administrative law judge specifically found that the relevant evidence established that the miner worked for six and one-half years in coal mine employment. She further found that the medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Additionally, the administrative law judge found, assuming *arguendo,* that the evidence had established the existence of pneumoconiosis, the evidence did not establish that the

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effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2009). 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 version of the Code of Federal Regulations.

[3] [*T.B. o/b/o S.B.*] *v. Director, OWCP*, BRB No. 06-0216 BLA (July 26, 2006)(unpub.); [*S.B.*] *v. Director, OWCP*, BRB No. 02-0739 BLA (Aug. 26, 2003)(unpub.); Director's Exhibit 60.

miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied modification and denied benefits.

On appeal, claimant contends that the administrative law judge erred in crediting the miner with only six and one-half years of coal mine employment. Claimant further contends that the administrative law judge erred in her analysis of the x-ray and medical opinion evidence in determining that claimant did not establish the existence of pneumoconiosis or death due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Lukosevicz v. Director, OWCP*, 888 F.2d 101, 13 BLR 2-100 (3d Cir. 1989).[5]

The administrative law judge may grant modification based on a change in conditions or because there was a mistake in a determination of fact. 20 C.F.R.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record indicates that the miner's last coal mine employment was in Pennsylvania. Director's Exhibit 28. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

§725.310(a)(2000). If the modification request relates to a survivor's claim, however, a change in physical condition cannot be established because a deceased miner's condition cannot change. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). Thus, claimant may establish a basis for modification only by proving a mistake in a determination of fact. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

Claimant contends that the administrative law judge erred in declining to modify her finding as to the length of the miner's coal mine employment. Specifically, claimant argues that the administrative law judge erred in failing to credit the miner with eleven and one-half years of coal mine employment alleged between 1948 and 1960. Claimant's Brief at 15-16. We disagree. The administrative law judge considered the miner's coal mine employment history form, his Social Security earnings records, a co-worker's affidavit, and the widow's testimony from the December 5, 2001 hearing initially held on her claim. The administrative law judge explained that, although the miner's coal mine employment history form and the co-worker's affidavit could support more than eleven years of coal mine employment, if accepted at face value, she did not fully credit them "because the [miner's] Social Security records document *other full-time, non-coal mine employment* during these same years (i.e., the [m]iner's garment industry work)."[6] Decision and Order at 4. The administrative law judge further explained how the more reliable evidence of record established six and one-half years of coal mine employment.[7] The administrative law judge's method of calculating the miner's coal mine employment was reasonable, *see Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988), and her finding is supported by substantial evidence. The finding is therefore affirmed.

[6] The administrative law judge noted that the miner's widow had testified "that her husband worked a full 8-hour day in the garment industry, thus supporting that he was not simultaneously working in coal mine employment." Decision and Order at 4 n.4 (citation omitted). The administrative law judge further noted the widow's testimony that the miner had worked in coal mining "'only a couple year[s]'". . . ." *Id.*

[7] Employing the same methodology as in her 2005 decision, the administrative law judge credited the miner with three and one-half years of coal mine employment from 1948 through 1951 because there was no evidence that the miner had any other employment during that time, and both he and his co-worker reported coal mine employment during this period. The administrative law judge further credited the miner with one quarter of coal mine employment with Mariani Coal that was documented on his Social Security records. Finally, the administrative law judge credited the miner with coal mine employment for eleven additional quarters between 1948 and 1960 that were not documented on his Social Security records, but during which he was not working in the garment industry. Decision and Order at 4.

Pursuant to 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of pneumoconiosis. Claimant's Brief at 5-7. Claimant's contention lacks merit. The administrative law judge considered four x-rays that were read for determining the presence of pneumoconiosis.[8] The x-rays dated October 9, 1979 and October 8, 1980, were read as positive for pneumoconiosis by Dr. McGuire, a Board-certified radiologist. Director's Exhibits 15, 40. The remaining two x-rays, dated October 7, 1980 and May 13, 1992, were read as negative for pneumoconiosis by Drs. Cole and Barrett, both of whom are Board-certified radiologists and B readers. Director's Exhibits 15, 16. Contrary to claimant's contention, the administrative law judge permissibly considered the conflicting x-ray readings based on the readers' radiological qualifications and reasonably accorded greater weight to the negative readings by the physicians with superior radiological qualifications. *See* 20 C.F.R. §718.202(a)(1); *White v. New White Coal Co.*, 23 BLR 1-, 1-4-5 (2004). We therefore affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as it is supported by substantial evidence.

Pursuant to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred in her analysis of the medical opinions when she accorded greater weight to Dr. Sherman's opinion than to the opinions of Drs. Gentile, Dunay, Marmo and Biancarelli. Claimant's Brief at 8-12. We reject claimant's contention. The administrative law judge permissibly found that the opinions of Drs. Gentile and Marmo, diagnosing the existence of pneumoconiosis, were not well-reasoned and were entitled to little weight, as they were based on inaccurate employment and smoking histories, were inadequately explained, and were not supported by the objective evidence of record. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 7, 8; Director's Exhibits 10, 14, 16, 28.

Likewise, the administrative law judge permissibly found the diagnosis of pneumoconiosis made by Dr. Biancarelli, who treated the miner in the hospital and signed his death certificate, to be unreasoned and entitled to little weight, as she did not address the miner's smoking history, and failed to provide any explanation or objective evidence to support her conclusion. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Director's Exhibits 14, 16. The administrative

[8] The administrative law judge referred to the chart of fourteen readings of thirteen x-rays set forth in her 2005 decision, nine of which had not been read for the purpose of detecting pneumoconiosis. Decision and Order at 5 n.5; [2005] Decision and Order at 6-8.

law judge further noted that although Dr. Biancarelli signed the death certificate indicating that the miner's death was due to respiratory arrest secondary to "COPD (black lung)," she had noted a "questionable history of COPD" in 1992, and had stated that the miner's shortness of breath was secondary to his "increasing abdominal girth." Director's Exhibit 16; Decision and Order at 9. The administrative law judge further noted that although Dr. Biancarelli described the miner's smoking as "heavy in the past" in 1991, she failed to address his smoking history in her letter of January 30, 2001. Director's Exhibit 14. Thus, the administrative law judge permissibly found Dr. Biancarelli's hospital records, death certificate and follow-up letter, to be inconsistent, and thus, unreasoned and entitled to little weight. *See Lango,* 104 F.3d at 573, 21 BLR at 2-12; *Bobick,* 13 BLR at 1-52; *Fields,* 10 BLR at 1-19.

The administrative law judge also reasonably accorded little weight to Dr. Dunay's diagnosis of pneumoconiosis, as conclusory and not well-documented, finding that it was inadequately explained and unsupported by the objective evidence of record. *Lango,* 104 F.3d at 573, 21 BLR at 2-12; *Fields,* 10 BLR at 1-19; *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985); Director's Exhibits 46, 50, 53. Additionally, contrary to claimant's contention, the administrative law judge permissibly determined that although Drs. Gentile, Marmo and Biancarelli were the miner's treating physicians, their opinions did not merit determinative weight because they were insufficiently reasoned and documented. *See Lango,* 104 F.3d at 573, 21 BLR at 2-12; *see also* 20 C.F.R. §718.104(d)(5).[9]

In contrast, the administrative law judge permissibly found the opinion of Dr. Sherman, that the miner did not have pneumoconiosis, to be probative and well-reasoned, as Dr. Sherman reviewed and referred to the extensive medical evidence in detail, and his opinion was "based on the most comprehensive data." Decision and Order at 7; *see Clark,* 12 BLR at 1-155; *Fields,* 10 BLR at 1-19; *Hall v. Director, OWCP,* 8 BLR 1-193 (1985). Contrary to claimant's contention, the administrative law judge was not required to discount Dr. Sherman's opinion because the physician did not physically examine the miner. *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *Cadwallader v. Director,*

[9] Claimant relies, in part, on revised 20 C.F.R. §718.104(d), which addresses the administrative law judge's analysis of the opinion of a treating physician that is developed after January 19, 2001. *See* 20 C.F.R. §718.101(b). Because several of the treating physicians' opinions in this case were developed before January 19, 2001, revised Section 718.104(d) does not apply to those reports. However, the administrative law judge's analysis of each treating physician's opinion in this case was consistent with Section 718.104(d), which requires the administrative law judge to determine the weight to accord the treating physician's opinion based on its credibility in light of its documentation and reasoning. *See* 20 C.F.R. §718.104(d)(5).

*OWCP*, 7 BLR 1-879 (1985). We therefore affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). After weighing all of the relevant evidence together, the administrative law judge rationally concluded that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, we affirm the administrative law judge's finding that claimant did not establish a mistake in a determination of fact in the prior denial of benefits.[10] *See* 20 C.F.R. §725.310 (2000); *Trumbo*, 17 BLR at 1-87-88; *Anderson*, 12 BLR at 1-112.

[10] Claimant's contention that the administrative law judge failed to specifically discuss the pulmonary function study of October 9, 1979 and the blood gas studies that were taken during the miner's hospitalizations, does not establish an error by the administrative law judge. The administrative law judge considered those tests in her 2005 decision, and explained that the pulmonary function study was invalid and the blood gas studies were not probative and did not support the doctors' opinions diagnosing pneumoconiosis. [2005] Decision and Order at 13, 18. In again reviewing the evidence, the administrative law judge found, within her discretion, that there was no mistake in a determination of fact. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). Further, contrary to claimant's contention, the administrative law judge considered the lay testimony of the miner's widow and co-worker in rendering her decision. Decision and Order at 10.

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