BRB Nos. 06-0234 BLA
and 06-0234 BLA-A

LINDA WELCH (Widow of JOHN L. WELCH) Claimant-Respondent Cross-Petitioner v. CANYON FUEL COAL LLC c/o ARCH COAL COMPANY Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/28/2006 DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Martin J. Linnet (Wilderman & Linnet), Denver, Colorado, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (2000-BLA-00581) of Administrative Law Judge Richard K. Malamphy denying employer's petition for modification of an award of 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] The administrative law judge determined that the evidence of record supported a finding that the miner was totally disabled due to pneumoconiosis at the time of his death and that pneumoconiosis hastened his death. Accordingly, he denied employer's request for modification pursuant to 20 C.F.R. §725.310 (2000).[2]

Employer argues that the administrative law judge did not properly weigh the evidence relevant to whether pneumoconiosis was a substantially contributing cause of the miner's total disability and death pursuant to 20 C.F.R. §§718.204(c) and 718.205(c). Claimant responds and urges affirmance of the award of benefits. In her cross-appeal, claimant alleges that the administrative law judge erred in addressing employer's petition for modification and in admitting three medical reports on modification. The Director, Office of Workers' Compensation Programs, has submitted letters indicating that he will not file response briefs in either 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 rational, supported by substantial evidence, and in accordance with applicable 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).

Employer initially contends on appeal that the administrative law judge did not provide a valid rationale for discrediting the opinions in which Drs. Farney, Tuteur, and Tomashefski stated that pneumoconiosis was not a contributing cause of the miner's

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[1] The miner filed a claim for benefits on July 29, 1992, which was denied by the district director on December 17, 1992. Director's Exhibit 28. The miner submitted a second application for benefits on March 1, 1999. Director's Exhibit 1. The miner died on June 4, 1999. Claimant, the miner's surviving spouse, filed a claim on her behalf on August 31, 1999. Director's Exhibit 29. The claims were consolidated and in a Decision and Order issued on November 6, 2001, Administrative Law Judge Paul H. Teitler awarded benefits in both claims. The Board affirmed Judge Teitler's Decision and Order and summarily denied employer's Motion for Reconsideration. Director's Exhibits 100, 106. Employer filed a timely request for modification and submitted new medical opinions from Drs. Farney, Tuteur, and Tomashefski.

[2] The new version of 20 C.F.R. §725.310, which became effective on January 19, 2001, does not apply in this case, as both the miner's claim and the survivor's claim were pending at the time of the effective date of the amended regulations. 20 C.F.R. §725.2(c).

pulmonary impairment and that pneumoconiosis did not hasten the miner's death. The administrative law judge determined that each of these opinions was of little probative weight, as the physicians did not fully address the abnormalities noted on the negative x-ray readings. The administrative law judge also indicated that because Dr. Tuteur relied on a pulmonary function study (PFS) from 1992, rather than the more recent objective evidence obtained in 1999, his opinion was entitled to little weight. Similarly, the administrative law judge discredited Dr. Tomashefski's opinion because he did not address the miner's 1999 qualifying post-exercise blood gas study (BGS). The administrative law judge found that Dr. Farney's opinion was not well reasoned, as he was the only physician of record who questioned the validity of the 1999 BGS. Decision and Order at 21-22; Director's Exhibits 113, 119; Employer's Exhibit 1.

Employer's contention has merit, in part. The administrative law judge acted within his discretion in according little weight to Dr. Farney's opinion on the ground that Dr. Farney did not acknowledge that the miner suffered from hypoxemia, a condition which could be related to dust exposure in coal mine employment and which the other physicians offering an opinion as to total disability acknowledged was present based upon the miner's 1999 BGS. Decision and Order at 22; Director's Exhibit 119; *see Mangus v. Director, OWCP*, 882 F.2d 152, 13 BLR 2-9 (10th Cir. 1989). The administrative law judge rationally found that Dr. Farney's statement that the miner's qualifying post-exercise BGS, obtained in 1999, was not valid because the blood sample was drawn from a vein, rather than an artery, is not supported by any evidence in record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Contrary to the administrative law judge's findings, however, both Drs. Tomashefski and Tuteur discussed the results of the miner's 1999 post-exercise BGS and indicated that pneumoconiosis was not the source of the oxygen desaturation demonstrated by the study. Director's Exhibit 113; Employer's Exhibit 1. Employer is also correct in asserting that the administrative law judge did not adequately explain how the fact that Drs. Tuteur and Tomashefski did not specifically address the abnormalities seen on the x-rays read as negative for pneumoconiosis detracted from the credibility of their opinions regarding the cause of the miner's total disability and death. Both physicians diagnosed simple pneumoconiosis based upon the miner's autopsy results and indicated that the negative x-ray readings were consistent with their determination that the miner's pneumoconiosis was mild. *Id*. As employer has noted, autopsy evidence is considered to be the most probative of the existence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Kinnick v. National Mines Corp.*, 2 BLR 1-221 (1979). Because the administrative law judge did not properly characterize the opinions of Drs. Tomashefski and Tuteur and did not set forth a valid rationale for discrediting their opinions under Sections 718.204(c) and 718.205(c), we must vacate the administrative law judge's findings that claimant established that pneumoconiosis was a substantially contributing

cause of both the miner's total disability and his death. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

We will now address claimant's cross-appeal. Claimant argues that the administrative law judge erred in considering employer's petition for modification pursuant to Section 725.310 (2000) without compelling employer to allege specific factual errors in the award of benefits. Claimant also contends that the administrative law judge erred in admitting more than one medical report in support of employer's petition for modification. Finally, claimant argues that the administrative law judge erred in placing the burden of proof upon her to establish entitlement when the burden of proof is on employer as the proponent of the petition for modification to prove by a preponderance of the evidence that there has been a mistake in a determination of fact under Section 725.310 (2000).

Contrary to claimant's argument, the administrative law judge did not err in declining to require employer to allege specific errors of fact in the prior denial. As claimant herself has noted, the Board has held that the contents of a petition for modification need not comply with any formal requirements; it is sufficient if it can be ascertained from the communication that the party is dissatisfied with the prior disposition of the claim. *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); *Searls v. Southern Construction Co.*, 11 BLR 1-161 (1988)**;** *Cobb v. Schirmer Stevedoring Co.*, 2 BRBS 132 (1975), *aff'd*, 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). We decline claimant's invitation to alter this holding.

We also reject claimant's contention that the administrative law judge erred in admitting the three medical reports that employer submitted in support of its petition for modification. Employer notes correctly that because the claims in this case were pending on the effective date of the amended regulations, the new version of Section 725.310, which includes a limitation on the amount of evidence that can be submitted with a petition for modification, does not apply in this case. Director's Exhibits 1, 29; 20 C.F.R. §725.2(c).

Claimant has indicated correctly, however, that the administrative law judge's analysis of employer's petition for modification was not complete. Claimant asserts that the administrative law judge neglected to determine whether altering the award of benefits in either claim would serve the principles of equity and fairness. Although not stated in precise terms, claimant's argument has merit, inasmuch as the administrative law judge did not include a consideration of whether reopening the award of benefits would render justice under the Act. *Branham v. Bethenergy Mines, Inc.*, 20 BLR 1-27 (1996). The issue of whether reopening a claim would render justice under the Act is committed to the administrative law judge's discretion under Section 725.310 (2000) and requires a consideration of several factors including, but not limited to, the diligence of

the parties, the number of times that the party has sought reopening, and the quality of the new evidence. *See, e.g., Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 547, 22 BLR 2-429, 2-452-53 (7th Cir. 2002); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255.

In light of the foregoing, we vacate the administrative law judge's finding that employer did not establish a mistake in a finding of fact in the prior award of benefits in both the miner's claim and the survivor's claim and remand the case to the administrative law judge for reconsideration of this issue pursuant to Section 725.310 (2000). On remand, the administrative law judge must perform an independent assessment of the newly submitted medical opinion evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish that an error was made in the determination that the miner was totally disabled due to pneumoconiosis at the time of his death pursuant to Section 718.204(c) and that his death was due to pneumoconiosis pursuant to Section 718.205(c). *Branham*, 20 BLR 1-27, 1-34; *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The administrative law judge must place the burden of proof on employer when assessing whether the prior decision awarding benefits contains a mistake in a determination of fact pursuant to Section 725.310 (2000). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Finally, the administrative law judge must determine whether reopening the claims would render justice under the Act. *Branham*, 20 BLR 1-27, 1-34.

Accordingly, the administrative law judge's Decision and Order denying employer's petition for modification is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge