

BRB No. 08-0170 BLA

D.S.W.	)	
(Widow of G.W.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/16/2008
	)	
EASTOVER MINING COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order – Denial of Benefits (04-BLA-0134) of Administrative Law Judge Larry S. Merck rendered on a survivor's claim filed on August 2, 1993, pursuant to the provisions of Title IV of the Federal Coal Mine Health and

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<sup>1</sup> Claimant is the widow of the miner, G.W., who died on July 13, 1993. Director's Exhibit 3.

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> Director's Exhibits 1, 3. On July 31, 2003, the United States Court of Appeals for the Sixth Circuit reversed the Board's decision affirming an administrative law judge's award of survivor's benefits.<sup>3</sup> *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); Director's Exhibit 101. Consequently, by order dated October 15, 2003, the Board vacated its decision and remanded the case to the district director. Director's Exhibit 100. Before the district director, claimant timely requested modification on February 3, 2004, and submitted additional medical evidence. *See* 20 C.F.R. §725.310 (2000)<sup>4</sup>; Director's Exhibits 102, 103; Claimant's Exhibits 1-2. Employer responded with additional medical evidence. Employer's Exhibit 1-3.

In considering claimant's request for modification of the denial of her survivor's claim, the administrative law judge credited the miner with at least thirty-seven years of coal mine employment based on the parties' stipulation and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish that the miner had pneumoconiosis or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.205(c). The administrative law judge therefore determined that claimant did not establish that there had been a mistake in a determination of fact to justify modifying the denial of the claim pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends generally that the administrative law judge erred in failing to find that the miner had pneumoconiosis or that pneumoconiosis hastened his death. Employer responds, urging affirmance of the denial of benefits. The Director,

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<sup>2</sup> 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 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>4</sup> The recent revisions to 20 C.F.R. §725.310 do not apply to claims, such as this one, that were pending on January 19, 2001, the effective date of the revised regulations. 20 C.F.R. §725.2(c). Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

Office of Workers' Compensation Programs, has declined to file a response brief 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 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 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, and that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause of his death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310 (2000), authorizes the modification of an award or denial of benefits based upon a change in conditions or a mistake in a determination of fact. The sole ground available for modification in a survivor's claim is that a mistake in a determination of fact was made in the administrative law judge's previous decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

In challenging the administrative law judge's denial of benefits, claimant points to favorable evidence in the record and states that the administrative law judge erred in declining to credit it:

It is submitted that [claimant] has carried her burden of proof of establishing the existence of pneumoconiosis by X-ray evidence, reports from [the miner's] treating physician, Dr. Woolum and the full well reasoned review of Dr. Glen Ray Baker. The [administrative law judge]

erred in failing to be convinced by this evidence that pneumoconiosis contributed to and hastened the death of [the miner].

Claimant's Brief at 5. However, claimant's dissatisfaction with the result reached is not a valid reason to disturb the administrative law judge's decision.

As we have emphasized previously, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and demonstrate why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Unless the party identifies errors and briefs allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See* 20 C.F.R. §802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-121 (1987). Because claimant, who is represented by counsel, has not identified any specific legal or factual errors in the administrative law judge's consideration of the medical evidence, we decline to review the administrative law judge's findings.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge