

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0602 BLA

LOUISE KACHIK)
(Widow of FRANCIS KACHIK))
)
Claimant-Petitioner)

v.)

) DATE ISSUED: 09/30/2019

)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent)

) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Modification (2017-BLA-05654) of Administrative Law Judge Drew A. Swank pursuant to the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a request for modification of the denial of a survivor's claim.¹

Addressing claimant's petition for modification, the administrative law judge again found the miner worked for nearly thirty years in coal mine employment, with at least fifteen years spent in underground mines. He further determined, however, claimant failed to invoke the presumption of death due to pneumoconiosis at Section 411(c)(4) because she did not establish the miner had a totally disabling respiratory or pulmonary impairment at the time of his death.² 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.204(b)(2), §718.305(b)(1)(iii). The administrative law judge also found claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis because there is no evidence the miner suffered from complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Finally, he found the evidence insufficient to establish the miner's death was due to pneumoconiosis and, therefore, insufficient to establish a mistake in a determination of fact and an essential element of entitlement. 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied claimant's request for modification and claim for benefits.

On appeal, claimant asserts the administrative law judge erroneously discredited the opinions of Drs. Heggere and Tatarko in finding the miner's death was not due to

¹ Claimant is the widow of the miner, Francis Kachik, who died on July 18, 2013, Director's Exhibit 12. She filed a survivor's claim on October 8, 2014. Director's Exhibit 4. The administrative law judge issued a Decision and Order Denying Benefits on October 20, 2016, finding claimant established the existence of simple clinical pneumoconiosis arising out of the miner's coal mine employment, but did not establish the miner's death was due to pneumoconiosis. Director's Exhibit 30. Claimant requested modification on November 28, 2016, and the district director then referred the case to the Office of Administrative Law Judges. Director's Exhibits 31, 33-34.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Because the miner was not determined to be eligible to receive benefits at the time of his death, claimant is not entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012).

pneumoconiosis. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.³

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 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).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record on modification, an administrative law judge is authorized "to correct mistakes of fact, whether 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); *see Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995) (administrative law judge may reconsider "even the ultimate fact of entitlement"); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). The Third Circuit has held that, in addressing a petition for modification, the administrative law judge must review all evidence, both newly submitted and previously in the record, to determine whether any mistake of fact was made in the prior adjudication. *See Keating*, 71 F.3d at 1123.

Because no statutory presumptions apply, claimant must establish by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes an award of benefits. *Trumbo*, 17 BLR at 1-87-88. A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of death, or if pneumoconiosis was a substantially contributing cause of death. 20 C.F.R.

³ We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, or the rebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.305. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 9-10.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 8, 9, 27.

§718.205(b)(1), (2). Pneumoconiosis is a “substantially contributing cause” if it hastens the miner’s death. 20 C.F.R. §718.205(b)(6); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3d Cir. 1989).

Claimant contends the administrative law judge erred in discrediting the opinions of Drs. Heggere and Tatarko. She argues the administrative law judge erred in finding Dr. Heggere’s opinion inconsistent and equivocal because the physician did not waver as to whether pneumoconiosis hastened or contributed to the miner’s death. She also contends the administrative law judge inappropriately discredited Dr. Tatarko’s uncontradicted report. Claimant’s Brief at 5. We disagree.

The administrative law judge reviewed all of the evidence, including the previously submitted autopsy report and follow-up letter of Dr. Heggere, along with the newly submitted medical statement of Dr. Tatarko. *See* 20 C.F.R. §718.205(c); *see also Keating*, 71 F.3d at 1123. He permissibly discredited, as not well-reasoned, Dr. Heggere’s statement that pneumoconiosis and centrilobular emphysema significantly contributed to the miner’s death because it lacks sufficient explanation and is “at odds” with his contrary conclusion that he cannot determine an accurate cause of death because of the limited scope of the autopsy, which was confined to the chest.⁵ Decision and Order at 11; Director’s Exhibit 13 at 5; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). The administrative law judge also permissibly determined Dr. Tatarko’s statement that the miner’s pneumoconiosis could have contributed to the miner’s congestive heart failure⁶ was not

⁵ In response to a question from claimant’s counsel as to “the mechanics of death in this case,” Dr. Heggere stated:

The autopsy was limited to chest only examination (heart and lungs). The examination of the lungs and heart showed simple coal workers’ pneumoconiosis with centrilobular emphysema and biventricular hypertrophy. These features are consistent with increased pulmonary hypertension and oxygen saturation deficits. In addition to this, the patient has other co-morbid conditions to include, possible neoplasm in the region of pancreatic head. Hence, the accurate mechanism for cause of the death cannot be determined based on the limited autopsy.

Director’s Exhibit 13 at 5.

⁶ The miner’s death certificate lists his cause of death as congestive heart failure as a consequence of coronary artery disease. Director’s Exhibit 12. Chronic obstructive pulmonary disease was identified as a significant condition contributing to death but not

well-reasoned because it was unsupported and failed to directly address whether the miner's death was due to his pneumoconiosis.⁷ Decision and Order at 11; Claimant's Exhibit 1. The administrative law judge thus rationally found, within his discretion, the opinions of Drs. Heggere and Tatarko are insufficient to prove the miner's death was due to pneumoconiosis. *Mancia v. Director, OWCP*, 130 F.3d 579, 589 (3d Cir. 1987). We therefore affirm the administrative law judge's weighing of the evidence and conclusions that claimant did not establish the miner's death was due to pneumoconiosis or a mistake in a determination of fact. 20 C.F.R §718.205; 20 C.F.R. §725.310.

Because claimant did not invoke the Section 411(c)(3) or Section 411(c)(4) presumptions and did not establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of survivor's benefits on modification. *See* 20 C.F.R. §718.205; *Trumbo*, 17 BLR at 1-87-88.

resulting in the underlying cause of death. *Id.* The administrative law judge found that the death certificate is entitled to little weight. Decision and Order at 11.

⁷ Dr. Tatarko stated:

In my opinion, [the miner] Kachik had acquired pulmonary disease caused by coal mine [dust] exposure. He did have LV Dysfunction/CAD causing Congestive Heart Failure and Pneumoconiosis could have contributed to the development of this issue as well. The patient had an LV function of 20% which didn't correlate to the severity of his CAD. And so LV function can be attributed to the Cardiomyopathy brought about by Pneumoconiosis.

Claimant's Exhibit 1.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge