BRB No. 99-0826 BLA

LORAINE McCOWN (Widow of LLOYD McCOWN)	)	
Claimant-Petitioner	)	
v.	)	
ODYSSEY COAL SALES, INC.	)	DATE ISSUED:
and	)	
BITUMINOUS CASUALTY CORP.	)	
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Loraine McCown, Shelbiana, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1930) of Administrative Law Judge Robert L. Hillyard 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 administrative law judge found, and the parties stipulated to, ten years and three months of qualifying coal mine employment. Decision and Order at 4; Hearing

Transcript at 13. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the instant survivor's claim is a request for modification.[1] Decision and Order at 3, 4, 10. The administrative law judge noted the proper standard and found that based on the evidence of record, claimant failed to establish a mistake in fact pursuant to 20 C.F.R. §725.310 as the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 11-13. Accordingly, benefits were denied. On appeal, claimant generally contends that the evidence of record is sufficient to establish entitlement to benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

[1]The record indicates that the miner filed an earlier claim on January 6, 1985. Director's Exhibit 48. The claim was denied on June 23, 1987. Director's Exhibit 48. The miner filed a second claim on September 5, 1990. Director's Exhibit 49. The Benefits Review Board affirmed the administrative law judge's denial of benefits in that claim as the miner failed to establish the existence of pneumoconiosis on February 28, 1995. Director's Exhibit 49. The miner died on March 12, 1995. Claimant, the miner's widow, stated that she had additional evidence to submit and requested reconsideration of the miner's claim on March 16, 1995. Director's Exhibit 49. The Board denied the reconsideration request on August 13, 1996. Director's Exhibit 49. Claimant filed her survivor's claim on June 27, 1995, which was denied on April 17, 1996. Director's Exhibits 1, 26. Claimant took no further action until she filed a modification request, the subject of the instant appeal, on February 28, 1997. Director's Exhibit 30.

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 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and consistent 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 benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death.[2] *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. The United States Court of Appeals for the Sixth Circuit issued *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), holding that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made even where no specific allegation of either has been made by claimant. Furthermore, in determining whether claimant has established modification pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the State of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

(1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 and therefore insufficient to establish modification.[3] *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

With respect to 20 C.F.R. §718.205(c), the administrative law judge properly considered the entirety of the medical opinion evidence of record and rationally found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. *Piccin, supra.* The relevant evidence of record concerning the cause of death consists of five medical opinions and the death certificate. Dr. Stamper opined that several conditions contributed to the miner's death, including chronic obstructive pulmonary disease. Director's Exhibit 47. The death certificate, signed by Charles Morris, the county coroner, listed the cause of death as respiratory arrest, due to congestive heart failure, due to colon cancer. Director's Exhibit 12. Dr. Dennis, who performed the autopsy, did not indicate that pneumoconiosis was a cause of death in his original report, but in his supplemental report and deposition, the physician indicated that pneumoconiosis hastened the miner's death. Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 3. Drs. Hansbarger, Caffrey and Naeye opined that pneumoconiosis did not contribute to or hasten the miner's death. Director's Exhibit 13; Employer's Exhibits 1, 2.

[3]The administrative law judge properly concluded that as the instant case was a survivor's claim, modification could not be established based on a change in conditions. Decision and Order at 3; *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The administrative law judge properly considered this evidence and rationally concluded that it was insufficient to establish claimant's burden of proof pursuant to 20 C.F.R. §718.205(c) as Dr. Stamper did not relate his diagnosed conditions to coal mine employment and the opinion of Dr. Dennis was not as reasoned and documented as the opinions of the remaining physicians.[4] *See Griffith, supra*; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Director's Exhibits 13, 47; Claimant's Exhibit 1; Employer's Exhibits 1-3; Decision and Order at 12-13. The administrative law judge permissibly accorded greater weight to the opinions of Drs. Hansbarger, Caffrey and Naeye as all three are highly qualified pathologists and their opinions are well supported and well reasoned as they reviewed more evidence than just the autopsy report and slides. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *King v. Consolidation Coal Co*., 8 BLR 1-262 (1985)*; Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kuchwara, supra*; Decision and Order at 12-13; Director's Exhibit 13; Employer's Exhibits 1, 2. Although the record indicates that Dr. Stamper was the miner's treating physician, the administrative law judge has provided valid reasons for finding his opinion insufficient to meet claimant's burden of proof.[5] *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Wetzel, supra*; Decision and Order at 9, 12; Director's Exhibit 47; Hearing Transcript at 20.

The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's finding that the

[4]Dr. Dennis testified that the miner had pneumoconiosis that hastened his death but stated that he did not have the opportunity to become familiar with the miner's hospital records prior to performing the autopsy and documenting his findings and conclusions. Employer's Exhibit 3. Dr. Dennis further stated that the respiratory specialists would be more qualified to give an opinion as to whether pneumoconiosis was a contributing cause of death because that is their area of expertise. Employer's Exhibit 3.

[5]The administrative law judge properly found that the presumption at 20 C.F.R. §718.304 is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein. *See* 20 C.F.R. §718.304; Decision and Order at 10.

evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) as it is supported by substantial evidence and is in accordance with law. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits in this survivor's claim.[6] *Worrell, supra*.

Although we have affirmed the administrative law judge's denial of benefits in the survivor's claim, we must remand this case to the administrative law judge to review the record and determine if claimant also requested modification of the miner's claim. *See* Director's Exhibit 30. It appears that this letter may have been a request for modification of the miner's claim as well as a modification request of the survivor's claim. *See also* Director's Exhibit 29. If the administrative law judge determines that claimant did request modification of the miner's claim, then he must address that claim and if modification is established, consider entitlement pursuant to 20 C.F.R. Part 718.

Accordingly, the administrative law judge's Decision and Order denying benefits in the survivor's claim is affirmed, but the case is remanded to the administrative law judge for further consideration of the status of the miner's claim consistent with this decision.

SO ORDERED.

[6]Claimant asserts that her daughter is totally disabled and the administrative law judge erred in failing to make such a determination. We disagree as the administrative law judge properly determined that the record does not contain medical evidence of the adult child's disability. Statements of a claimant, standing alone, are insufficient to prove the existence of disability, thus medical evidence must be produced. 42 U.S.C. §423(d)(5)(A); *Tackett v. Director, OWCP*, 10 BLR 1-117 (1987); *Lupasky v. Director, OWCP*, 7 BLR 1-532 (1984).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge