BRB No. 01-0279 BLA

MARY D. LANGO (Widow of ANDREW F. LANGO) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Upon Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Lynne G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

Barry H. Joyner (Howard M. Radzely, Acting 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, the United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Upon Remand (98-BLA-0943) of Administrative Law Judge Ralph A. Romano 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).[1] This case is before the Board for the

[1] 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,

third time.[2] Originally, in a Decision and Order issued on May 15, 1995, the administrative law judge found sixteen and one-half years of coal mine employment established and he adjudicated the survivor's claim pursuant to 20 C.F.R. Part 718, Director's Exhibit 36. The administrative law judge found the existence of pneumoconiosis established by the x-ray

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refer to the amended regulations.

[2] Claimant is the widow of the miner, Andrew F. Lango, who died on August 9, 1982, Director's Exhibit 8. Subsequent to the miner's death, claimant filed a survivor's claim on August 18, 1982, Director's Exhibit 1, which was initially denied by the district director on September 29, 1982, Director's Exhibit 17. Claimant then filed a timely request for a hearing on October 19, 1982, which served to keep claimant's original survivor's claim viable and pending, Director's Exhibit 18. No action was taken on claimant's pending survivor's claim until claimant filed another survivor's claim on February 18, 1994, Director's Exhibit 2, which therefore merged with her first survivor's claim, *see* 20 C.F.R. §725.309(d); *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988); *Tackett v. Howell and Bailey Coal Co.*, 9 BLR 1-181 (1986); *Chadwick v. Island Creek Coal Co.*, 7 BLR 1-883 (1985).

The miner had filed a living miner's claim on July 20, 1982, which was denied by the district director on September 29, 1982, Director's Exhibit 26. Although a timely request for a hearing was filed on October 19, 1982, Director's Exhibit 18, no action was taken on the miner's claim and it is not at issue herein.

evidence pursuant to 20 C.F.R. §718.202(a)(1) and pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found, however, that claimant failed to establish that pneumoconiosis contributed to or hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(2000). Accordingly, benefits were denied. Claimant appealed and the Board initially affirmed the administrative law judge's findings as to the length of the miner's coal mine employment and under Sections 718.202(a)(1) and 718.203(b) as unchallenged, Director's Exhibit 37. *Lango v. Director, OWCP*, BRB No.95-1659 BLA (Mar. 27, 1996)(unpub.). The Board also affirmed the administrative law judge's finding that claimant failed to establish that pneumoconiosis contributed to or hastened the miner's death pursuant to Section 718.205(c)(2000) and, therefore, affirmed the denial of benefits. Claimant appealed the Board's decision to the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, and the Third Circuit found no basis to overturn the Board's affirmance of the administrative law judge's finding that claimant failed to establish that pneumoconiosis contributed to or hastened the miner's death pursuant to Section 718.205(c)(2000) and, therefore, the denial of benefits, Director's Exhibit 38. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Subsequently, claimant filed a timely request for modification pursuant to 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), on December 30, 1997, Director's Exhibit 39. In a Decision and Order issued on April 19, 1999, the administrative law judge found that the newly submitted evidence, considered in conjunction with the previously submitted evidence, failed to establish that pneumoconiosis contributed to or hastened the miner's death pursuant to Section 718.205(c)(2000) or, therefore, a mistake in a determination of fact pursuant to Section 725.310 (2000) and denied benefits. Claimant appealed and the Board held that, while claimant had waived her right to a hearing on modification, *see generally Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000), because claimant's waiver was premised on being able to submit the deposition testimony of Dr. DiNicola, *see* Claimant's Exhibit 1, the administrative law judge erred in refusing to admit Dr. DiNicola's deposition on modification. *Lango v. Director, OWCP*, BRB No.99-0858 BLA (May 17, 2000)(unpub.). Thus, the Board vacated the administrative law judge's denial of benefits and remanded the case for the administrative law judge to consider Dr. DiNicola's deposition.

On remand, at issue herein, the administrative law judge considered the newly submitted evidence, including Dr. DiNicola's deposition, in conjunction with the previously submitted evidence, and found that it failed to establish that pneumoconiosis contributed to or hastened the miner's death pursuant to Section 718.205(c)(2000) and, therefore, that he had not made a mistake in a determination of fact warranting modification pursuant to Section 725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find

death due to pneumoconiosis established pursuant to Section 718.205(c) and therefore, a mistake in a determination of fact pursuant to Section 725.310 (2000). The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the administrative law judge's Decision and Order Upon Remand denying benefits be affirmed.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of a denial based upon a change in conditions or a mistake in a determination of fact. However, the sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner's condition, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). If a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993). Moreover, the Third Circuit has held that pursuant to a petition for modification, the administrative law judge must review all evidence of record, both the newly submitted evidence and the evidence previously in the record and determine whether there was any mistake of fact made in the prior adjudication, including the ultimate fact, *see Keating*, 71 F.3d at 1123, 20 BLR at 2-63.

In order to establish entitlement on the basis of this survivor's claim, which was filed after January 1, 1982, when the miner had not been awarded benefits prior to his death on a claim filed prior to January 1, 1982, *see* 30 U.S.C. §§901, 932(1); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989), claimant must establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988),[3] and that the miner's death was due to

[3] None of the available presumptions pursuant to 20 C.F.R. §718.303-306 is applicable, *see* 20 C.F.R. §718.202(a)(3). The presumptions at Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), as implemented by 20 C.F.R. §718.303, and at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, are inapplicable to this survivor's claim filed after January 1, 1982, *see* 20 C.F.R. §§718.303(c), 718.305(a), (e); Director's Exhibit 1. Moreover, the presumption at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5),

pneumoconiosis, *see* 20 C.F.R. §718.1; 718.205(c); *Neeley*, *supra*; *cf. Smith*, *supra*, which arose out of coal mine employment, *see* 20 C.F.R. §718.203; *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Moreover, pursuant to 20 C.F.R. §718.205(c)(2), (5), pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death, *see also Lango*, 104 F.3d at 576, 21 BLR at 2-18; *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

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as implemented by 20 C.F.R. §718.306, is also inapplicable to this survivor's claim filed after January 1, 1982 and in which fewer than twenty-five years of coal mine employment were established, *see* 20 C.F.R. §718.306(a); Director's Exhibit 1. Finally, inasmuch as there is no evidence of complicated pneumoconiosis in the record, the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, is inapplicable, *see* 20 C.F.R. §§718.205(c)(3), 718.304.

The administrative law judge considered all of the relevant medical opinion evidence pursuant to Section 718.205(c), including the miner's death certificate, Director's Exhibit 8, completed by Dr. DiNicola, the miner's treating and attending physician, which lists metastatic carcinoma of the lung as the immediate cause of death, but further notes chronic obstructive pulmonary disease and anthracosilicosis as other significant conditions contributing to the miner's death. Hospital records completed by Dr. DiNicola, diagnose anthracosilicosis, Director's Exhibits 10-11, and, after reviewing the evidence, Dr. DiNicola completed a 1994 medical report in which he stated that pneumoconiosis hastened the miner's death, Director's Exhibit 29. In a subsequent, supplemental report submitted on modification, Dr. DiNicola stated that pneumoconiosis hastened the miner's death because the miner's "lungs were significantly compromised" by his coal workers' pneumoconiosis and because pneumoconiosis caused an "inability to breathe comfortably," Director's Exhibit 39. Finally, in his deposition submitted on modification, Dr. DiNicola testified that pneumoconiosis hastened the miner's death because "physiologically his body was traumatized" by his pneumoconiosis, *see* Claimant's Exhibit 1 at 20, and the doctor concluded that the "compilation" of cancer, the miner's smoking and pneumoconiosis "contributed" to the miner's death, *see* Claimant's Exhibit 1 at 40. On the other hand, Dr. Spagnolo, a board-certified physician in internal medicine and pulmonary diseases, reviewed the evidence of record and in a 1998 report submitted on modification, Director's Exhibit 41, stated that, while it was determined that the miner had pneumoconiosis caused by his coal mine employment, there was no objective medical evidence that indicated that the miner's coal workers' pneumoconiosis was in any way responsible for and/or hastened or contributed to his death, but that the sole cause of his death was lung cancer.[4]

[4] Dr. Spagnolo originally submitted an opinion in 1994 after reviewing some of the evidence of record, Director's Exhibit 14, in which he found no evidence of coal workers' pneumoconiosis and stated that the evidence he reviewed did not support a finding that pneumoconiosis caused or contributed in any substantial way to the miner's death. However, in light of the fact that Dr. Spagnolo did not review any of the positive x-ray evidence of record in 1994 showing that the miner had pneumoconiosis, the Board previously held that the administrative law judge, within his discretion, gave no weight to Dr. Spagnolo's 1994

While noting that Dr. DiNicola was claimant's treating physician, the administrative law judge nevertheless found that his opinion was "conclusory" and not well-documented and/or well-reasoned, as he failed to adequately explain in either his submitted medical reports or newly submitted deposition testimony how, specifically, he concluded that the miner's death was hastened by his pneumoconiosis or how pneumoconiosis contributed to the miner's death. Decision and Order Upon Remand at 3-4. The administrative law judge found that Dr. DiNicola did not provide the underlying basis for his conclusions, the information upon which he relied and/or the process of reasoning by which he arrived at his conclusions. The administrative law judge further found that Dr. DiNicola's opinion was entitled to less weight than Dr. Spagnolo's contrary, 1998 opinion, which the administrative law judge found was better reasoned and supported by the objective evidence of record and worthy of greater weight in light of Dr. Spagnolo's superior qualifications as a board-certified physician in pulmonary diseases as compared to Dr. DiNicola, who is not a board-certified physician in any specialty. Thus, the administrative law judge found that death due to pneumoconiosis was not established pursuant to Section 718.205(c) and, therefore, that a mistake in a determination of fact was not established pursuant to Section 725.310 (2000).

Claimant contends that the administrative law judge did not specifically discuss Dr. DiNicola's deposition testimony and erred in finding Dr. DiNicola's opinion to be conclusory. Specifically, claimant contends that Dr. DiNicola's opinion was adequately documented and reasoned and deserves additional weight as he was the miner's treating physician. In addition, claimant contends that Dr. Spagnolo's 1998 report, that the miner had pneumoconiosis caused by his coal mine employment, was not sufficient to offset the prejudicial affect of Dr. Spagnolo's original, 1994 report, that the miner did not have pneumoconiosis, because the doctor had not reviewed any additional medical evidence in the interim.

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opinion, inasmuch as it was based on an incomplete picture of the miner's health, *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986). *See also Lango*, 104 F.3d at 577, 21 BLR at 2-20; Director's Exhibit 37 - *Lango*, BRB No.95-1659 BLA at 4.

While a treating physician's opinion merits particular consideration, the administrative law judge properly noted that the physician's special status is only one factor which may be taken into consideration in weighing the medical evidence of record and an administrative law judge may nevertheless reject a treating physician's opinion which the administrative law judge finds is not adequately documented and reasoned, *see Lango*, 104 F.3d at 577, 21 BLR at 2-20, 2-21 (3d Cir. 1997); *Schaaf v. Matthews*, 574 F.2d 160 (3d Cir. 1978); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge found that in Dr. DiNicola's newly submitted deposition testimony, as well as his medical reports, Dr. DiNicola failed to adequately explain the basis for his conclusion that the miner's death was hastened by his pneumoconiosis or how any of his documentation supported his opinion, *see Lango*, 104 F.3d at 576-578, 21 BLR at 2-19 - 2-21; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fuller v. Gibraltar Corp.*, 6 BLR 1-1291 (1984).[5] It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded to opinions of medical experts, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to determine whether an opinion is documented and reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge if

[5] Claimant also contends that the administrative law judge erred in not adequately discussing why he found that the miner's hospital records relied upon by Dr. DiNicola were incomplete. However, any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as the Board previously held, and the Third Circuit agreed, that the administrative law judge had properly found that the hospital records do not indicate the role the miner's lungs and/or anthracosilicosis played in the miner's death, *see Lango*, 104 F.3d at 577-578, 21 BLR at 2-21; Director's Exhibit 37 - *Lango*, BRB No. 95-1659 BLA at 4. *See also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(2-1 opinion: with Brown, J., dissenting) (based on the law of the case doctrine it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case).

Similarly, while claimant contends that the administrative law judge erred in not considering the miner's death certificate which was completed by Dr. DiNicola, the Third Circuit previously held that the mere fact that the miner's death certificate refers to pneumoconiosis cannot be viewed as a reasoned medical finding, particularly if no autopsy has been performed, *see Lango*, 104 F.3d at 578, 21 BLR at 2-21; *Risher v. Office of Workers' Compensation Programs*, 940 F.2d 327, 331, 15 BLR 2-186, 2-192 (8th Cir. 1991); *see also Brinkley*, *supra*; *Williams*, *supra*.

supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Moreover, the administrative law judge, within his discretion, gave greater weight to the opinion and/or reasoning of Dr. Spagnolo regarding the effect that the miner's pneumoconiosis had on the miner's death in light of the doctor's superior qualifications, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and because the administrative law judge found that Dr. Spagnolo's opinion was better supported by the objective evidence, *see Wetzel*, *supra*. Thus, we affirm the administrative law judge's finding that death due to pneumoconiosis was not established pursuant to Section 718.205(c) and, therefore, that a mistake in a determination of fact was not established pursuant to Section 725.310 (2000) as rational and supported by substantial evidence.[6] Consequently, because we affirm the administrative law judge's finding that claimant failed to establish that pneumoconiosis contributed to or hastened the miner's death pursuant to Section 718.205(c), a requisite element of entitlement, we affirm the administrative law judge's finding that entitlement under Part 718 is precluded, *see Lango*, 104 F.3d at 576, 21 BLR at 2-18; *Lukosevicz*, *supra*; *Neeley*, *supra*; *cf. Smith*, *supra*.[7]

Accordingly, the Decision and Order Upon Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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[6] In addition, although claimant also contends that the administrative law judge was unable or unwilling to finding death due to pneumoconiosis established pursuant to Section 718.205(c), charges of bias or prejudice are not to be made lightly and must be supported by concrete evidence, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992); *see also Marcus v. Director, OWCP*, 548 F.2d 1044, 1050 (D.C. Cir. 1976); *Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568 (1984). Because claimant has failed to cite any specific evidence of bias by the administrative law judge, we reject claimant's contention, *see Cochran*, *supra*; *Marcus*, *supra*; *Zamora*, *supra*.

[7] Because the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis pursuant to Section 718.205(c) is affirmed, we need not address whether the administrative law judge's finding that the existence of pneumoconiosis was established by the x-ray evidence of record pursuant to Section 718.202(a)(1) is in accord with the holding of the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997) ("all types of relevant evidence must be weighed together" in determining whether claimant has met his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202), *see Lango*, 104 F.3d at 576, 21 BLR at 2-18; *Lukosevicz*, *supra*; *Trumbo*, *supra*; *Neeley*, *supra*; *cf. Smith*, *supra*.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge