

BRB No. 03-0331 BLA

LOUISE WHITMAN)
(Widow of RONALD W. WHITMAN))
)
 Claimant-Petitioner)
)
 v.)
)
 DIXIE FUEL COMPANY)
)
 and) DATE ISSUED: 09/30/2003
)
)
 BITUMINOUS CASUALTY)
 CORPORATION)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION AND ORDER

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

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for
claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order B Denying Benefits (2002-BLA-0003) of Administrative Law Judge Joseph E. Kane 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).² The administrative law judge found the instant case was a request for modification of claimant's 1999 survivor's claim which was denied in a Decision and Order issued on April 24, 2000 by Administrative Law Judge Donald W. Mosser, and affirmed by the Board by Decision and Order dated April 27, 2001.³ Addressing claimant's request for modification, the administrative law judge found that Judge Mosser denied the initial claim based on his determination that claimant failed to demonstrate that the miner's death was due to pneumoconiosis. Decision and Order at 3. In addition, the administrative law judge found that claimant submitted no new evidence since the prior denial. *Id.* Noting that Judge Mosser considered the

¹ Claimant is the widow of the miner, Ronald W. Whitman, who died on December 5, 1998. Director's Exhibit 4.

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.

³ In the original decision, Judge Mosser credited the miner with nineteen years of coal mine employment and adjudicated the claim under 20 C.F.R. Part 718. In addition, Judge Mosser accepted the parties' stipulation to the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203. However, Judge Mosser found the evidence insufficient to establish that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Mosser denied benefits. Director's Exhibit 37.

In a Decision and Order issued on April 27, 2001, the Board affirmed the denial of benefits, holding that substantial evidence supports Judge Mosser's finding that the medical evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis. *Whitman v. Dixie Fuel Co.*, BRB No. 00-0780 BLA (Apr. 27, 2001) (unpub.); Director's Exhibit 49. Claimant filed a request for modification of the denial of her survivor's claim on May 16, 2001. Director's Exhibit 50.

medical opinions of Drs. Miller, Caffrey, Hansbarger, Fino and Branscomb, as well as the autopsy report of Dr. Ally and the miner's death certificate, the administrative law judge reviewed this evidence and found that Judge Mosser's decision does not contain a mistake in a determination of fact. Decision and Order at 3-4. Accordingly, the administrative law judge denied claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000).⁴

On appeal, claimant contends that the administrative law judge erred in finding that the evidence of record fails to establish a mistake in a determination of fact. Employer responds, urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence, and asserting that claimant failed to raise any basis for review. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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), a party may request modification of a denial based upon a change in conditions or a mistake in a determination of fact.⁵ 20 C.F.R. §725.310; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *see generally Jesse v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). However, the sole ground for modification in a survivor's claim is that of a mistake of a determination of fact, since there cannot be a change in the deceased miner's condition. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and

⁴ The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claims, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

⁵ The miner's last coal mine employment took place in the Commonwealth of Kentucky, therefore, 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*).

Order of the administrative law judge is supported by substantial evidence and that it contains no reversible error.⁶ The administrative law judge set forth the findings from Judge Mosser's 2000 Decision and Order, that claimant failed to establish that the miner's death was due to pneumoconiosis, and noted the medical evidence of record upon which it was based. Decision and Order at 3-4. The administrative law judge then reasonably found that based upon his review of Judge Mosser's rationale and the relevant evidence of record, there was no mistake in a determination of fact in Judge Mosser's 2000 Decision and Order. *Id.* Specifically, the administrative law judge found that:

[Judge Mosser's] recitation of the findings of the various physicians is accurate, and his legal conclusions follow reasonably from such bases. Furthermore, the record weighs heavily in favor of [Judge Mosser's] conclusions. Without hesitation, I find that the previous denial was free of a mistake of fact.

Decision and Order at 3-4.

A review of the record supports the administrative law judge's determination that the evidence of record does not support a finding that there was a mistake in a determination of fact in the prior decision. Contrary to claimant's contention, Dr. Miller's opinion is not mechanically entitled to greater weight based on his status as claimant's treating physician. The opinions of treating physicians "should be '[g]iven their proper deference.'" *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, BLR (6th

⁶ To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis, that the miner's pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); see *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Cir. 2002), quoting *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993). However, where an administrative law judge finds that a treating physician's opinion is not credible, the administrative law judge need not accord additional weight to the treating physician's opinion. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, BLR (6th Cir. 2003); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir.1995); see also *Jericol Mining, Inc. v. Napier*, 311 F.3d 703 (6th Cir. 2002); *Wolfe Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); 20 C.F.R. §718.104(d)(5).

Dr. Miller in his October 1999 deposition stated that the miner was not a surgical candidate for his perforated bowel because of the extensiveness of the cancer and his severe lung disease.⁷ Director's Exhibit 34 (Employer's Exhibit 3) at 6. He further stated that black lung played no part in the miner's death except that it might have been possible to operate and cure the immediate perforation, but that there is no way to state with medical certainty that this would have been the case. *Id.* at 10. In the prior decision, Judge Mosser found these statements in Dr. Miller's opinion to be equivocal and, therefore, insufficient to support claimant's burden of proof.⁸ See 2000 Decision and Order at 8; Director's Exhibit 37; see *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justus v. Director, OWCP*, 6 BLR 1-1127 (1984). As it was within a reasonable exercise of Judge Mosser's discretion, as trier-of-fact, to accord less weight to Dr. Miller's opinion which he found to be equivocal, we reject claimant's contention that Dr. Miller's opinion was entitled to determinative weight based on his status as the miner's treating physician. Decision and Order at 3-4; see *Groves*, 277 F.3d 834, 22 BLR 2-320; *Griffith*, 49 F.3d 184, 19 BLR 2-11; see also *Worrell*, 27 F.3d 227, 18 BLR 2-290; *Wojtowicz*, 12 BLR 1-162.

⁷ Dr. Miller, on the death certificate, listed the immediate cause of death as acute abdomen due to perforated viscus due to colon cancer. He also included other significant conditions, contributing to death but not resulting in the immediate cause, as thrombophlebitis and black lung. Director's Exhibit 4.

⁸ Judge Mosser, while not explicitly stating that Dr. Miller was the miner's treating physician, nonetheless, inherently considered Dr. Miller's status as a treating physician in his decision, based on his citation to and notation regarding the United States Court of Appeals for the Sixth Circuit's holding in *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995), regarding the weight to be accorded a treating physician. 2000 Decision and Order at 8.

Likewise, the remainder of the relevant medical reports of record, *i.e.*, the autopsy report of Dr. Ally and the medical reviews of Drs. Branscomb, Fino, Caffrey and Hansbarger, while including diagnoses of simple coal workers' pneumoconiosis as shown on autopsy, nonetheless, did not state that the miner's pneumoconiosis contributed in any way to his death. Thus, as the administrative law judge rationally found that Judge Mosser's recitation of the findings of the physicians of record is accurate and his legal conclusions reasonably follow therefrom, we affirm the administrative law judge's finding that Judge Mosser's decision does not contain a mistake in a determination of fact pursuant to Section 725.310 (2000) in the prior denial of benefits. Decision and Order at 3-4; Director's Exhibits 5, 6, 19, 20, 34; 20 C.F.R. §725.310 (2000); *Worrell*, 27 F.3d 227, 18 BLR 2-290; *Wojtowicz*, 12 BLR 1-162. Consequently, we affirm the administrative law judge's denial of claimant's request for modification as supported by substantial evidence.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge