

BRB No. 01-0749 BLA

MARY LOU CASTLE )  
(Widow of JAMES BENNIE CASTLE) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
LESLIE COAL MINING COMPANY )  
 )  
and )  
 )  
OLD REPUBLIC INSURANCE COMPANY )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
DIRECTOR, OFFICE OF WORKERS' ) ) DATE ISSUED:  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) ) DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Mary Lou Castle, Omar, West Virginia, *pro se*.

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

Helen H. Cox (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, HALL and

GABAUER, Administrative Appeals Judges.  
PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order - Denial of Benefits (2000-BLO-9) of Administrative Law Judge Daniel J. Roketenetz on claims 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).<sup>2</sup> This case has an extensive procedural history. The miner filed an application for benefits on August 4, 1970. Benefits were denied by the Social Security Administration, and the case was later forwarded to the Department of Labor for consideration. The case was considered by Administrative Law Judge Theodor P. Von Brand who issued his Decision and Order - Denying Benefits on March 14, 1986. Judge Von Brand credited the miner with at least thirty years of coal mine employment and found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) (2000). Judge Von Brand found rebuttal established pursuant to 20 C.F.R. §727.203(b)(2) (2000) and, based on this rebuttal finding, he further determined that entitlement under 20 C.F.R. Part 410 (2000) was also precluded. Accordingly, benefits were denied. Director's Exhibit 39.

On October 15, 1987, the miner filed a new application for benefits. Benefits were denied by the district director. At the miner's request, the case was transferred to the Office of Administrative Law Judges. The case was returned to the district director for consideration under the Board's decision in *Lukman v. Director, OWCP*, 11 BLR 1-71 (1988)(*en banc* reconsideration, Brown and McGranery, JJ., dissenting in part), 10 BLR 1-56 (1987). On July 11, 1989, the district director issued a Proposed Decision and Order of No Material Change in Conditions and Denial of Claim. The record does not indicate that the miner took any further action on this claim. Director's Exhibit 40.

On May 22, 1992, the miner filed another application for benefits. The claim was denied by the claims examiner and, at the miner's request, the case was transferred to the Office of Administrative Law Judges. Administrative Law Judge Jeffrey Tureck held a hearing and, on August 3, 1995, he issued a Decision and Order Denying Benefits. Judge Tureck noted that the case before him was a duplicate claim and that the two prior claims were denied based on findings that the miner was not totally disabled due to pneumoconiosis.

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<sup>1</sup> Claimant is Mary Lou Castle, the widow of James Bennie Castle, the miner. Claimant is pursuing the miner's claim as well as her own survivor's claim.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Judge Tureck found the newly submitted evidence insufficient to establish a material change in conditions. Consequently, he denied benefits.

The miner appealed to the Board. Director's Exhibit 41. After the miner died, on September 23, 1995, Director's Exhibit 3, claimant filed her application for benefits. Director's Exhibit 1. On May 24, 1996, claimant filed a petition for modification on the miner's claim, and on June 13, 1996, the Board issued an Order dismissing the miner's appeal and remanding the case to the district director. Director's Exhibit 41.

On July 3, 1996, the claims examiner denied benefits on the survivor's claim. Director's Exhibit 12. On September 17, 1996, the district director denied the modification request on the miner's claim. Director's Exhibit 16. Claimant requested reconsideration of the evidence in her case, Director's Exhibit 17, and she submitted additional evidence, Director's Exhibit 26. On November 13, 1996, the claims examiner found that claimant was entitled to survivor's benefits. Director's Exhibit 27. Employer controverted the award of benefits, Director's Exhibit 28, and on November 15, 1996, the district director issued a Proposed Decision and Order Denying Request for Modification on the miner's claim. Director's Exhibit 29.

On January 9, 1997, the district director found claimant entitled to survivor's benefits. Director's Exhibit 33. At employer's request, the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 42. At the request of the parties, the hearing was cancelled, and on June 28, 1999, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) issued his Decision and Order - Denial of Benefits. The administrative law judge considered the evidence and found that it did not establish that the miner was totally disabled due to pneumoconiosis at the time of his death. Consequently, the administrative law judge found that there was no basis for modification on the miner's claim and he denied benefits on this claim. With regard to the survivor's claim, the administrative law judge found the evidence sufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3) (2000), but that the evidence was insufficient to establish that pneumoconiosis caused, contributed to or hastened the miner's death. Accordingly, the administrative law judge denied benefits on the survivor's claim.

Claimant appealed to the Board, but then she requested modification with the district director. The Board remanded the case to the district director. On November 23, 1999, the district director issued a Proposed Decision and Order Denying Modification. Claimant requested that the case be transferred to the Office of Administrative Law Judges.

After holding a hearing, the administrative law judge issued his Decision and Order - Denial of Benefits on May 31, 2001. The administrative law judge noted the procedural

history of this case, and credited the miner with thirty-seven years of coal mine employment. The administrative law judge noted that both claims were before him on modification and found the evidence insufficient to establish a basis for modification on both the miner's and the survivor's claims. Accordingly, benefits were denied on both claims. This Decision and Order is the subject of the current appeal.

Claimant appeals without the assistance of counsel.<sup>3</sup> Employer responds, urging affirmance of the denial of benefits on both the miner's and the survivor's claims. The Director, Office of Workers' Compensation Programs (the Director), responds, maintaining that the amended regulations do not impact the adjudication of this case.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

We first consider claimant's appeal of the miner's claim. The current posture of the miner's claim is the appeal of the administrative law judge's denial of a second request for modification of the denial of benefits of the miner's third claim for benefits. Modification may be established by showing that there has been a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310. The Board has held that in considering whether a claimant has established a change in conditions, 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 at least one element of entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In considering whether modification is established based on a mistake in a determination of fact, the administrative law judge must consider the entirety of the evidentiary record. *See Nataloni, supra*. Since the miner died in 1995, before the prior request for modification of his claim, there cannot be a change

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<sup>3</sup> Claimant's appeal was filed by Susie Davis of the Kentucky Black Lung Association. In an Order issued on June 26, 2001, the Board advised the parties that claimant would be considered to be appearing *pro se* before the Board.

in his condition. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, the only basis for establishing modification in a survivor's claim or on the miner's claim, at this point in the miner's case, is based on a finding of a mistake in a determination of fact.

In the administrative law judge's 1999 Decision and Order, he found the evidence insufficient to establish that the miner was totally disabled due to pneumoconiosis prior to his death. The administrative law judge noted that the evidence before Judge Tureck failed to establish total disability, and found that the newly submitted evidence "does not change that outcome." 1999 Decision and Order at 9. The administrative law judge also considered all of the evidence and found it insufficient to establish that the miner was totally disabled due to pneumoconiosis prior to his death. 1999 Decision and Order at 9-10. Consequently, the administrative law judge denied the request for modification on the miner's claim.

In his 2001 Decision and Order, the administrative law judge considered all of the evidence of record and noted that the existence of pneumoconiosis arising out of coal mine employment is not contested at this point in the case. In finding that claimant has failed to establish a basis for modification on the miner's claim, the administrative law judge noted that the miner's prior claims were denied because the evidence was insufficient to establish that he was totally disabled due to pneumoconiosis. The administrative law judge reviewed the newly submitted medical evidence.<sup>4</sup> The administrative law judge noted that Drs. Broudy and Fino are board-certified pulmonary specialists, and that Drs. Hutchins, Naeye and Caffrey are board-certified pathologists. 2001 Decision and Order at 8. The administrative law judge found that Dr. De Lara's opinion, the only newly submitted medical opinion which might support claimant's position, does not address the issue of total disability due to pneumoconiosis. *See* 2001 Decision and Order at 8; Director's Exhibit 43. The administrative law judge stated:

A thorough review of my last decision, in conjunction with the previous

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<sup>4</sup> With the instant petition for modification, new evidence was submitted. In a letter dated August 27, 1999, Dr. DeLara, who performed the miner's autopsy, stated that the miner had coal workers' pneumoconiosis and that his lungs were already compromised. He also opined that the miner's development of carcinoma "added more problems in his breathing capacity which led to his demise." Director's Exhibit 43. Drs. Naeye, Hutchins, Broudy and Caffrey opined that the miner's pneumoconiosis was too mild to cause or contribute to the miner's death or any pulmonary impairment the miner suffered. Employer's Exhibits 1-3, 5-7. Drs. Branscomb and Fino indicated that there was no change from their earlier opinions, Employer's Exhibits 8-9, where they opined that claimant suffered no impairment or disability from his coal mine employment and that the miner's death was not caused or aggravated by coal workers' pneumoconiosis, Director's Exhibit 43.

evidence as summarized in the two previous Administrative Law Judge's decisions, does not change my opinion that the evidence is insufficient to establish the Miner was totally disabled due to pneumoconiosis during his lifetime. After considering this older evidence along with the newly submitted medical evidence, I still conclude that the Miner has failed to meet all requisite elements of entitlement under Part 718....

2001 Decision and Order at 8.

We hold that the administrative law judge, within his purview as the finder-of-fact, permissibly and rationally determined that the evidence is insufficient to demonstrate a mistake in a determination of fact in the last denial of benefits. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni, supra*. Therefore, we affirm the administrative law judge's finding that claimant has not established a basis for modification on the miner's claim, *see generally Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

We now consider claimant's appeal of her survivor's claim. In the 1999 Decision and Order, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis but found that it did not establish that the miner's death was due to pneumoconiosis. 1999 Decision and Order. In his 2001 Decision and Order, the administrative law judge considered the newly submitted medical evidence.<sup>5</sup> *See* note 4, *supra*. The administrative law judge found that Dr. DeLara's opinion is identical, except for the date, to his earlier opinion, and the administrative law judge accorded greatest weight to the well reasoned and documented opinions of Drs. Branscomb, Fino, Hutchins, Naeye and Caffrey because these physicians possessed superior credentials. *See* 2001 Decision and Order at 9-10.

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<sup>5</sup> The administrative law judge's exclusion of the proffered second amended death certificate, *see* 2000 Hearing Transcript at 8-9, was not an abuse of his discretion and was a proper exercise of his authority of trier-of-fact. We therefore affirm it. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*).

We affirm the administrative law judge's reliance on the opinions of the physicians with superior credentials to find that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(c); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Therefore, we affirm the administrative law judge's finding that claimant has not established a mistake in a determination of fact, or a basis for modification of the survivor's claim. *See Worrell, supra; Nataloni, supra; Wojtowicz, supra.*

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed in all respects.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge