

BRB No. 10-0418 BLA

JO ANN CRICK )  
(Widow of LUTHER CRICK) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
PEABODY COAL COMPANY ) DATE ISSUED: 04/21/2011  
 )  
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 - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Jo Ann Crick, Bowling Green, Kentucky, *pro se*.

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

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order - Denying Benefits (08-BLA-5988) of Administrative Law Judge Donald W. Mosser (the administrative law judge), rendered on claimant's request for modification of the denial of a survivor's claim filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).<sup>2</sup> The administrative law judge determined that the issue before him was whether claimant's request for modification of the denial of her survivor's claim should be granted. The claim was previously denied by Associate Chief Administrative Law Judge Stephen L. Purcell on October 27, 2007. Judge Purcell found that the miner worked in coal mine employment for forty years, but that the evidence did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). Director's Exhibit 50.<sup>3</sup> On December 3, 2007, claimant filed a request for modification. *Id.* at 52. Following the district director's June 22, 2008 denial of claimant's request for modification, claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges.<sup>4</sup> *Id.* at

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<sup>1</sup> Claimant, Jo Ann Crick, is the widow of the miner, who died on September 30, 2004. Director's Exhibit 10. Claimant filed a claim for survivor's benefits on October 21, 2004. Director's Exhibit 4 at 2. Claimant remarried on September 22, 2007. Decision and Order at 3; Director's Exhibit 47.

The record reflects that the miner filed a claim on December 4, 1985, which was denied on September 10, 1986. Director's Exhibit 2 at 11, 85. On September 24, 1986, the district director granted the miner's September 16, 1986 request that his claim be held in abeyance pending the outcome of his claim for Kentucky Workers' Compensation. *Id.* at 6-7. On July 2, 1987, the district director granted the miner's request to dismiss his appeal, and the living miner's claim was not further pursued. *Id.* at 2.

<sup>2</sup> The Director, Office of Workers' Compensation Programs, and employer accurately submit that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case because it was filed before January 1, 2005. Director's Response of May 17, 2010; Employer's Brief at 7 n.1.

<sup>3</sup> Associate Chief Administrative Law Judge Stephen L. Purcell further found that, because pneumoconiosis was not established, claimant could not establish that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *J.C. [Crick] v. Peabody Coal Co.*, 2006-BLA-5238 (Oct. 16, 2007), slip op. at 10.

<sup>4</sup> Claimant withdrew her request for an administrative hearing. Administrative Law Judge Donald W. Mosser, therefore, adjudicated the claim on the record. Decision and Order at 2; Administrative Law Judge's Exhibit 2.

57-59. Referencing Judge Purcell's finding that the miner had forty years of coal mine employment,<sup>5</sup> the administrative law judge found, based on his review of the evidence of record, that Judge Purcell did not err in finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a). The administrative law judge found, therefore, that a mistake in a determination of fact was not made in the previous denial of the survivor's claim, that modification at 20 C.F.R. §725.310 was not appropriate, and that entitlement was precluded. Additionally, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Benefits were, therefore, denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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.<sup>6</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivors' benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate 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(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or if death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a

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<sup>5</sup> We affirm the administrative law judge's unchallenged finding that the miner had forty years of coal mine employment. Decision and Order at 3; *Crick*, slip op. at 4; *see Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>6</sup> As the miner's coal mine employment was in Kentucky, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 3; Director's Exhibit 5.

substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (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).

Pursuant to 20 C.F.R. §725.310, a claimant may, within a year of a final order, request modification of a denial of benefits. When a request for modification is filed, the administrative law judge has the authority to "reconsider all the evidence for any mistake of fact," including whether "the ultimate fact" of entitlement was wrongly decided. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994). The 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, 257 (1971). The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner's condition. See *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), modified on recon., 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Company*, 12 BLR 1-162, 1-164 (1989). In this case Judge Purcell denied benefits because the existence of pneumoconiosis was not established at Section 718.202(a). Thus, claimant must establish the existence of pneumoconiosis to show that a mistake in a determination of fact was made.

Initially, the administrative law judge noted that Judge Purcell properly found that the record did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). Decision and Order at 5. Next, the administrative law judge reviewed Judge Purcell's analysis of the medical evidence of record at 20 C.F.R. §718.202(a)(4), comprised of the medical opinions of Drs. Caffrey, Fino and Leigh, as well as the miner's hospitalization and treatment records. Director's Exhibits 11, 44, 46, 47, 51, 56. The administrative law judge found that Judge Purcell accurately summarized this evidence, and properly found that it did not establish the existence of pneumoconiosis at Section 718.202(a)(4).

First, the administrative law judge found that Judge Purcell properly determined that Dr. Caffrey's opinion failed to establish the existence of either clinical or legal pneumoconiosis<sup>7</sup> at Section 718.202(a)(4), because the opinion was "equivocal" as to the

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<sup>7</sup> Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). A disease "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly

presence of clinical pneumoconiosis, and Dr. Caffrey found that the miner's chronic obstructive pulmonary disease (COPD) was due to smoking and not coal mine employment.<sup>8</sup> See 20 C.F.R. §718.201; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); Director's Exhibit 47 at 8, 9-10.

Second, the administrative law judge found that Judge Purcell properly determined that Dr. Fino's opinion failed to establish the existence of either clinical or legal pneumoconiosis, because Dr. Fino opined that the miner did not have coal workers' pneumoconiosis, chronic obstructive pulmonary disease, or any respiratory impairment. See 20 C.F.R. §718.201; *Trent*, 11 BLR at 1-27; Decision and Order at 5; Director's Exhibit 47 at 27, 31-32.

Third, the administrative law judge found that Judge Purcell properly rejected Dr. Leigh's diagnosis of pneumoconiosis because, despite the fact that Dr. Leigh was a treating physician, there were no objective tests to support his diagnosis, and he "admitted that [he] had not personally diagnosed pneumoconiosis or COPD."<sup>9</sup> Decision and Order at 5. The administrative law judge also noted that Judge Purcell properly considered the fact that Drs. Caffrey and Fino had better qualifications than Dr. Leigh.<sup>10</sup>

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related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

<sup>8</sup> Dr. Caffrey opined that the miner's "employment in the coal mining industry for [forty] years did not cause or contribute to any discernable pulmonary disease during his lifetime." Director's Exhibit 46 at 8.

<sup>9</sup> In his letter of April 4, 2005, Dr. Leigh stated: "[I]t was my understanding that [the miner] had a diagnosis of chronic obstructive pulmonary disease [COPD] or coal workers' pneumoconiosis." Director's Exhibit 12 at 1.

On deposition, Dr. Leigh stated that the miner's pulmonary problems were mainly handled by pulmonologists at Western Kentucky Pulmonary Clinic, but stated that he had never requested any of their records. Director's Exhibit 51 at 32. He stated that the miner had multiple health conditions that could have caused the oxygen deprivation to his brain, resulting in stroke, including cardiovascular problems, high blood pressure, and diabetes. *Id.* at 16-18. Dr. Leigh indicated that the diagnosis of coal workers' pneumoconiosis was based on the fact that the miner worked in the mines for forty years, and cited "historically and from what I knew of him, [there was] evidence of injury from his coal exposure." *Id.* at 20-21.

<sup>10</sup> The administrative law judge cited the finding of Judge Purcell that Dr. Leigh, himself, stated that, as he was not a Board-certified pulmonologist, he would defer to the

Based on these factors, the administrative law judge properly found that Judge Purcell correctly rejected Dr. Leigh's medical opinion as unreasoned, unsupported by objective evidence or personal knowledge, and therefore insufficient to establish pneumoconiosis under Section 718.202(a)(4). *See* 20 C.F.R. §718.104(d)(5). *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984); *see generally Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (6th Cir. 2003)(the opinions of treating physicians get the deference they deserve based on their power to persuade).

Further, considering the miner's hospitalization and treatment records, the administrative law judge properly found that Judge Purcell correctly determined that they did not establish the existence of either clinical or legal pneumoconiosis, as the existence of coal workers' pneumoconiosis was not reported, and the miner's COPD and bronchitis were not linked to his coal mine employment. *See* 20 C.F.R. §718.201; *Trent*, 11 BLR at 1-27; Director's Exhibit 11.

As the administrative law judge rationally found no error in Judge Purcell's credibility determinations or evaluation of the medical evidence, we affirm the administrative law judge's conclusion that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). In light of the foregoing, we affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact in Judge Purcell's prior denial of benefits. The administrative law judge, therefore, properly found that claimant failed to establish a basis for modification of the prior denial of benefits pursuant to 20 C.F.R. §725.310. *See Wojtowicz*, 12 BLR at 1-164. Since claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), a requisite element of entitlement in a survivor's claim, *Trumbo*, 17 BLR at 1-85, entitlement to benefits is precluded.<sup>11</sup> *See Anderson*, 12 BLR at 1-111.

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opinions of the better qualified pulmonary specialists, Drs. Caffrey and Fino. Decision and Order at 5; *Crick*, slip op. at 9.

The record reflects that Dr. Leigh concentrates in family practice, is not Board-certified in any specialty, and is not a pulmonary specialist, while Dr. Caffrey is a Board-certified Anatomical and Clinical Pathologist and Dr. Fino is a Board-certified Internist and Pulmonologist. Director's Exhibit 51 at 4-5, 19, 30-31.

<sup>11</sup> Our affirmance of the administrative law judge's determination, that no mistake of fact was made in the previous determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), obviates the need to address his additional determination that the evidence failed to establish death due to

Therefore, we affirm the administrative law judge's denial of modification and survivor's benefits.

Accordingly, the administrative law judge's Decision and Order - Denying 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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REGINA C. McGRANERY  
Administrative Appeals Judge

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pneumoconiosis pursuant to Section 718.205(c). *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).