BRB No. 04-0105 BLA

RHODELIA TAYLOR (Widow of HARRY TAYLOR) Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)))))))))))	DATE ISSUED: 10/27/2004 DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Rhodelia Taylor, Caryville, Tennessee, *pro se.*

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor, Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denying Benefits (00-BLA-1035) of Administrative Law Judge Mollie W. Neal on a modification request in both a miner's claim and a survivor's claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

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[1]The miner filed his claim with the Department of Labor (DOL) on February 18, 1984. The miner died on November 18, 1984. Director's Exhibit 1. The widow then filed a survivor's claim with DOL on January 24, 1985. Director's Exhibit 3.

1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] This case is before the Board for the second time. On remand, the administrative law judge found that all of evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge concluded, therefore, that the evidence failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied both claims.

The relevant procedural history of this case is as follows: In a Decision and Order dated March 15, 1994, Administrative Law Judge Earl A. Thomas denied modification and benefits in both claims because he found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Judge Thomas concluded that the evidence was insufficient to establish a mistake in a determination of fact in both claims and a change in conditions with respect to the miner's claim. Director's Exhibit 66. The Board affirmed Judge Thomas' finding that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and thereby affirmed the denial of modification and of benefits. *Taylor v. Director, OWCP,* BRB No. 94-2334 BLA (Aug. 31, 1995)(unpublished). The Board subsequently denied claimant's request for reconsideration. *Taylor v. Director, OWCP,* BRB No. 94-2334 BLA (Aug. 15, 1996)(unpublished Order). Claimant's second request for modification was denied by Administrative Law Judge Thomas M. Burke on the same grounds in a Decision and Order dated January 13, 1999. Director's Exhibit 86. Claimant then filed a timely request for modification of Judge Burke's Decision and Order. Director's Exhibit 87. Administrative Law Judge John C. Holmes denied the modification request in a Decision and Order dated June 29, 2001, on the basis that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and death due to pneumoconiosis at 20 C.F.R. §718.205, and was thereby insufficient to establish a mistake in a determination of fact pursuant to Section 725.310 (2000). Decision and Order dated June 6, 2001 at 2. Judge Holmes further noted that claimant could not establish a change in conditions as the miner had died. Claimant then filed a *pro se* appeal with the Board. The Board vacated Judge Holmes' finding that the evidence failed to establish the existence of pneumoconiosis at Section 718.202(a) and, therefore, a mistake in a determination of fact pursuant to Section 725.310 (2000). The Board remanded the case for reconsideration of the statements of Drs. Kahn, deVega and Bruton

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[2]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.

that "anthracosis" was present, and to determine if they were sufficient to meet the definition of pneumoconiosis at 20 C.F.R. §718.201. The Board did not comment on whether Judge Holmes correctly determined that claimant had not established a change in conditions. *Taylor v. Director, OWCP,* BRB No. 01-0837 BLA (July 30, 2002)(unpub.). On remand, Administrative Law Judge Mollie F. Neal (the administrative law judge) found that the evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). The administrative law judge concluded, therefore, that the evidence failed to establish a mistake in a determination of fact pursuant to Section 725.310 (2000). Thus, the administrative law judge denied benefits. Claimant then filed the instant *pro se* appeal with the Board.

On appeal, claimant generally challenges the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, in response, asserts that the administrative law judge's findings are supported by substantial evidence, and, thus, that the denial of benefits should be affirmed.

In an appeal by a claimant filed without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

With respect to a miner's claim, the regulation at Section 725.310 (2000) provides that the fact finder has the authority to correct mistakes of fact and to consider a miner's change in condition. *See Garcia v. Director, OWCP*¸ 12 BLR 1-24 (1988); *Cooper v. Director, OWCP,* 11 BLR 1-95 (1988). With respect to a survivor's claim under Section 725.310(2000), modification may only be based upon a mistake in a determination of fact, and not a change in the miner's condition, as the miner is deceased. *See Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162 (1989).

At Section 718.202(a)(1), the administrative law judge found that all of the x-ray evidence was negative for pneumoconiosis. Decision and Order at 8. The record contains nineteen x-ray interpretations of fifteen different films. Director's Exhibits 12, 13, 18, 20-22, 46-48. They are all negative for pneumoconiosis. *Id.* We affirm, therefore, the administrative law judge's finding that the x-ray evidence is insufficient to establish a mistake in a determination of fact at Section 725.310 (2000). *See McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988).

The administrative law judge also weighed all of the biopsy and autopsy evidence at 20 C.F.R. §718.202(a)(2), and rejected all of the evidence supportive of a finding that claimant suffered from pneumoconiosis. There are three relevant opinions at Section 718.202(a)(2), by Drs. de Vega, Kahn and Naeye. The administrative law judge found that Dr. de Vega diagnosed anthracosis[3], but discounted Dr. de Vega's opinion because she correctly found that Dr. de Vega failed to explain his rationale for the diagnosis. We affirm this finding as a permissible use of the administrative law judge's discretion. *See Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988)(Ramsey, CJ, concurring). The administrative law judge also correctly found that Dr. Kahn provided an opinion which includes the statement: "microscopic findings on anthracosis in the hilar lymph nodes, but [that Dr. Kahn] does not include a diagnosis of anthracosis in his impressions." Decision and Order at 9; Director's Exhibit 96. The administrative law judge discounted Dr. Kahn's finding because he did not explicitly diagnose anthracosis but, rather, concluded that there was no coal workers' pneumoconiosis and found the absence of pulmonary fibrosis. Decision and Order at 10. The administrative law judge properly concluded that even if Dr. Kahn intended to diagnose anthracosis, his opinion was not well-reasoned because it was inconsistent with his other findings.[4] *See* Decision and Order at 10; *Trumbo,* 17 BLR at 1-888-89; *Clark*, 12 BLR at 1-155 (1989)(*en banc*); *Cooper,* 11 BLR at 1-98. Further, the administrative law judge permissibly credited the opinion of Dr. Naeye on autopsy, finding that coal workers' pneumoconiosis was not present, on the basis that Dr. Naeye was the pathologist who provided the opinion that was better reasoned than those of Drs. de Vega and Kahn. *See Trumbo,* 17 BLR at 1-888-89; *Clark*, 12 BLR at 1-155 (1989)(*en banc*); *Cooper,* 11 BLR at 1-98. Additionally, the administrative law judge found that Dr. Naeye's opinion was better supported by the credible medical evidence of record. *See Minnich v. Pagnotti Enterprises, Inc.,* 9 BLR 1-89 (1986); *Sabett v. Director, OWCP,* 7 BLR 1-299 (1984). Finally, the administrative law judge properly credited Dr. Naeye's autopsy opinion on the basis of his superior credentials, as the record reflects that he is a Board-certified pathologist.[5] *See Worhach v. Director, OWCP,* 17 BLR 1-105(1993); *Tackett v. Cargo*

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[3]The administrative law judge found that Dr. de Vega's statement "anthracosis of the hilar lymph nodes" equated with a diagnosis of pneumoconiosis. Decision and Order at 9-10; Director's Exhibits 9, 50.

[4]The administrative law judge specifically stated that if Dr. Kahn "intended to diagnose anthracosis, his report is inconsistent insofar as his findings of 'no coal macules' or 'no coal nodules' and 'pulmonary edema as the only significant lesions present in the lungs' are inconsistent with the definition of pneumoconiosis." Decision and Order at 10.

[5]Dr. Naeye's credentials are included in the record. Director's Exhibit 50. Except

Mining Co., 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos.88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988). We affirm, therefore, the administrative law judge's rejection of the autopsy opinions of Drs. de Vega and Kahn at Section 718.202(a)(2), and the administrative law judge's conclusion that they are insufficient to establish a mistake in a determination of fact at Section 725.310 (2000).

We next address the administrative law judge's determination that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The medical opinion evidence of record relevant to the existence of pneumoconiosis at Section 718.202(a)(4) consists of the miner's death certificate completed by Dr. Sinicrope and three medical opinions by Drs. Bogartz, Sinicrope and Bruton. On the miner's death certificate, Dr. Sinicrope listed congestive heart failure, pulmonary infarctions, coronary sclerosis, myocardial infarction, cerebral edema, and focal infarctions, as causes of the miner's death. Director's Exhibit 8. The administrative law judge correctly found that Dr. Sinicrope failed to state that pneumoconiosis was a cause of the miner's death. Decision and Order at 9. The administrative law judge also correctly found that Dr. Bogartz did not opine that the miner had pneumoconiosis in any form.[6] Decision and Order at 9; Director's Exhibit 11. Drs. Sinicrope and Bruton did, however, submit opinions which affirmatively concluded that the miner suffered from anthracosis during his lifetime. Director's Exhibits 50, 52, 54, 72; Claimant's Exhibit 1. The administrative law judge rationally rejected Dr. Sinicrope's opinion because she found that it was unsupported by any laboratory or diagnostic test. *See Minnich*, 9 BLR at 1-90-91; *Sabett,* 7 BLR at 1-301, n.1. Further, she rationally rejected Dr. Sinicrope's opinion because he failed to adequately explain his conclusion. *See Trumbo,* 17 BLR at 1-888-889; *Clark*, 12 BLR at 1-155 (1989)(*en banc*); *Cooper,* 11 BLR at 1-98. We affirm the administrative law judge's determination to reject Dr. Sinicrope's opinion as a permissible exercise of her discretion.[7] The

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for a notation that they are pathologists, neither Dr. de Vega's nor Dr. Kahn's credentials are of record.

[6]Dr. Bogartz submitted an opinion dated May 8, 1972 wherein he diagnosed "chronic bronchitis with chronic brochospasm, probably allergic in nature." Director's Exhibit 11.

[7]The administrative law judge rejected Dr. Sinicrope's opinion because it was based, in part, on an erroneous assumption that the miner had ten years of coal mine employment, when, in fact, Administrative Law Judge Giles J. McCarthy earlier found only 7.5 years of coal mine employment. Because the administrative law judge rejected

administrative law judge also rationally rejected Dr. Bruton's opinion because she found that it was based on an incorrect assumption with regard to the x-ray evidence, as she found that the x-ray evidence was unanimously negative for pneumoconiosis.[8] *See Trumbo,* 17 BLR at 1-888-889; *Cooper,* 11 BLR at 1-98; *see also Bobick v. Saginaw Mining Co.,* 13 BLR 1-52 (1988); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Moreover, the administrative law judge rationally discredited Dr. Bruton's opinion as the administrative law judge found that it was based, in part, upon Dr. de Vega's autopsy report, which she had previously discredited. Decision and Order at 9-10. We affirm, therefore, the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Trumbo,* 17 BLR at 1-888-889; *Clark*, 12 BLR at 1-155 (1989)(*en banc*); *McMath*, 12 BLR at 9; *Cooper,* 11 BLR at 1-98; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

In light of the foregoing, we affirm the administrative law judge's findings that the evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). Moreover, we affirm the administrative law judge's finding that the evidence fails to establish a mistake in a determination of fact pursuant to Section 725.310(2000).[9]

As claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, we affirm the denial of benefits on modification in both the

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Dr. Sinicrope's opinion on other valid grounds, we decline to address the administrative law judge's rejection of Dr. Sinicrope's opinion based upon an erroneous years of coal mine employment assumption, as any error in so doing would be harmless. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

[8]Dr. Bruton stated that "The patient's x-rays were certainly compatible with black lung. Furthermore, it is my opinion that the patient's anthracosis was a direct result of his coal mining occupation. Finally, the patient's anthracosis certainly contributed to his demise." Director's Exhibits 52, 54.

[9]With respect to the miner's claim, the administrative law judge incorrectly found that the method of modification which allows a claimant to establish a change of conditions under Section 725.310 (2000) was unavailable to claimant, as the miner died prior to the hearing. Decision and Order at 5-6. However, as the administrative law judge permissible rejected all of the evidence supportive of a finding that the miner suffered from pneumoconiosis pursuant to Section 718.202(a), and the miner is now deceased, we hold that this error is harmless. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

miner's claim and the survivor's claim. *See Neeley v. Director,* OWCP, 11 BLR 1-85 (1988); *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge