BRB No. 00-1026 BLA

KATHERN L. BOWENS (Widow of ROBERT BOWENS)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

Kathern L. Bowens, Mallory, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Michelle S. Gerdano (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (00-BLA-375) of Administrative Law Judge John C. Holms denying benefits 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).[1] The administrative law judge noted that the miner had fourteen years of qualifying coal mine employment. Decision and Order at 1. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718 (2000), the administrative law judge determined that the instant survivor's claim is a request for modification.[2] Decision and Order at 2-3. The administrative law judge noted the proper standard and found that based on the evidence of record, claimant failed to establish modification pursuant to 20 C.F.R. §725.310 (2000) as the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000). Decision and Order at 4. Accordingly, benefits were denied. On appeal, claimant generally contends that the evidence of record is sufficient to establish entitlement to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not

[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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The record indicates that the miner filed earlier claims on May 23, 1970, January 2, 1976 and on September 18, 1989, which were finally denied on December 26, 1989. Director's Exhibits 62, 63, 64. The miner died on August 28, 1994. Director's Exhibit 7. Claimant, the miner's widow, filed her survivor's claim on October 21, 1994, which was denied on March 2, 1999. Director's Exhibits 1, 46, 53. Claimant filed her request for modification, the subject of the instant appeal, on July 20, 1999. Director's Exhibit 57.

participate in this appeal.[3]

[3]As the administrative law judge's finding that the existence of pneumoconiosis was established is favorable to claimant and unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which employer and the Director have responded.[4] Claimant has not responded to the Board's order.[5] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised 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 findings of fact

[4]The Director's brief, dated May 14, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. In a brief dated May 14, 2001, employer asserted that the regulations at issue in the lawsuit "could" affect the outcome of this case. Employer's Brief at 2-10. Employer contends that the provisions contained at 20 C.F.R. §§718.201(c), 718.104(d), 718.205(d) and 718.204(a) may affect the disposition of this case, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of the instant appeal.

[5]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on April 20, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

and conclusions of law if they are rational, supported by substantial evidence, and consistent with applicable law. 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 pursuant to 20 C.F.R. Part 718 (2000) in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201 (2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Fourth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death.[6] *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The United States Court of Appeals for the Fourth Circuit issued *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), holding that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been made by claimant. Furthermore, in determining whether claimant has established modification pursuant to Section 725.310 (2000), the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *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); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 (2000) and therefore insufficient to establish modification.[7] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

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[6]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3.

[7]As the instant case is a survivor's claim, modification can not be established based on

a change in conditions. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

With respect to 20 C.F.R. §718.205, the administrative law judge properly considered the entirety of the medical opinion evidence of record and rationally found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis.[8] *Piccin, supra.* The relevant evidence of record concerning the cause of death consists of eight medical opinions and the death certificate. Dr. Reddy, the miner's treating physician, opined that the miner suffered from pneumoconiosis and that the disease had hastened his death. Director's Exhibit 54. The death certificate listed the cause of death as "Endstage Lung Carcinoma" and does not list any other contributing cause or other significant condition. Director's Exhibit 7. Drs. Gagucas, Hansbarger, Kleinerman, Bush, Zaldivar, Hippensteel and Naeye opined that pneumoconiosis did not contribute to or hasten the miner's death. Director's Exhibit 9; Employer's Exhibits 1-6. Specifically, Drs. Hansbarger, Bush, Zaldivar and Hippensteel opined that the miner's death was due to cancer caused by smoking. Employer's Exhibits 1, 3-5. The administrative law judge properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205(c) as Dr. Reddy did not offer any justification or reasoning for her newly submitted opinion that the miner's death was hastened by pneumoconiosis. *See Shuff, supra*; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Director's Exhibit 54; Decision and Order at 4. The administrative law judge permissibly determined that the great weight of the remaining medical opinion evidence supported a finding that the miner's death was not contributed to or hastened by pneumoconiosis. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kuchwara, supra*; Decision and Order at 4; Director's Exhibit 54; Employer's Exhibits 1-6. Although the record indicates that Dr. Reddy was the miner's treating physician, the administrative law judge has provided valid reasons for finding her opinion insufficient to meet claimant's burden of proof.[9] *See*

[8]In the prior decision, Administrative Law Judge Joan Huddy Rosenzweig found that no physician of record opined that the miner's death was caused or hastened by pneumoconiosis.

[9]The presumption at 20 C.F.R. §718.304 (2000) is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein.

Grizzle v. Pickands Mather and Co., 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Clark, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel, supra*; *Kuchwara, supra*; Decision and Order at 4; Director's Exhibit 54.

See 20 C.F.R. §718.304 (2000).

The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 (2000) as it is supported by substantial evidence and is in accordance with law.[10] Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310 (2000), we affirm the denial of benefits in this survivor's claim. *Shuff, supra.*

Accordingly, the administrative law judge's Decision and Order denying modification and benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[10]We note claimant's lack of representation by counsel during the proceedings before the administrative law judge. Claimant was specifically informed of her right to have counsel at no charge to her and the issues involved in the case. She was also allowed to testify and present evidence. Hearing Transcript at 4-21. Consequently, the hearing before the administrative law judge was properly adjudicated. *See* 20 C.F.R. §725.362(b); *Shapell v. Director, OWCP*, 7 BLR 1-703 (1985).