

BRB No. 10-0550 BLA

SANDRA LARKIN)
(o/b/o Estate of KATHLEEN GLADYS)
CLONCH, Widow of ROBERT CLONCH))
)
Claimant-Petitioner)
)
v.)
)
SOUTHERN OHIO COAL COMPANY) DATE ISSUED: 05/24/2011
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Modification (2008-BLA-05703) of Administrative Law Judge Joseph E. Kane (the administrative law judge) on a survivor's claim filed on August 27, 2001, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act).²

¹ Claimant, Sandra Larkin, is pursuing this survivor's claim on behalf of the estate of her mother, Kathleen Gladys Clonch, the miner's widow.

² The 2010 amendments to the Act are not applicable in this case because the claim was filed prior to January 1, 2005.

Director's Exhibit 1. The administrative law judge denied the claim on December 22, 2003, finding that, while the evidence established pneumoconiosis that arose out of coal mine employment, *see* 20 C.F.R. §§718.202(a), 718.203(b),³ it failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Director's Exhibit 15. The Board affirmed the denial in *Clonch v. So. Ohio Coal Co.*, BRB No. 04-0347 BLA (Dec. 21, 2004) (unpub.). Director's Exhibit 18. The United States Court of Appeals for the Sixth Circuit affirmed the Board's decision in *Clonch v. So. Ohio Coal Co.*, No. 05-3133, 2006 WL 3409880 (6th Cir. Nov. 27, 2006). Director's Exhibit 20. Thereafter, claimant timely requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 21. No additional evidence was submitted in support of the modification request, however. On review, the administrative law judge reconsidered the evidence and again found that, while it established pneumoconiosis arising out of coal mine employment, it failed to establish that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203(b), 718.205(c). Accordingly, claimant's request for modification was denied.

On appeal, claimant asserts that "[t]here is currently no medical evidence of record which addresses whether the miner's death was contributed to by his coal workers' pneumoconiosis. Accordingly, the evidence is currently inconclusive with regard to the miner's death." Claimant's Brief at 12. Neither employer, nor the Director, Office of Workers' Compensation Programs, has filed a substantive 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, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, where

³ The administrative law judge found that the evidence reflected that the miner had thirty-two years of coal mine employment. Decision and Order on Modification at 2.

⁴ Because the miner's last coal mine employment was in Ohio, 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 (1989)(*en banc*).

pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where the death was caused by complications of pneumoconiosis, or where the irrebuttable presumption of death due to pneumoconiosis is applicable. 20 C.F.R. §718.205(c)(1), (2), and (3). 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Modification in a survivor's claim can be found if claimant establishes that the prior decision contained a mistake in a determination of fact. 20 C.F.R. §725.310 (2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230-231, 18 BLR 2-290, 2-294 (6th Cir. 1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the claim was denied because claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). Consequently, in order to establish a mistake in a determination of fact, claimant has to establish that the miner's death was due to pneumoconiosis. See 20 C.F.R. §725.310; *Wojtowicz*, 12 BLR at 1-164.

In finding that the evidence did not establish that the miner's death was due to pneumoconiosis, the administrative law judge noted that he originally denied the claim because the only evidence addressing the cause of death was the miner's death certificate, attributing his death to "cardiac arrest due to, or as a consequence of, atherosclerotic cardiac disease." Decision and Order on Modification at 4; Director's Exhibit 3A. The administrative law judge found that this evidence was insufficient to establish that the miner's death was due to pneumoconiosis. See 20 C.F.R. §718.205(c); *Brown*, 996 F.2d at 817, 17 BLR at 2-140; *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). In reviewing the case on modification, the administrative law judge, noting that no new evidence was provided, again found that the death certificate was insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). Decision and Order on Modification at 4. The administrative law judge, therefore, denied claimant's request for modification.

Claimant alleges no specific error in the administrative law judge's weighing of the medical evidence on the issue of death causation. Claimant merely states both that there is no evidence addressing the issue and that the evidence is inconclusive.⁵ Such

⁵ Claimant also states that "any condition that hastens the miner's death is a substantially contributing cause of death" and cites to medical evidence from the miner's denied claims addressing whether the miner had pneumoconiosis and/or total disability. Claimant's Brief at 4-10. Claimant does not, however, argue that this evidence establishes death causation at 20 C.F.R. §718.205(a).

general assertions provide no basis for the Board to review the administrative law judge's findings. *See Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-121 (1987). We affirm, therefore, the administrative law judge's findings that the evidence failed to establish that the miner's death was due to pneumoconiosis and that there was no mistake in fact in his decision denying benefits on that basis. *See* 20 C.F.R. §§718.205(c); 725.310; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge