BRB No. 99-0141 BLA

The Estate of ANN B. KROFCHECK (Widow of PAUL L. KROFCHECK)	)	
Claimant-Petitioner	)	
v.	)	Date Issued:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order On Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Howard J. Levin (Anapol, Schwartz, Weiss & Cohan, P.C.), Philadelphia, Pennsylvania, for claimant.

Sarah M. Hurley (Henry L. Solano, 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order On Modification (97-BLA-1916) of Administrative Law Judge Michael P. Lesniak denying benefits on a miner's claim and 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 fourth time. Originally, in a Decision and Order issued on March 15, 1982, Administrative Law Judge Thomas M. Burke found approximately eleven to thirteen years of coal mine employment established and adjudicated the instant miner's and survivor's claims pursuant to the interim presumption at 20 C.F.R. §727.203, Director's Exhibit 16. Judge Burke found that invocation of the interim presumption was not established pursuant to 20 C.F.R. §727.203(a)(1)-(4), and found that claimant failed to establish entitlement pursuant to Section 411(c) of the Act, 30 U.S.C. §921(c), the permanent regulations at 20 C.F.R. Part 410, Subpart D, and 20 C.F.R. Part 718. Accordingly, benefits were denied. Claimant appealed and the Board affirmed Judge Burke's findings pursuant to Section 727.203(a) and that the miner did not have a totally disabling respiratory or pulmonary impairment and did not die due to pneumoconiosis, Director's Exhibit 23. *Krofcheck v. Director, OWCP*, BRB No. 82-0671 BLA (May 16, 1984)(unpub.). Thus, the Board held that entitlement pursuant to 30 U.S.C. §921(c)(2) and Part 410, Subpart D, was precluded. In a summary Judgement Order, the Board's Decision and Order was affirmed by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, Director's Exhibit 25. *Krofcheck v. Benefits Review Board*, No. 84-3436 (3d Cir., Feb. 4, 1985)(unpub. order).

Subsequently, claimant filed a request for modification along with new evidence on August 29, 1985, Director's Exhibit 26. In a Decision and Order On Request for Modification issued on January 25, 1990, Judge Lesniak (hereinafter, the administrative law judge) considered whether, in light of the miner's death, the newly submitted evidence established a mistake in a determination of fact pursuant

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[1]Claimant is the estate of Ann B. Krofcheck, the deceased widow of the miner, Paul L. Krofcheck. The miner originally filed a claim on May 24, 1978, Director's Exhibit 1. The miner died on February 24, 1979, Director's Exhibits 1, 5. Subsequent to the miner's death, Ann B. Krofcheck, the surviving widow of the miner, filed a survivor's claim on March 11, 1979, Director's Exhibit 1.

to 20 C.F.R. §725.310, Director's Exhibit 39. The administrative law judge found that the newly submitted evidence failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1)-(4), death due to pneumoconiosis, or entitlement pursuant to Section 410.490, Part 410, Subpart D, and Part 718. Accordingly, benefits were denied. On reconsideration, in an Order issued on July 20, 1990, the administrative law judge found newly submitted blood gas study evidence insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(3) and, therefore, again denied benefits, Director's Exhibit 46. Claimant appealed and the Board affirmed the administrative law judge's findings that a basis for modification was not established pursuant to Section 727.203(a)(1)-(4) and noted that entitlement pursuant to Section 410.490 was precluded, Director's Exhibit 52. *Krofcheck v. Director, OWCP*, BRB No. 90-1995 BLA (Jul. 15, 1993)(unpub.). However, the Board vacated the administrative law judge's denial of benefits and remanded the case for reconsideration of whether death due to pneumoconiosis was established in the survivor's claim under Part 718 and whether entitlement was established pursuant to Part 718 in the miner's claim.

In a Decision and Order On Remand issued on December 3, 1993, the administrative law judge found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4) and, therefore, denied benefits in both the miner's and the survivor's claims, Director's Exhibits 53, 56. Claimant appealed and, subsequently, Ann B. Krofcheck, the widow of the miner, died on November 17, 1994, Director's Exhibit 65. On appeal, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(4) and, therefore, affirmed the administrative law judge's denial of benefits in both the miner's and the survivor's claims, Director's Exhibit 62. *Krofcheck v. Director, OWCP*, BRB No. 94-2352 BLA (Mar. 28, 1995)(unpub.).

On May 6, 1995, the children, *i.e.*, the estate, of Ann B. Krofcheck filed a request for modification, Director's Exhibit 63, along with new evidence, which is at issue herein. Initially, the administrative law judge determined that the denial of benefits under Section 727.203 was final and would not be reconsidered because claimant failed to take any action concerning her claim under Section 727.203 following the Board's July, 1993, Decision and Order affirming the administrative law judge's findings that a basis for modification was not established pursuant to Section 727.203(a)(1)-(4), *See Krofcheck,* BRB No. 90-1995 BLA (Jul. 15, 1993); Director's Exhibit 52. Thus, the administrative law judge only considered

claimant's request for modification of the miner's and the survivor's claims under Part 718. The administrative law judge considered the newly submitted evidence and found it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or, therefore, a mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to consider the newly submitted evidence of record pursuant to the interim presumption at Section 727.203 and the permanent regulations at Part 410, Subpart D, and in failing to find it sufficient to establish a basis for modification pursuant to Section 725.310. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing that the administrative law judge erred in failing to consider the newly submitted evidence of record pursuant to the interim presumption at Section 727.203 or the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), as implemented by 20 C.F.R. §718.303. Nevertheless, the Director contends that the newly submitted evidence is not sufficient to establish a basis for modification under Section 725.310. Claimant has filed a reply brief, reiterating their contentions.

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, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact.[2] 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).

[2]The administrative law judge properly noted that because the miner had died in 1979, claimant is precluded from establishing a change in condition, but is limited to establishing a mistake in a determination of fact pursuant to Section 725.310.

In regard to the administrative law judge's findings under Part 718, the administrative law judge found, as indicated in the previous Decision and Orders, that as none of the x-ray evidence of record was positive for pneumoconiosis, claimant was unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), Decision and Order at 8-9. In order to establish entitlement to benefits under Part 718 in a miner's claim, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.* In a survivor's claim filed prior to January 1, 1982, Director's Exhibit 1, entitlement may be established based on a finding that the miner was totally disabled due to pneumoconiosis at the time of his death, *see* 20 C.F.R. §718.1; *Trent, supra*; *Perry, supra*, or if the evidence of record establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), *see* 20 C.F.R. §§718.1, 725.212(a)(3)(ii); *Foreman v. Peabody Coal Co.*, 8 BLR 1-371 (1985). Moreover, in this case arising within the jurisdiction of the Third Circuit Court, if pneumoconiosis actually hastened the miner's death, then pneumoconiosis is a substantially contributing cause of death for purposes of Section 718.205, *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

The administrative law judge noted that claimant had submitted a new opinion from Dr. Freedman, who reviewed previously submitted x-ray readings by Dr. Ferguson of x-rays dating from August, 1978, to February, 1979, but not the x-ray films themselves, *see* Claimant's Exhibit 1 at 10. Dr. Ferguson had found no nodular pneumoconiosis of the type which is generally associated with anthracosis, but some nonspecific fibrosis which could be related to "bituminosis or exposure to other pathogens" and stated that his reading did not establish a diagnosis of pneumoconiosis, nor rule it out, Director's Exhibits 7, 34. Dr. Freedman opined that the changes described by Dr. Ferguson on a June, 1979, x-ray as being outside the normal range would correspond with a category 1 interstitial abnormality consistent with coal workers' pneumoconiosis and that Dr. Ferguson did not contraindicate pneumoconiosis, Director's Exhibits 73, 75; Claimant's Exhibit 3. Other new opinions were submitted from Dr. Cander, who reviewed the evidence of record and found no evidence that the miner had pneumoconiosis or any lung disease related to his coal mine employment, Director's Exhibits 84, 89, Dr. Navani, who reviewed the x-ray evidence and found no readings indicating coal workers' pneumoconiosis,

Director's Exhibits 86-88, and Dr. Strimlan, who reviewed a September, 1978, pulmonary function study he administered and diagnosed obstructive airway disease but, as the administrative law judge noted, did not comment on its etiology, *see* 20 C.F.R. §718.201.

Claimant contends that Dr. Freedman's opinion is reasoned and documented and sufficient to establish the existence of pneumoconiosis by x-ray evidence pursuant to Section 727.203(a)(1), *see also* 20 C.F.R. §718.202(a)(1). The Third Circuit Court has held that "all types of relevant evidence must be weighed together in determining whether claimant has met its burden of establishing the existence of pneumoconiosis pursuant to Section 718.202, *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

The administrative law judge found that as Dr. Freedman did not have the opportunity to review the x-ray films, his interpretation of Dr. Ferguson's x-ray reports is insufficient to establish the existence of pneumoconiosis based on the x-ray evidence alone, Decision and Order at 8-9. Moreover, pursuant to Section 718.202(a)(4), the administrative law judge found Dr. Freedman's opinion poorly reasoned and poorly documented as it was based on unsubstantiated assumptions that Dr. Ferguson's x-ray reading automatically implies pneumoconiosis, which the administrative law judge found was not supported by the objective data of record nor reasoned. Thus, the administrative law judge found that the newly submitted evidence, considered in conjunction with all the evidence of record, did not establish a mistake in a determination of fact or that claimant suffered from pneumoconiosis pursuant to Section 718.202(a)(1), (4).

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the 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). Thus, as the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that Dr. Freedman's opinion was insufficient to demonstrate the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4) as supported by

substantial evidence, *see Williams, supra*.[3]

[3]In addition, we affirm the administrative law judge's findings that the existence of pneumoconiosis was not demonstrated pursuant to Section 718.202(a)(2)-(3) as unchallenged on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge properly found that there is no autopsy or biopsy evidence in the record, *see* 20 C.F.R. §718.202(a)(2), and that none of the available presumptions pursuant to 20 C.F.R. §718.304-306 are applicable, *see* 20 C.F.R. §718.202(a)(3). 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. Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable as less than fifteen years of coal mine employment was established, *see* 20 C.F.R. §718.305(a). Finally, Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, is inapplicable as the miner died after March 31, 1978, *see* 20 C.F.R. §718.306(a); Director's Exhibits 1, 5.

However, the Third Circuit Court held in *Keating, supra; see also Hillibush v. U.S. Department of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988), that under Section 718.202, in claims filed prior to January 1, 1982, the claimant can rely solely on lay testimony, due to the lack of medical evidence resulting from "lost, destroyed or incomplete" medical evidence,[4] *see* Section 413(b) of the Act, 30 U.S.C. §923(b); 20 C.F.R. §718.202(c).[5] In the instant case, both the miner's and the survivor's claims were filed prior to January 1, 1982, Director's Exhibit 1. Moreover, inasmuch as the Third Circuit Court has held that "all types of relevant evidence must be weighed together" pursuant to Section 718.202, *see Williams, supra*, we vacate the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202 and remand the case for reconsideration of all relevant evidence, including the lay evidence of

[4]The record contains the results of a September, 1978, pulmonary function study, but its tracings were destroyed, *see* Director's Exhibit 34.

[5]Section 718.202(c) provides that pneumoconiosis may not be found solely on the basis of a living miner's statement or testimony or, in claims filed after January 1, 1982, through affidavits of survivors of dependents in claims involving a deceased miner, *see* 20 C.F.R. §718.202(c).

record, pursuant to Sections 725.310 and 718.202(a) and (c).[6]

[6]The miner's widow testified that the miner had shortness of breath, coughed and wheezed, and wasn't sure if his treating physicians were aware of his coal mine employment, Director's Exhibit 15. The miner's son testified that the miner had shortness of breath and a cough since his coal mine employment ended and was hospitalized for a respiratory problem in 1944, two years after his coal mine employment ended, Director's Exhibit 33. However, contrary to claimant's contention, the miner's widow did not specifically testify that the miner had sixteen years of coal mine employment, *see* Director's Exhibit 15.

In addition, claimant and the Director both properly contend that the rebuttable presumption at Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), implemented by 20 C.F.R. §718.303, that the miner's death was due to pneumoconiosis is applicable to claims filed prior to January 1, 1982, in which more than ten years of coal mine employment was established, *see* 20 C.F.R. §718.205(b)(4); *Marx v. Director, OWCP,* 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989)*; Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *Beard v. Director, OWCP*, 10 BLR 1-82 (1987), *aff'd*, 856 F.2d 192 (6th Cir. 1988)(table). Moreover, inasmuch as both the miner's claim and the survivor's claim were filed prior to April 1, 1980, Director's Exhibit 1, and claimant established more than ten years of coal mine employment, *see* Director's Exhibit 16, the interim presumption at Section 727.203, as written, is applicable, *see* 20 C.F.R. §727.203(a). Consequently, as the administrative law judge did not consider whether a mistake in a determination in fact had been made under Section 727.203, *see* 20 C.F.R. §727.203(a); *Keating, supra*, or the rebuttable presumption at Section 718.303, we remand the case for consideration of the relevant evidence pursuant to Sections 725.310, 718.303 and 727.203(a), *see Keating, supra*.[7]

Finally, claimant also contends that the administrative law judge should consider the lay testimony of the miner's widow, *see* Director's Exhibit 15, 33, pursuant to Section 727.203(a)(5). Although the Board held in its original Decision and Order issued in 1984 that the presence of relevant medical evidence in the record precludes the availability of Section 727.203(a)(5), the Third Circuit Court subsequently rejected the Board's approach to Section 727.203(a)(5) and held that invocation under subsection (a)(5) is available where the available medical evidence is insufficient to establish total disability or lack thereof under subsections (a)(1)-(4), *see Koppenhaver v. Director, OWCP*, 864 F.2d 287, 12 BLR 2-103 (3d Cir. 1988), *vacating* 11 BLR 1-51 (1988)(en banc recon.); *Hillibush, supra*; *Pekala v. Director, OWCP*, 13 BLR 1-1 (1989). Moreover, when Section 727.203(a)(5) is available, it is applicable to the claims of deceased miners as well as to the claim of survivors, *see DeForno v. Director, OWCP*, 14 BLR 1-11 (1990). Thus, if the administrative law judge finds invocation of the interim presumption is not established pursuant to

[7]Contrary to claimant's contention that the administrative law judge erred in failing to consider entitlement under the permanent regulations at Part 410, Subpart D, the Third Circuit Court has held that if a claimant fails to establish entitlement pursuant to Section 727.203, then the administrative law judge should consider entitlement pursuant to Part 718, *see Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987).

Section 727.203(a)(1)-(4) on remand, he should consider the relevant lay evidence of record under Section 727.203(a)(5).

Accordingly, the Decision and Order On Modification of the administrative law judge's denying benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge