

BRB No. 08-0601 BLA

L.F.)
(on behalf of and Widow of J.F.))
)
Claimant-Petitioner) DATE ISSUED: 05/29/2009
)
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
) DECISION and ORDER

Respondent

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Nathaniel Martin, Jasper, Alabama, for claimant.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James,
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: McGRANERY, HALL and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2006-BLA-6178 and
2006-BLA-6179) of Administrative Law Judge Robert D. Kaplan rendered on a request
for modification of the denial of a miner's duplicate claim² and on a survivor's claim

¹ Claimant is the widow of the miner, who died on April 23, 2005. Claimant filed
for survivor's benefits on October 11, 2005, and is also pursuing the miner's claim on
behalf of his estate. Claimant's Exhibit 2; Director's Exhibit 84.

² The miner's first claim for benefits, filed on January 6, 1983, was denied by the
district director on April 7, 1983, for failure to establish any element of entitlement.
Director's Exhibit 43-1, 43-17. The miner's second claim was filed on August 25, 1997,
and was denied by the district director on November 19, 1997, for failure to establish any

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). Upon stipulation of the parties, the administrative law judge credited the miner with thirteen years of coal mine employment, and adjudicated both claims pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence of record was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge denied modification of the denial of the miner's duplicate claim because claimant failed to establish either a change in conditions or a mistake in a determination of fact in favor of the miner pursuant to 20 C.F.R. §725.310 (1999).³ With respect to the survivor's claim, the administrative law judge found that because the evidence was insufficient to establish the existence of pneumoconiosis, claimant could not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both claims.

On appeal, claimant asserts that the weight of the evidence is sufficient to establish entitlement to benefits in both claims, and further contends that the administrative law judge abused his discretion in readjudicating the issue of the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits in the miner's claim, and urging a remand of the survivor's claim for further findings.

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,

element of entitlement. Director's Exhibits 44-1, 44-15. The miner's request for modification, filed on July 17, 1998, was denied by the district director on October 1, 1998. Director's Exhibit 44-21. The miner filed the present duplicate claim on March 13, 2000. Director's Exhibit 2. The district director denied the claim on December 5, 2000, for failure to establish total respiratory disability. Director's Exhibit 28. The miner filed a timely request for modification on August 22, 2001. Director's Exhibit 32.

³ 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The revised regulations at 20 C.F.R. §§725.309 and 725.310 do not apply to claims, such as this miner's claim, that were pending on January 19, 2001. 20 C.F.R. §725.2(c); Decision and Order at 1.

and in accordance with applicable law.⁴ 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).

Turning first to the miner’s claim, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901, 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant may establish a basis for modification of the denial of the miner’s duplicate claim by establishing either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310 (1999). In considering whether a change in conditions has been established pursuant to Section 725.310(1999), 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 that defeated entitlement in the prior decision.⁵ *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). As the miner’s duplicate claim and subsequent denials of modification thereof were based on a finding that the evidence was insufficient to establish total respiratory disability, claimant may demonstrate a change in conditions by establishing this element of entitlement. Mistakes of fact may be predicated on wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *See Banks v. Chicago Grain*

⁴ The law of the United States Court of Appeals for the Eleventh Circuit is applicable, as the miner was employed in the coal mining industry in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director’s Exhibit 43-2.

⁵ The miner’s current duplicate claim was initially denied by the district director on May 24, 2000, for failure to establish any element of entitlement. Director’s Exhibit 16. At a subsequent informal conference on the miner’s request for modification, the district director found that the miner established a material change in conditions pursuant to 20 C.F.R. §725.309(d)(1999), as the Director did not contest the issues of the existence of pneumoconiosis and that it arose out of coal mine employment. Upon review of the record, however, the district director denied benefits, based on the miner’s failure to establish total respiratory disability. Director’s Exhibit 28. The miner’s three subsequent requests for modification were also denied on the same basis. Director’s Exhibits 38, 40, 42.

Trimmers Ass'n, 390 U.S. 459 (1968); *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

Claimant generally asserts that the medical record and the miner's testimony established that the miner's pneumoconiosis/chronic obstructive pulmonary disease (COPD) prevented him from performing the exertional requirements of his usual coal mine employment, and thus established total respiratory disability pursuant to Section 718.204(b). However, as claimant merely references some of the evidence of record favorable to the miner's case but has not identified any substantive error of law or fact in the administrative law judge's weighing of the evidence on the issue of total disability,⁶ claimant essentially requests that the Board reweigh the evidence of record, which is beyond the scope of the Board's powers. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Anderson*, 12 BLR at 1-112; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Accordingly, we affirm the administrative law judge's finding that total respiratory disability was not established pursuant to Section 718.204(b). Because claimant has failed to establish a change in conditions or a mistake in a determination of fact under Section 725.310 (1999) with respect to total disability, the element that defeated entitlement in the prior decision, we affirm the administrative law judge's denial of benefits in the miner's claim.

Turning to the survivor's claim, in order to establish entitlement to survivor's benefits 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 suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20

⁶ After summarizing the relevant evidence of record, Decision and Order at 4-5, 8-12, the administrative law judge determined that none of the pulmonary function studies and blood gas studies of record produced qualifying values for total disability; that there was no evidence of cor pulmonale with right-sided congestive heart failure; and that the record contained no well-reasoned medical opinion of total respiratory disability. Decision and Order at 17-19.

C.F.R. §718.205(c)(5); *see also Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).

Claimant initially alleges that the administrative law judge abused his discretion in “retracting” the prior determination that the miner had pneumoconiosis arising out of coal mine employment. Claimant’s Brief at 5. We disagree. The administrative law judge properly adjudicated the contested issues of pneumoconiosis and its cause, as the miner’s duplicate claim and multiple requests for modification had been denied, and the survivor’s claim contained autopsy evidence. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-135 (1999)(*en banc*).

In the alternative, claimant maintains that the positive x-rays, autopsy evidence and reasoned medical opinions of record establish the existence of pneumoconiosis at Section 718.202(a). Contrary to claimant’s arguments, however, the autopsy report, noting anthracotic pigment, was negative for pneumoconiosis,⁷ and the administrative law judge permissibly found that the autopsy evidence outweighed the positive x-ray evidence. Decision and Order at 14; *see Terlip v. Director, OWCP*, 8 BLR 1-363 (1985). As substantial evidence supports the administrative law judge’s findings that the weight of the evidence was insufficient to establish clinical pneumoconiosis at Section 718.202(a)(1), (2), and that claimant failed to establish the existence of pneumoconiosis by means of an applicable presumption under Section 718.202(a)(3), they are affirmed. The administrative law judge also acted within his discretion in finding that the opinions of Drs. Shad and Pandey, that the miner had pneumoconiosis, were unreasoned and entitled to no weight because the physicians failed to explain the basis for their conclusions, while the contrary opinion of Dr. Hasson, that the miner did not have pneumoconiosis, was well-reasoned and supported by its underlying documentation. Decision and Order at 15-16; Director’s Exhibits 9, 21, 43; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We find merit, however, in the Director’s argument that this case must be remanded for further findings because the administrative law judge failed to consider the entirety of Dr. Khan’s medical opinion in finding it insufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Director’s Brief at 7-8.

The record reflects that on October 28, 2004, Dr. Kahn provided a medical opinion diagnosing the miner with obstructive lung disease, but the physician did not state its etiology. Director’s Exhibit 70. On February 22, 2005, when asked to clarify his diagnosis, the doctor stated that the miner “suffers from lung disease caused by a number

⁷ The microscopic description of the autopsy noted, in part, “Scattered small areas showing the presence of anthracotic pigment are identified, however, no diagnostic lesions of coalminers [sic] pneumoconiosis are found.” Director’s Exhibits 81, 88.

of factors that include exposure to coal dust and rock dust.” Director’s Exhibit 74. Dr. Khan noted the miner’s twenty pack-year smoking history, and while he would not say that smoking and coal dust exposure were equal contributors, he opined that tobacco use and coal dust exposure have contributed significantly to the miner’s respiratory impairment. *Id.* Dr. Khan provided another supplemental opinion on September 24, 2007, in which he stated that his answers were based on a “review of the information . . . provided me which includes pulmonary function tests, chest x-ray, death certificate, and autopsy report.” He opined that, “based on all the data listed previously [the miner] suffers from pneumoconiosis, [which] I define . . . as any chronic respiratory or pulmonary condition due in whole or part to dust exposure in coal mine employment.” Claimant’s Exhibit 1. Dr. Khan further opined that coal dust exposure contributed substantially to the miner’s respiratory impairment. In an addendum dated December 4, 2007, Dr. Khan stated, regarding the cause of death, that “based on autopsy reports [the miner] had end stage obstructive lung [sic] disease with pulmonary fibrosis and honeycombing.” Claimant’s Exhibit 4.

The administrative law judge correctly noted Dr. Kahn’s 2004 diagnosis of obstructive lung disease, but regarding the doctor’s 2005 opinion, incorrectly determined that Dr. Kahn “only referred to [clinical] pneumoconiosis when he stated that . . . the October 2004 x-ray was ‘suggestive of pneumoconiosis’. . . . Dr. Kahn referred to the miner’s ‘respiratory symptoms,’ a ‘respiratory impairment,’ and a ‘lung disease.’. . . [h]owever Dr. Kahn does not definitively state that the miner had [legal] pneumoconiosis.” Decision and Order at 16. Consequently, the administrative law judge failed to determine whether Dr. Kahn’s February 22, 2005 statement, that coal dust exposure contributed significantly to the miner’s respiratory impairment and that the miner’s obstructive lung disease was caused in part by exposure to coal dust and rock dust, constituted a credible diagnosis of legal pneumoconiosis, as defined at 20 C.F.R. §718.201(a)(2). *See Brown v. Director, OWCP*, 851 F.2d 1569, 11 BLR 2-192 (11th Cir. 1988). Furthermore, because the administrative law judge failed to acknowledge Dr. Kahn’s February 22, 2005 diagnosis, he dismissed Dr. Kahn’s September 24, 2007 diagnosis of pneumoconiosis as being based solely on the autopsy evidence that found no diagnostic lesions of pneumoconiosis. Decision and Order at 16. Consequently, we vacate the administrative law judge’s findings pursuant to Section 718.202(a)(4) in the survivor’s claim, and remand this case for the administrative law judge to determine whether Dr. Khan’s opinion constitutes a reasoned diagnosis of legal pneumoconiosis thereunder; whether the weight of the evidence as a whole establishes the existence of pneumoconiosis; and if so, whether the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c). *See Bradberry*, 117 F.3d 1361, 21 BLR 2-166.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed with respect to the miner's claim, but is affirmed in part and vacated in part with respect to the survivor's claim, and this case is remanded to the administrative law judge for further consideration of the survivor's claim consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge