

BRB No. 10-0722 BLA

BARBARA F. WILLIAMS)
(o/b/o and Surviving Child of FRANK L.)
WILLIAMS))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 08/25/2011
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Request for Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Barbara F. Williams, Birmingham, Alabama, *pro se*.

Sarah M. Hurley (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order Denying Request for Modification (09-BLA-5512 and 09-BLA-5788) of Administrative

¹ Claimant is the surviving dependent child of the miner, who died on February 28, 1985. Director's Exhibit 20. She is pursuing her survivor's claim, and is also pursuing the miner's claim on his behalf.

Law Judge Theresa C. Timlin rendered on a miner's duplicate claim² and a survivor's claim³ filed pursuant to the provisions 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).⁴ The relevant procedural history is as follows.⁵ In a decision dated August 11, 1987, Administrative Law Judge A. A. Simpson denied both the miner's duplicate claim and the survivor's claim on the grounds that claimant failed to establish that the miner had pneumoconiosis or that his death was due to pneumoconiosis. Director's Exhibits 17, 31. On appeal, the Board affirmed the denial of both claims. *Williams v. Director, OWCP*, BRB No. 87-2566 BLA (Feb. 26, 1991)(unpub.); Director's Exhibit 37. The Board further denied claimant's request for reconsideration. *Williams v. Director, OWCP*, BRB No. 87-2566 BLA (June 12, 1991)(Order)(unpub.); Director's Exhibit 39. Claimant timely requested modification of both claims on May 15, 1992, which was denied by the district director on June 19, 1992. Following additional proceedings, claimant again appealed to the Board. In its most recent decision, the Board held that while claimant had timely requested a hearing before an administrative law judge following the denial of her request for modification, the

² The miner's initial claim was filed on February 24, 1970, and denied on October 21, 1981, for failure to establish any element of entitlement. Director's Exhibits 16, 57. The miner's duplicate claim, filed on September 13, 1983, was denied by the district director on December 17, 1984. Director's Exhibit 1.

³ Claimant's survivor's claim, filed on March 1, 1985, was denied by the district director on April 22, 1985.

⁴ The Department of Labor has amended the regulations implementing the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010). 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. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to these claims, filed before January 1, 2005. Decision and Order at 2 n.2; Director's Letter at 1 n.1.

⁵ These claims have previously been before the Board, and the complete procedural history is contained in the Board's prior decisions. *B.W. [Williams] v. Director, OWCP*, BRB No. 08-0342 BLA (Nov. 26, 2008)(unpub.); *Williams v. Director, OWCP*, BRB No. 87-2566 BLA (Feb. 26, 1991)(unpub.).

claims were never forwarded to the Office of Administrative Law Judges. Therefore, the Board remanded the case to the district director to prepare the case for a hearing on the miner's 1983 duplicate claim and the survivor's 1985 claim. *B.W. [Williams] v. Director, OWCP*, BRB No. 08-0342 BLA (Nov. 26, 2008)(unpub.); Director's Exhibit 57.

Subsequent to the Board's decision, the case was referred to the Office of Administrative Law Judges, and a hearing was held by Administrative Law Judge Theresa C. Timlin (the administrative law judge). In her decision denying modification, the administrative law judge credited the miner with eighteen years of coal mine employment,⁶ as stipulated by the parties, and adjudicated both claims pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge found that claimant failed to establish grounds for modification of the denial of the miner's duplicate claim, pursuant to 20 C.F.R. §725.310 (2000). With respect to the survivor's claim, the administrative law judge found that because claimant was unable to establish that the miner had pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), claimant could not establish that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). Therefore, the administrative law judge found that claimant failed to establish grounds for modification of the denial of her survivor's claim.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director responds, urging affirmance of the administrative law judge's decision.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider 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, 1-177 (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 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).

To be entitled to benefits under the Act on the miner's claim, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R.

⁶ The record indicates that the miner's coal mine employment was in Alabama. Decision and Order at 5 n.5; Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

§§718.3, 718.202, 718.203, 718.204. 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).

When a request for modification is filed, the administrative law judge has the authority to reconsider all the evidence to determine whether claimant has established either a change in conditions since the prior denial, or a mistake in a determination of fact in the prior decision. 20 C.F.R. §725.310(a) (2000); *see Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987). Here, however, as the miner died prior to the denial of his duplicate claim, claimant cannot show that his condition has changed. Thus, under the facts of this case, the appropriate inquiry is whether claimant established a mistake in fact in the prior determination that the miner did not suffer from pneumoconiosis. Mistakes of fact may be predicated on wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *See Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

The administrative law judge considered the evidence previously of record, in conjunction with the newly submitted evidence, to determine if claimant established the existence of pneumoconiosis by any of the methods available pursuant to 20 C.F.R. §718.202(a)(1)-(4), and therefore, had established grounds for modification of the prior denial.⁷ Considering the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge permissibly credited the negative x-ray readings by Drs. Strong, Elmer, Russakoff, Sargent, and Hasson, over the positive x-ray readings by Drs. Risman and Haden, based on their superior radiological qualifications, and because the negative readings are the most recent of record.⁸ *See White v. New White Coal Co.*, 23 BLR 1-1,

⁷ The existence of pneumoconiosis may be established by means of x-rays, biopsy or autopsy evidence, by one of the presumptions listed at 20 C.F.R. §718.202(a)(3), or by medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4).

⁸ A September 12, 1970 x-ray was read by Dr. Risman, a “field reader,” as positive for pneumoconiosis, and was re-read as negative by Dr. Strong, a Board-certified radiologist. Director’s Exhibit 16. Serial x-rays dating from 1963 through 1977 that were read as positive by Dr. Haden, who is Board-certified in Internal Medicine and Pulmonary Disease, were outweighed by the negative, more recent readings by better qualified physicians. Director’s Exhibit 16. Specifically, Dr. Elmer, a Board-certified radiologist and B reader, and Dr. Russakoff, a B reader, interpreted the November 14, 1983 x-ray as negative for pneumoconiosis. Dr. Sargent, a dually-qualified reader, and Dr. Hasson, a B reader, both interpreted the April 25, 1981 x-ray as negative for pneumoconiosis. Director’s Exhibits 7-9, 16.

1-4-5 (2004); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 6; Director's Exhibits 4, 7-9, 16. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis by x-ray evidence, pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(2), (3), the administrative law judge accurately determined that there were no biopsy or autopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) is applicable in this living miner's claim filed after January 1, 1982, in which the record contains no evidence of complicated pneumoconiosis. *See Dagnan v. Black Diamond Coal Mining Co.*, 994 F.3d 1536, 18 BLR 2-203 (11th Cir. 1993); Decision and Order at 7. We therefore affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3).

Evaluating the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge credited the opinions of Drs. Hasson, Risman, and Russakoff, who each found that the miner did not suffer from pneumoconiosis, over the opinions of Drs. Haden and Hawley, who opined that the miner had pneumoconiosis. Decision and Order at 6-7. The administrative law judge rationally discounted Dr. Haden's opinion of occupational pneumoconiosis, as it was based primarily on his positive x-ray readings for pneumoconiosis, which the administrative law judge found outweighed by the negative x-ray readings. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); Decision and Order at 6; Director's Exhibit 16. Additionally, the administrative law judge rationally discounted Dr. Hawley's diagnosis of occupational pneumoconiosis, because the doctor did not explain the basis for his diagnosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 6; Director's Exhibit 16.

By contrast, the administrative law judge reasonably credited the opinions of Drs. Hasson, Risman, and Russakoff, that the miner did not have pneumoconiosis, because they were better documented and better reasoned than the conclusory opinions of Drs. Haden and Hawley. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 6-7; Director's Exhibits 5, 16.

Additionally, the administrative law judge considered the miner's hospitalization records from June 1979, February 1982, and February 1985, and permissibly concluded that they did not establish the existence of pneumoconiosis.⁹ *See McClendon v.*

⁹ None of the hospital records contains a diagnosis of clinical or legal pneumoconiosis. Moreover, while the miner's 1979 hospital record includes a notation

Drummond Coal Co., 861 F.2d 1512, 1514, 12 BLR 2-108, 2-109 (11th Cir. 1988); *Stomps v. Director, OWCP*, 816 F.2d 1533, 1535, 10 BLR 2-107, 2-108 (11th Cir. 1987); Decision and Order at 7; Director's Exhibit 45.

Finally, the administrative law judge considered a December 5, 1990 letter from Dr. Graham, submitted by claimant on modification, in which Dr. Graham stated:

[The miner] was treated by me for pulmonary lung disease. We deemed this patient as being a candi[d]ate for black lung.

Director's Exhibit 38. The administrative law judge reasonably found that this letter is not sufficient to establish the existence of pneumoconiosis, as it is undocumented, unreasoned, and does not offer any support for the physician's conclusion. *See Clark*, 12 BLR at 1-155; Decision and Order at 7; Director's Exhibit 38. We affirm that finding, as it is supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Because claimant has failed to establish grounds for modification pursuant to 20 C.F.R. §725.310 (2000) with respect to the existence of pneumoconiosis, the element that defeated entitlement in the prior decision, we affirm the administrative law judge's denial of benefits in the miner's claim. *See Anderson*, 12 BLR at 1-112.

Turning to the survivor's claim, in order to establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1985). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1),(3), or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). 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); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 1367, 21 BLR 2-166, 2-176 (11th Cir. 1997).

that the miner had a history of "mild COPD [chronic obstructive pulmonary disease] secondary to working in coal mines," the more recent 1982 and 1985 hospital records relate the miner's COPD to his long history of smoking. Director's Exhibit 45.

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. *Wojtowicz v. Duquesne Light Company*, 12 BLR 1-162, 1-164 (1989). The fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

In considering claimant's request for modification of the denial of her survivor's claim, the administrative law judge initially found that claimant established that she is a dependent surviving child of the miner. Therefore, the administrative law judge found that claimant is an eligible survivor for purposes of the Act. Decision and Order at 8-9. The administrative law judge further found, however, that claimant did not establish that the miner died due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c), as the records from the miner's last hospitalization identify only sepsis, gouty arthritis, anemia, malnutrition, and alcohol abuse, as the causes of death. Decision and Order at 9; Director's Exhibit 45. Additionally, the death certificate makes no mention of pneumoconiosis, but identifies anemia and gout as conditions which contributed to death.¹⁰ Director's Exhibit 20. We, therefore, affirm, as supported by substantial evidence, the administrative law judge's findings that claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205(c) and that, consequently, modification of the prior denial of the survivor's claim was not appropriate pursuant to Section 725.310 (2000). Decision and Order at 9; *see* 20 C.F.R. §725.310 (2000); *Bradberry*, 117 F.3d at 1367, 21 BLR at 2-176; *Wojtowicz*, 12 BLR at 1-164; *Anderson*, 12 BLR at 1-112.

¹⁰ The death certificate does not identify the immediate cause of death. Director's Exhibit 20.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge