

BRB No. 13-0498 BLA

ANNA MAE VRANA )  
(Widow of JOSEPH VRANA) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 SHANNOPIN MINING COMPANY ) DATE ISSUED: \_\_\_\_\_  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE )  
 CORPORATION )  
 )  
 Employer/Carrier-Respondents )  
 )  
 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 Thomas M. Burke,  
Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Edensburg, Pennsylvania,  
for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for  
employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Benefits (2011-BLA-06147) of Administrative Law Judge Thomas M. Burke (the administrative law judge), rendered with respect to claimant's request to modify the denial of her survivor's claim, filed on June 14, 2002, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).<sup>2</sup> This case is before the Board for a third time.<sup>3</sup> The administrative law judge considered the evidence submitted 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 the prior denial of claimant's survivor's claim.<sup>4</sup> Specifically, the administrative law judge determined that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 and, therefore, failed to establish a basis for modification under 20 C.F.R. §725.310. Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant argues that the administrative law judge did not properly address whether the evidence was sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in response to claimant's appeal.

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,

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<sup>1</sup> Claimant is the widow of the miner, Joseph Vrana, who died on February 10, 2000. Director's Exhibit 8.

<sup>2</sup> The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim because it was filed before January 1, 2005.

<sup>3</sup> We incorporate the procedural histories set forth in *Vrana v. Shannopin Mining Co.*, BRB No. 05-0380 BLA (Nov. 30, 2005) (unpub.) and *Vrana v. Shannopin Mining Co.*, BRB No. 08-0285 BLA (May 27, 2008) (unpub.).

<sup>4</sup> Claimant seeks to modify the Decision and Order Denying Benefits on Modification of Administrative Law Judge Micheal P. Lesniak issued on April 26, 2010. Judge Lesniak found that claimant failed to establish that the miner suffered from complicated pneumoconiosis pursuant 20 C.F.R. §718.304, or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibits 55, 82.

and in accordance with applicable law.<sup>5</sup> 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 a basis for modification in a survivor’s claim, where the denial of benefits related to the miner’s condition and death, she 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 Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-63 (3d Cir. 1995).

Based on his consideration of all of the record evidence, the administrative law judge found that claimant established that the miner suffered from clinical and legal pneumoconiosis. However, the administrative law judge determined that there was no mistake in a determination of fact on the issue of death causation. Specifically, the administrative law judge determined that the opinions of Drs. Jaworski, Anderson and Begley, that pneumoconiosis hastened the miner’s death, were not reasoned and documented. Therefore, the administrative law judge found that claimant did not satisfy her burden of proof. Because it is unchallenged on appeal, we affirm the administrative law judge’s finding that claimant failed to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).<sup>6</sup> *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant’s sole argument on appeal is that the administrative law judge did not properly address whether the opinion of Dr. Begley is sufficient to establish that the miner suffered from complicated pneumoconiosis. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A,

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<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner’s coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibits 1, 3.

<sup>6</sup> The Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The language previously found at 20 C.F.R. §718.205(c) is now set forth in 20 C.F.R. §718.205(b). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

In a report dated September 8, 2008, Dr. Begley indicated that he reviewed the miner's medical records, and noted that the miner had several abnormal x-rays, although he did not identify the dates of the x-rays to which he referred. Director's Exhibit 63. Dr. Begley stated, "one has to be concerned that [the miner] may have had complicated pneumoconiosis based upon the multiple x-ray reports, which reveal a 1.5 to 2.0 cm lesion in the right lung." *Id.*

In a deposition conducted on November 2, 2009, Dr. Begley was asked whether the miner had complicated pneumoconiosis and stated:

Of concern is the fact that [the miner] had a two [centimeter] lesion in his right lung, which was never biopsied. And this, in view of his many years of exposure to coal dust, as well as his repeated documentation of simple pneumoconiosis, may well represent complicated pneumoconiosis.

Director's Exhibit 93 at 12. On cross-examination, however, Dr. Begley further testified:

Q. I asked if you could [diagnose] complicated coal workers' pneumoconiosis within a reasonable degree of medical certainty.

A. I don't have his x-rays in front of me. You'd have to be extremely concerned with 40-something years of coal dust exposure, documented simple coal workers' pneumoconiosis, that he may, in fact, have complicated pneumoconiosis.

Q. And without seeing those films, you can't [diagnose] that with a reasonable degree of medical certainty, is that correct?

A. I answered that question already.

Q. Is my question correct?

A. Yes.

*Id.* at 29-30.

Contrary to claimant's argument, the administrative law judge observed correctly that Dr. Begley could not diagnose complicated pneumoconiosis with any degree of

medical certainty because he did not have the opportunity to personally review the miner's x-rays.<sup>7</sup> Decision and Order at 17-18. Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if her evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because there is no evidence in this record to establish the existence of complicated pneumoconiosis under 20 C.F.R. 718.304(a)-(c), we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact with regard to the prior denial of her survivor's claim.

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<sup>7</sup> Judge Lesniak previously found that claimant did not establish the existence of complicated pneumoconiosis because "only Dr. Begley mentioned complicated pneumoconiosis in his medical report and said that he cannot diagnose it himself without seeing the miner's x-rays. Dr. Begley only reviewed the x-ray interpretations completed by other doctors and not the x-rays themselves. None of the doctors actually interpreting the x-rays found complicated pneumoconiosis." April 26, 2010 Decision and Order Denying Modification at 10; *see* Director's Exhibit 10; Employer's Exhibit 4.

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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BETTY JEAN HALL  
Administrative Appeals Judge