

BRB No. 99-1322 BLA

JENNIE JUSTUS)
(Widow of SONNY JUSTUS))
)
 Claimant-Petitioner)
)
 v.)
)
KENTUCKY CARBON CORPORATION) DATE ISSUED:
)
 and)
)
LIBERTY MUTUAL INSURANCE)
COMPANY)
)
 Employer/Carrier-)
 Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Modification of Lawrence P. Donnelly,
Administrative Law Judge, United States Department of Labor.

Jennie Justus, Grundy, Virginia, *pro se*.

Melissa Amos Young (Gentry, Locke, Rakes & Moore), Roanoke, Virginia,
for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative
Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's surviving spouse,¹ appeals, without the assistance of counsel,²

¹ Claimant and the miner married in June 1966, and remained married until the miner died on June 30, 1995. *See* Director's Exhibits 1, 6, 9, 29; Employer's Exhibit 1.

the Decision and Order (99-BLA-00527) of Administrative Law Judge Lawrence P. Donnelly denying benefits on a modification request filed in this survivor's claim 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). This case is on appeal to the Board for the second time.³ Administrative Law Judge Lawrence P. Donnelly (the administrative law

² Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, filed an appeal on behalf of claimant, but is not representing her on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

³ Claimant filed her first application for survivor's benefits on January 10, 1996. *See* Director's Exhibit 1. The district director denied this claim on March 15, 1996, and again after conference on July 29, 1996 on the grounds that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. *See* Director's Exhibit 22. Administrative Law Judge Jeffrey Tureck found that employer conceded the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b). Judge Tureck, however, found that claimant failed to establish that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c) and denied benefits. On appeal, the Board affirmed Judge Tureck's findings that the evidence failed to support claimant's burden of proof at Section 718.205(c), and the denial of benefits. *Justus v. Kentucky Carbon Corp.*, 97-0946 BLA (Oct. 30, 1997)(unpub.).

Claimant filed a request for modification on July 28, 1998 which the district director

judge) considered the newly submitted evidence in conjunction with the previously submitted evidence of record, and concluded that claimant failed to establish a mistake in a determination of fact as the evidence was insufficient to establish that pneumoconiosis caused, contributed to or hastened the miner's death pursuant to 20 C.F.R. §§718.205, 725.310. Accordingly, he denied modification. On appeal, claimant generally challenges the denial of her request for modification. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *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).

denied on October 16, 1998. *See* Director's Exhibits 37, 39.

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis.⁴ See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *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). The United States Court of Appeals for the Fourth Circuit has held that any condition that hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205(c)(2). See *Shuff, supra*.

⁴ Since the miner's last coal mine employment took place in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Initially, the administrative law judge correctly determined that, pursuant to Section 725.310, claimant could only establish modification based on a mistake in a determination of fact as this case involved a survivor's claim. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order at 2. At Section 725.310, the administrative law judge properly reviewed claimant's newly submitted evidence and the previous evidence of record to determine whether Administrative Law Judge Jeffrey Tureck made a mistake in a determination of fact when he found the evidence of record was insufficient to establish that pneumoconiosis caused, contributed to or hastened the miner's death. *See* 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 408, 18 BLR 2-26 (4th Cir.1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In finding the evidence of record insufficient to meet claimant's burden of proof, the administrative law judge acted within his discretion when he found the 1998 report of Dr. Sutherland, in which the physician opined that the autopsy report indicated advanced coal workers' pneumoconiosis and that the miner's death was the direct result of his pneumoconiosis, not well-reasoned because the physician failed to provide a rationale for his statement that the miner's "concurrent problems"⁵ were "secondary to his advanced pneumoconiosis" and failed to mention the causes of the miner's death listed on the death certificate.⁶ *See Akers v. Sterling Smokeless Coal Co.*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Stark, supra*. We, therefore, affirm the administrative law judge's finding regarding the credibility of Dr. Sutherland's report as it is supported by substantial evidence.

As Dr. Sutherland's report is the only evidence of record supportive of claimant's burden of proof at Sections 725.310 and 718.205(c), we affirm the finding of the administrative law judge that the medical evidence is insufficient to establish modification based on a mistake in a determination of fact and we affirm the administrative law judge's

⁵ Although Dr. Sutherland does not specify what the miner's concurrent problems were, he did state that any other concurrent problems which the miner developed would have been secondary to his advanced pneumoconiosis. *See* Director's Exhibit 37. The evidence of record reflects that the miner suffered from adenocarcinoma. *See* Director's Exhibits 9-11, 29; Employer's Exhibits 1-6.

⁶ The death certificate lists the immediate cause of death as uremic coma due to or the consequence of acute renal failure due to or the consequence of acute tubular necrosis. *See* Director's Exhibits 9, 29; Employer's Exhibit 1. The death certificate identifies adenocarcinoma rectosigmoid, metastatic to liver and lungs as an other significant condition relating to the miner's death. *Id.*

denial of modification as it is supported by substantial evidence. *See* Decision and Order at 5; *Nataloni, supra*; *Kovac, supra*.

Accordingly, the Decision and Order of the administrative law judge denying modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge