U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0191 BLA

KATHLEEN GOFF (Widow of CALVIN GOFF) Claimant-Petitioner v. EASTERN COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/24/2015 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Kathleen Goff, Shelbiana, Kentucky, *pro se*.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits on Remand (2010-BLA-05039) of Administrative Law Judge Christine

[1] Claimant is the widow of the miner, Calvin Goff, who died on July 1, 2001. Director's Exhibit 5. The miner filed a claim for black lung benefits on January 13, 1993, which was denied by the district director on July 1, 1993. Director's Exhibit 1 at 11, 105. The miner took no further action until he filed a second claim on August 31, 1998, which was denied by the district director on December 4, 1998. Director's Exhibit

L. Kirby rendered on a survivor's claim filed on September 26, 2001, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the third time. On June 27, 2007, Administrative Law Judge Alice M. Craft issued a Decision and Order denying benefits, finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[2] After considering claimant's appeal, the Board affirmed the denial of benefits. *K.G.* [*Goff*] *v. Eastern Coal Co.*, BRB No. 07-0861 BLA (June 24, 2008) (unpub.).

Claimant requested modification of the denial on July 18, 2008. Director's Exhibit 36. On June 7, 2011, Administrative Law Judge Robert B. Rae denied claimant's request pursuant to 20 C.F.R. §725.310, as she did not establish that the miner had pneumoconiosis or that the prior decision contained a mistake in a determination of fact. Pursuant to claimant's appeal, the Board vacated Judge Rae's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1) and (4), holding that Judge Rae had not adequately explained his findings, and did not weigh all relevant evidence. *Goff v. Eastern Coal Co.*, BRB No. 11-0619 BLA, slip op. at 3, 4-5 (June 25, 2012) (unpub.).

On remand, this case was reassigned to Judge Kirby (the administrative law judge), due to Judge Rae's retirement. On February 14, 2014, the administrative law judge issued a Decision and Order in which she determined that claimant failed to establish the existence of pneumoconiosis and, therefore, failed to establish a mistake in a determination of fact in the prior decision. Accordingly, the administrative law judge denied claimant's request for modification pursuant to 20 C.F.R. §725.310 and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of her request for modification and the denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of

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2 at 5, 255. In a letter dated March 22, 1999, the district director notified employer that the miner's second claim was finally denied by reason of abandonment. *Id*. at 2.

[2] Administrative Law Judge Alice M. Craft found that the miner had twenty-one years of coal mine employment, based on the parties' stipulation. *Goff v. Eastern Coal Co.*, BRB No. 11-0619 BLA, slip op. at 2 n.2 (June 25, 2012) (unpub.).

Workers' Compensation Programs, has not filed a substantive brief in response to claimant's 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, 1-177 (1989). 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 with 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, 361-62 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). Death is considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable.[4] 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

A request for modification will be granted in a survivor's claim only if the party seeking modification establishes that a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The United States Court of Appeals for the Sixth Circuit has held that claimant need not allege a specific error in order for an administrative law judge to grant modification; rather, the administrative law judge has broad discretion to correct mistakes

[3] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Therefore, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Based on the filing date of the survivor's claim, and the denial of the miner's lifetime claims, the 2010 amendments to 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(*l*), are not applicable in this case.

of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-291, 2-996 (6th Cir. 1994).

In this case, the administrative law judge denied claimant's request for modification, as she failed to establish a mistake in a determination of fact in Judge Craft's finding that the evidence was insufficient to prove that the miner had pneumoconiosis. Relevant to 20 C.F.R. §718.202(a)(1), the administrative law judge examined each of the thirty-one x-rays in the miner's treatment records, and incorporated by reference Judge Craft's chart and description of the x-ray evidence. Decision and Order Denying Benefits on Remand at 4; *see* 2007 Decision and Order Denying Benefits at 5-8. The administrative law judge accurately determined that all of the x-rays were taken between April 1992 and June 2001, in the course of medical treatment, and that no additional x-rays were submitted in support of the request for modification. Decision and Order Denying Benefits on Remand at 4. The administrative law judge also correctly found that none of the radiologists who interpreted the x-rays for the purpose of treatment discussed coal workers' pneumoconiosis (CWP). *Id*. She rationally determined that, because these readings were silent as to the existence of pneumoconiosis, they were "inconclusive to establish either the presence or absence of CWP."[5] *Id*.; *see Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984).

The administrative law judge further considered the rereadings of the treatment record x-rays dated August 21, 1998, October 9, 1998, December 29, 1998, and June 5, 2001, that were submitted by employer and claimant in conjunction with her application for survivor's benefits. Decision and Order Denying Benefits on Remand at 4. Each of these films was reread as positive by Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, and as negative by Dr. Wiot, who is also a dually qualified radiologist. Director's Exhibit 33; Claimant's Exhibits 2-5; Employer's Exhibit 7. The administrative law judge acted within her discretion as fact-finder in determining that Drs. Alexander and Wiot had equivalent radiological qualifications[6] and, therefore, the evidence in these four x-rays was in "equilibrium." Decision and Order Denying Benefits on Remand at 4; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321,

[5] The administrative law judge accurately reported that Judge Craft had found that, because these readings were silent as to the existence of pneumoconiosis, they were negative for pneumoconiosis. Decision and Order Denying Benefits on Remand at 4.

[6] The administrative law judge observed correctly that Judge Craft had found that Dr. Wiot's negative readings were entitled to greater weight "due to his preeminence in the field." Decision and Order Denying Benefits on Remand at 4; *see* 2007 Decision and Order Denying Benefits at 20.

17 BLR 2-77, 2-87 (6th Cir. 1993). Based on this finding, and the administrative law judge's determination that the other readings of the treatment record x-rays were inconclusive, she rationally concluded that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); Decision and Order Denying Benefits on Remand at 4-5.

The administrative law judge also considered the medical reports that Judge Craft had weighed at 20 C.F.R. §718.202(a)(4).[7] Decision and Order Denying Benefits on Remand at 6-8. These consisted of reports in the miner's treatment records, as well as the medical opinions of Drs. King, Musgrave, Rosenberg, and Fino. Director's Exhibits 6 (at 3, 4), 41 at 5; Claimant's Exhibit 1; Employer's Exhibits 1, 4. In a letter dated November 13, 2005, Dr. King indicated that he had treated the miner, who had "a diagnosis of black lung" and chronic obstructive pulmonary disease (COPD). Director's Exhibit 41 at 5. Dr. King further stated that the miner had restrictive lung disease as "a result of his occupational exposure and coal workers' pneumoconiosis." *Id*. Dr. Musgrave, the miner's oncologist, submitted a letter dated September 4, 2001 in which she reported that the miner had a history of esophageal cancer and black lung disease. Director's Exhibit 6 at 3. Dr. Musgrave also noted that the miner's pulmonary function study results were consistent with restrictive airway disease. *Id*. Drs. Rosenberg and Fino opined that the miner did not have coal workers' pneumoconiosis, or any respiratory disease caused by coal dust exposure, based on their review of the miner's medical records. Employer's Exhibits 1, 4.

The administrative law judge acted within her discretion in finding that Dr. King's opinion had "limited probative value," as he did not identify the specific bases for his diagnoses of black lung disease, COPD, and restrictive airways disease caused by coal dust exposure, and did not explain how he reached his conclusions. Decision and Order on Remand Denying Benefits at 6; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). The administrative law judge also rationally determined that Dr. Musgrave's opinion had "little probative value" because she did not specify the pulmonary function study to which she referred, and did not explain how she arrived at her diagnosis of black lung disease. Decision and Order on Remand Denying Benefits at 7; *see Williams*, 338 F.3d at 518, 22 BLR at 2-655. We affirm, therefore, the administrative law judge's finding that Judge Craft's discrediting of the evidence

[7] Claimant cannot establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (3), as there is no evidence in the record that is relevant to those subsections. *See Goff*, BRB No. 11-0619 BLA, slip op. at 5 n.6.

supportive of a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4) did not contain a mistake in a determination of fact.[8] *See Worrell*, 27 F.3d at 230, 18 BLR at 2-996.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge then considered the supplemental reports from Drs. King and Musgrave that claimant submitted in support of her request for modification. In letters dated October 1, 2008 and June 22, 2009, Dr. King stated that he based his diagnosis of CWP on the award of federal black lung benefits to the miner issued by a district director, the miner's history of occupational exposure, a December 12, 2000 pulmonary function study showing lung volumes consistent with restrictive airway disease, and interpretations of CT scans dated January 3, 2000 and February 19, 2000, that he described as consistent with CWP. Director's Exhibit 62 at 6. Dr. Musgrave proffered letters dated October 8, 2008 and June 18, 2009. Director's Exhibits 60, 70. She stated that pulmonary function studies performed in 2000 revealed lung volumes diagnostic of restrictive airway disease, and that unspecified CT scan readings supported a diagnosis of CWP. *Id*.

The administrative law judge rationally determined that Dr. King did not provide an adequately reasoned or documented opinion on the following grounds: He did not identify the basis for the award of federal black lung benefits, or indicate whether it became final; his reference to the miner experiencing sufficient coal dust exposure to cause CWP did not provide a sufficient rationale for diagnosing CWP; he relied on a pulmonary function study that Drs. Rosenberg and Fino, physicians with superior qualifications as Board-certified pulmonologists, declared invalid because the flow-volume curves showed incomplete effort;[9] and his view of the CT scan interpretations

[8] In light of the administrative law judge's permissible discrediting of the opinions of Drs. King and Musgrave, she was not required to apply 20 C.F.R. §718.104(d)(5), which allows an administrative law judge to accord controlling weight to a treating physician's opinion, "provided that the weight given . . . shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation . . . ." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002).

[9] Dr. King's qualifications are not of record. Dr. Mettu ordered and/or administered the February 12, 2000 pulmonary function study to which Dr. King referred. Director's Exhibit 6 at 153. Dr. Mettu reported that the results of the study, including the lung volumes, were consistent with restrictive airways disease. *Id*. He did not comment on the miner's cooperation or comprehension, nor did he reference the flow-volume curves. *Id*. Although the initials appearing below Dr. Mettu's signature on the report indicate that he was a Fellow of the American College of Chest Physicians, there is nothing in the record establishing that he was a Board-certified pulmonologist. *Id*.

conflicted with the administrative law judge's finding that this evidence was negative for CWP. *See Cornett v. Benham Coal Inc.*, 227 F.3d 569, 575-76, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150 (1990); Decision and Order on Remand Denying Benefits at 8-9; Employer's Exhibits 1, 4.

Similarly, the administrative law judge permissibly found that Dr. Musgrave's opinion was entitled to diminished weight because she did not identify the specific pulmonary function studies and CT scans underlying her diagnosis of pneumoconiosis.[10] *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Cornett*, 227 F.3d at 575-76, 22 BLR at 2-120; Decision and Order on Remand Denying Benefits at 9. Based on these findings, we affirm the administrative law judge's determination that the opinions of Drs. King and Musgrave were insufficient to establish either the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), or a mistake in a determination of fact at 20 C.F.R. §725.310. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-996.

Pursuant to 20 C.F.R. §718.107, the administrative law judge considered all of the CT scans of record, adopting and incorporating by reference Judge Craft's chart summarizing the CT scan evidence. Decision and Order Denying Benefits on Remand at 5, *see* 2007 Decision and Order Denying Benefits at 9. The administrative law judge observed that Judge Craft found that the CT scan interpretations were negative for pneumoconiosis, as none of them included findings of pneumoconiosis or obstructive disease. Decision and Order Denying Benefits on Remand at 5; *see* 2007 Decision and Order Denying Benefits at 20. The administrative law judge rationally determined, based on her review of the CT scan evidence, that she was in agreement with Judge Craft's finding, and that this finding did not contain a mistake in a determination of fact. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-996.

In light of our affirmance of the administrative law judge's determination that the evidence was insufficient to satisfy claimant's burden to establish the existence of pneumoconiosis at 20 C.F.R. 718.202(a), we also affirm her determination that claimant

[10] The administrative law judge also permissibly found, in the alternative, that if Dr. Musgrave was referring to the December 12, 2000 pulmonary function study, this study did not provide documentation for her diagnosis, as Drs. Rosenberg and Fino, who had superior qualifications as Board-certified pulmonologists, determined that the study was invalid. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150 (1990); Decision and Order on Remand Denying Benefits at 8-9. Dr. Musgrave's qualifications are not of record.

did not establish a mistake in a determination of fact at 20 C.F.R. 725.310.[11] *See Worrell*, 27 F.3d at 230, 18 BLR at 2-996. We affirm, therefore, the denial of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Remand is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[11] Because the administrative law judge permissibly discredited the evidence favorable to claimant, we need not review her findings regarding the opinions of Drs. Rosenberg and Fino, as error, if any, in her crediting of these opinions would be harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-54 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).