

BRB No. 11-0622 BLA

LINDA J. MORGAN)	
(Widow of NOBLE M. MORGAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELKWAY MINING COMPANY)	DATE ISSUED: 06/21/2012
)	
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 Request for Modification and Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Request for Modification and Denying Benefits (2009-BLA-00011) of Administrative Law Judge Ralph A. Romano, rendered on a survivor's claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be

¹ Claimant is the widow of the miner, Noble M. Morgan, who died on July 7, 1999. Director's Exhibits 5, 6.

codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the third time. The relevant procedural history of the case is as follows. Claimant filed her survivor's claim on July 29, 1999,² which was denied by Administrative Law Judge Robert J. Lesniak on August 27, 2002. Claimant appealed, and the Board affirmed Judge Lesniak's findings that the miner suffered from pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), but vacated his finding at 20 C.F.R. §718.205(c), because he failed to consider relevant law in weighing the conflicting medical opinions as to whether the miner's death was due to pneumoconiosis. *Morgan v. Elkay Mining Co.*, BRB No. 02-0845 BLA (Sept. 12, 2003) (unpub.). In a Decision and Order - Denying Benefits Upon Remand, issued on February 12, 2004, Judge Lesniak reconsidered the evidence and again found that claimant failed to satisfy her burden to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The denial of benefits was affirmed subsequently by the Board, *see Morgan v. Elkay Mining Co.*, BRB No. 04-0473 BLA (Mar. 30, 2005) (unpub.) (Hall, J., dissenting) and the United States Court of Appeals for the Fourth Circuit, *see Morgan v. Elkay Mining Co.*, No. 05-1516 (4th Cir. Dec. 20, 2007) (unpub.).

Claimant subsequently filed a timely request for modification and the case was assigned to Judge Romano (the administrative law judge). Director's Exhibit 74. The administrative law judge issued his Decision and Order Denying Request for Modification and Denying Benefits on May 18, 2011, which is the subject of this appeal. The administrative law judge considered the evidence on modification, in conjunction with the evidence previously submitted in the survivor's claim, and determined that there was no mistake in a determination of fact with regard to Judge Lesniak's denial of benefits. The administrative law judge concluded that claimant failed to establish a basis for modification under 20 C.F.R. §725.310, and he denied survivor's benefits.

On appeal, claimant argues that the administrative law judge erred in finding Dr. Green's opinion to be insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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,

² On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Based on the filing date of this claim, the amendments are not applicable.

and in accordance with applicable law.³ 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, in a survivor’s claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). The miner’s death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner’s death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 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. *See* 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. 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).

In order to establish a basis for modification in a survivor’s claim, where the denial of benefits related to the miner’s condition and death, the survivor must demonstrate that there was a mistake in a determination of fact in the prior decision. *See* 20 C.F.R. §725.310; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge has the authority to consider all the evidence for any mistake in a determination of fact, including the ultimate fact of entitlement. *See Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

The administrative law judge reconsidered the evidence before Judge Lesniak, and found no mistake in determination of fact with regard to Judge Lesniak’s finding that the evidence before him was insufficient to establish the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Decision and Order Denying Request for Modification and Denying Benefits at 4. Because claimant does not challenge this finding on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge next weighed the newly submitted medical opinion of Dr. Green, that coal dust exposure was a significant contributing factor in the miner’s

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner’s coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 2.

death, against the contrary opinions of Drs. Tuteur, Swedarsky and Hippensteel, that the miner's death was unrelated to his coal mine employment. Decision and Order Denying Request for Modification and Denying Benefits at 4-8; Director's Exhibit 80; Claimant's Exhibit 1; Employer's Exhibits 3, 7. The administrative law judge found that Dr. Green's opinion was not well-reasoned and further concluded that, notwithstanding the weight accorded the contrary evidence,⁴ Dr. Greene's opinion, standing alone, was insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Thus, the administrative law judge found that claimant failed to establish a basis for modifying the denial of her survivor's claim under 20 C.F.R. §725.310.

Claimant contends that the administrative law judge erred in finding Dr. Green's opinion to be insufficient to satisfy her burden of proof. Claimant submits that Dr. Green's opinion is well-reasoned and well-documented, and entitled to controlling weight, as he reviewed all of the relevant evidence and, unlike Dr. Tuteur, rendered conclusions that are consistent with the regulations. Claimant maintains that the administrative law judge should have rejected Dr. Tuteur's opinion as hostile to the Act.

Claimant's assertions of error with respect to Dr. Green are rejected as they are without merit. As noted by the administrative law judge, Dr. Green prepared a report on January 28, 2010, based on his review of the miner's medical records, autopsy report, death certificate and reports of various physicians. Claimant's Exhibit 1. Dr. Green reported that the miner suffered from colon cancer, coal workers' pneumoconiosis, and chronic obstructive pulmonary disease (COPD) due to coal dust exposure and cigarette smoking. *Id.* He opined that "the underlying cause" of the miner's death was colon cancer, while the "immediate cause of death was respiratory failure due to confluent and necrotizing pneumonia," involving both lungs. *Id.* Dr. Green noted that claimant had several risk factors for pneumonia including metastatic cancer, the effects of chemotherapy and the presence of chronic lung disease (consisting of COPD and coal workers' pneumoconiosis). *Id.* Dr. Green concluded that coal dust exposure was a significant factor that hastened the miner's death and explained:

[Claimant] was at risk for developing pneumonia from a variety of causes, including the dust-induced COPD. Furthermore, the pulmonary function studies show that his lungs were already compromised in several regards, including an abnormally low DLCO (an index of the ability to transport gases from the alveoli to the blood) and borderline hypoxemia at rest. I

⁴ The administrative law judge found that Dr. Tuteur's opinion was "entitled to weight," that Dr. Swedarsky's opinion was entitled to little weight, and that Dr. Hippensteel's opinion was not well-reasoned. Decision and Order Denying Request for Modification and Denying Benefits at 9-10.

thus think it is entirely reasonable to infer that both the development of pneumonia and respiratory failure are *more likely to occur* in a patient with already mildly compromised lungs.

Id. (emphasis added).

Contrary to claimant's arguments, the administrative law judge rationally found that Dr. Green's opinion was not well reasoned, as it was "expressed in terms of generalities rather than looking at the specifics of this case." Decision and Order Denying Request for Modification and Denying Benefits at 9; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge correctly observed that while Dr. Green cited to evidence indicating that the miner's lungs were mildly compromised by COPD, he "points to no evidence" that the [m]iner's mildly compromised lungs *actually caused* him to develop pneumonia and respiratory failure." Decision and Order Denying Request for Modification and Denying Benefits at 9 (emphasis added). The administrative law judge rationally concluded that Dr. Green's opinion was speculative and insufficient to satisfy claimant's burden of proof, because "stating that something 'is more likely to occur' does not rise to the level of establishing that it actually hastened the [m]iner's death here." *Id.*; *see Sparks*, 213 F.3d at 192, 22 BLR at 2-264; *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-92-93; *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

Claimant has the burden to establish entitlement, *see White v. Director, OWCP*, 6 BLR 1-368 (1983) and, therefore, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Although claimant asserts that Dr. Green's opinion is sufficient to establish that the miner's death was hastened by pneumoconiosis, her assertions amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge has broad discretion in rendering his credibility determinations, we affirm his finding that Dr. Green's opinion is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁵ *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21

⁵ Because we affirm the administrative law judge's finding that claimant's evidence on modification, consisting of Dr. Green's opinion, is insufficient to establish that the miner's death was due to pneumoconiosis, it is not necessary that we address

BLR at 2-274. We, therefore, affirm the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310, and affirm the denial of benefits. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

claimant's arguments with regard to Dr. Tuteur. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).