

BRB No. 98-1311 BLA

WILMA F. KISER	)	
(Widow of RIT B. KISER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Wilma F. Kiser, Castlewood , Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant,<sup>1</sup> without the benefit of counsel,<sup>2</sup> appeals the Decision and Order (97-BLA-

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<sup>1</sup> Claimant is Wilma F. Kiser, surviving spouse of the miner, Rit B. Kaiser, who died on February 23, 1991. Director's Exhibit 9.

<sup>2</sup> Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v.*

1424) of Administrative Law Judge Edward J. Murty, Jr. 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). The case is before the Board for the third time. The administrative law judge concluded that the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied the claim.

The procedural history of this claim is as follows: Claimant filed her survivor's claim on March 27, 1991. Director's Exhibit 1. Administrative Law Judge Edward J. Murty, Jr., issued a Decision and Order dated December 1, 1992, finding that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2), but that it was insufficient to establish death due to pneumoconiosis at Section 718.205(c). Following claimant's appeal, the Board affirmed the administrative law judge's finding that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(2), but vacated his findings at Section 718.205(c) because the Board determined that he relied, in part, upon qualifications of physicians which were not of record, and that the administrative law judge's decision should be made in light of the holding of the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). On remand, the Board instructed the administrative law judge to render a finding at Section 718.205(c) considering only the evidence of record. *Kiser v. Clinchfield Coal Co.*, BRB No. 93-1060 BLA (Feb. 22, 1995) (unpub.). On remand, the administrative law judge again found the evidence insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c), and thus, he denied benefits in a Decision and Order dated June 30, 1995. Director's Exhibit 68. Following claimant's second appeal, the Board affirmed the administrative law judge's denial of benefits. *Kiser v. Clinchfield Coal Co.*, BRB No. 96-0640 BLA (May 30, 1996)(unpub.). Director's Exhibit 73. Claimant then submitted new evidence on February 26, 1997, consisting of an interpretation of the miner's x-ray from 1989. Director's Exhibit 74. The administrative law judge then issued a Decision and Order dated June 26, 1998, denying claimant's request for modification , which is the subject of the instant *pro se* appeal.

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 Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Antonio v. Bethlehem Mines Corp.*, 6 BLR 1-702 (1983). 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

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*Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

with 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). Employer, in response, asserts that the administrative law judge’s findings are supported by substantial evidence, and urges affirmance of the administrative law judge’s Decision and Order. The Director, Office of Workers’ Compensation Programs has filed a letter indicating that he will not file a brief in the instant case.

The Board has held that the sole ground for modification in a survivor’s claim is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner’s condition. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In the instant case, the administrative law judge reviewed all of the evidence of record. He correctly found that the newly submitted x-ray was not relevant to an inquiry as to the cause of the miner’s death. 1998 Decision and Order at 2. The administrative law judge then found that the miner’s death certificate stated that the miner’s cause of death was “pneumonia due to or as a consequence of immunoblastic lymphoma”, and made no mention of pneumoconiosis. Director’s Exhibit 9; Decision and Order at 2. He noted further that Dr. Stefanini’s autopsy report, Director’s Exhibit 10, and the reports of Drs. Naeye, Caffrey and Tomaszefski, Director’s Exhibit 11, Employer’s Exhibit 2, 3 also failed to connect the death of the miner to pneumoconiosis. Decision and Order at 2-3. As it is claimant’s burden to establish that the miner’s pneumoconiosis was a substantially contributing cause of the miner’s death, *see Shuff, supra*; *see also Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988), we hold that the administrative law judge’s review of all of the relevant evidence of record constitutes a finding that there was no mistake in a determination of fact, *see Wojtowicz, supra*. We affirm, therefore, the administrative law judge’s denial of modification at Section 725.310, his finding that the medical evidence fails to establish death due to pneumoconiosis at Section 718.205(c), and thereby, his denial of the instant survivor’s claim.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge