BRB No. 05-0791 BLA

OLGA MARUNICH (Widow of MILTON MARUNICH)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 03/27/2006
UNITED STATES STEEL MINING COMPANY	)	
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 Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, the spouse of a deceased miner, appeals the Decision and Order Denying Benefits (04-BLA-6727) of Administrative Law Judge Linda S. Chapman (the

administrative law judge) with respect to 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 case was before her on employer's request for modification of the district director's Proposed Decision and Order awarding benefits. The administrative law judge determined, pursuant to 20 C.F.R. §725.310, that employer established that there was a mistake of fact in the award of benefits, as the evidence of record was insufficient to establish the existence of pneumoconiosis. The administrative law judge also found that even if claimant had established the existence of pneumoconiosis, she did not prove that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

Claimant contends on appeal that the administrative law judge erred in considering employer's request for modification of the district director's Proposed Decision and Order awarding benefits. Claimant argues that because employer failed to timely respond to the district director's initial findings of entitlement, it was barred from challenging the award of benefits in any further proceeding. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and urges the Board to reject claimant's arguments on appeal. Claimant has filed a reply brief reiterating her contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance 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 survivor's benefits under 20 C.F.R. Part 718 in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner had complicated pneumoconiosis. 20 C.F.R. §§718.1; 718.202; 718.203; 718.205(c); 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(2); *Piney Mountain Coal Co. v.*

[1] Claimant died on October 26, 2003. Jean Hurley, claimant's daughter, is pursuing the survivor's claim on behalf of her mother's estate. Director's Exhibit 45.

Mays, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980, 16 BLR 2-90 (4th Cir. 1992).[2]

The miner died on March 2, 2002.[3] Claimant filed her application for survivor's benefits on March 21, 2002. Director's Exhibit 3. The district director issued a Notice of Claim on April 1, 2002, to which employer did not respond. Director's Exhibit 14. In a "Schedule for the Submission of Additional Evidence" dated June 12, 2002, the district director indicated to the parties that claimant had been found entitled to benefits and that employer was the properly designated responsible operator. Director's Exhibit 16. Employer filed no response. The district director subsequently issued a Proposed Decision and Order awarding benefits on September 16, 2002. Director's Exhibit 18. Employer objected to the award of benefits in a letter dated November 18, 2002, and requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 23. The case was assigned to Administrative Law Judge Robert L. Hillyard, who determined that, pursuant to 20 C.F.R. §725.419, employer's letter constituted a request for modification, which had to be initiated before the district director. Accordingly, Judge Hillyard remanded the case to the district director for consideration of whether employer established the prerequisites for modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 46. The district director denied employer's modification request and transferred the case to the administrative law judge for a hearing. The parties' discussion at the hearing of the significance of employer's request for modification was limited to the effect it had on the application of the evidentiary limitations set forth in 20 C.F.R. §725.414. The Decision and Order Denying Benefits that is the subject of this appeal followed.

On appeal claimant argues only that the administrative law judge erred in failing to consider whether employer was permitted to lodge its first objection to the initial award of benefits in a request for modification submitted more than thirty days after the issuance of the district director's Proposed Decision and Order. In support of her contention, claimant cites the unpublished decision of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP [Duelly]*, 104 Fed. Appx. 912, 2004 WL 1688333, No. 03-1604 (4th Cir. Jan. 29, 2004). The court held in *Duelly* that pursuant to 20 C.F.R. §725.413(b)(3) (2000), a responsible operator could

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[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's most recent coal mine employment occurred in West Virginia. Director's Exhibit 1; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] The miner was awarded benefits as a result of a claim filed on February 11, 1991. Director's Exhibit 1.

not challenge the district director's initial finding of entitlement in any subsequent proceeding, including a request for modification under Section 725.310, without first establishing good cause for its untimely response to the initial finding of entitlement.

In the case at bar, employer asserts that under Section 725.310, it had a right to seek modification within one year of the district director's issuance of the Proposed Decision and Order. The Director maintains that pursuant to the amended versions of 20 C.F.R. §§725.412(b) and 725.419, the administrative law judge acted properly in addressing employer's request for modification.

Upon consideration of the arguments raised by the parties and the relevant regulatory provisions, we hold that the administrative law judge did not err in treating as valid employer's request for modification of the district director's Proposed Decision and Order awarding benefits. As the Director notes, the amendments to the regulations, which did not apply to the claim at issue in *Duelly*, have changed the way that the Department of Labor (DOL) treats operator response to the district director's findings of entitlement.

In the process of considering amendments to the regulations, DOL decided to eliminate the notice of initial finding regarding claimant eligibility and operator liability. As a consequence, DOL deleted Section 725.413(b)(3) (2000), which required a responsible operator to affirmatively challenge, within thirty days, an initial finding of entitlement to benefits. Under the amended regulations, which apply to this claim, the district director issues a schedule for the submission of additional evidence after developing evidence in accordance with 20 C.F.R. §725.405.[4] 20 C.F.R. §725.410. Amended Section 725.412(b) provides that a responsible operator "shall be deemed to have contested the claimant's entitlement" if it does not respond to the schedule. 20 C.F.R. §725.412(b). The amended regulations also specifically indicate, in Section 725.419(d), that "[o]nce a proposed decision and order…becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, *except as provided in §725.310*." 20 C.F.R. §725.419(d) (emphasis supplied). Therefore, based upon the plain language of revised Sections 725.412(b) and 725.419(c), employer was not required to respond to any initial notice of entitlement, including the schedule for the admission of additional evidence, and employer had a right to request modification of the Proposed Decision and Order awarding benefits pursuant to Section 725.310.

[4] The amended regulations apply to this claim because it was filed after January 19, 2001. Director's Exhibit 3; 20 C.F.R. §725.2(c).

With respect to the administrative law judge's consideration of employer's request for modification, the administrative law judge determined that employer established a mistake of fact in the district director's finding that the miner had pneumoconiosis. The administrative law judge then concluded that the evidence of record is insufficient to establish the existence of pneumoconiosis at Section 718.202(a). Decision and Order at 9, 14. The administrative law judge also found that claimant did not prove that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Because claimant has not challenged any of these findings on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.* 6 BLR 1-710 (1983). In light of our affirmance of the administrative law judge's determination that the miner did not have pneumoconiosis and that his death was not due to pneumoconiosis, essential elements of entitlement, we must also affirm the denial of benefits. *See* 20 C.F.R. §718.205(a); *Trumbo*, 17 BLR at 1-87.

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