

BRB No. 04-0759 BLA

ELSIE MULLINS)
(Widow of RAY MULLINS))
)
 Claimant-Petitioner)
)
 v.)
)
 BETHENERGY MINES, INCORPORATED) DATE ISSUED: 05/27/2005
)
 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 Mollie W. Neal,
Administrative Law Judge, United States Department of Labor.

Elsie Mullins, Elkhorn, Kentucky, pro se.

Natalie D. Brown (Jackson Kelly PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order -
Denying Benefits (2003-BLA-5786) of Administrative Law Judge Mollie W. Neal on a

¹ Claimant, Elsie Mullins, is the widow of the miner, Ray Mullins, who died on
March 10, 1982. The original death certificate lists the cause of death as cardio-
respiratory arrest due to hypertension and ventricular tachycardia due to acute antero-
lateral wall myocardial infarction. Director's Exhibit 5. Later, the death certificate was
amended to list "black lung" as a significant contributing condition. Director's Exhibit
27. There is no record of a separate miner's claim having been filed.

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).³ The administrative law judge found that the instant case constituted a timely request for modification, and proceeded to consider whether a mistake in a determination of fact was made in the prior denial of benefits on this survivor's claim.⁴ Decision and Order at 7.

² Susie Davis, a benefits counselor with the Kentucky Black Lung Coalminers & Widows Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

³ Claimant initially filed a claim for benefits on April 27, 1982. Director's Exhibit 1. After the denial of her claim by the district director on January 17, 1984, claimant requested a hearing. Director's Exhibit 1. At the hearing, claimant requested that she be allowed to withdraw her claim. This request was granted by Administrative Law Judge Edward J. Murty in a Decision and Order issued on February 20, 1986. No further action was taken until the filing of the instant claim on December 3, 2000, Director's Exhibit 2, which was denied by the district director on February 14, 2001 because claimant did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 14. On January 30, 2002, claimant requested a hearing, Director's Exhibit 15. Because the request for hearing was made more than thirty days after the district director's denial, the request was treated as a request for modification, Director's Exhibit 16. On May 17, 2002, the district director again denied benefits Director's Exhibit 26. On January 17, 2003, claimant submitted additional evidence, Director's Exhibit 28, and on February 14, 2003 the district director denied the request for modification, Director's Exhibit 29. Claimant then filed a timely request for a hearing, Director's Exhibit 30. The hearing was held on January 14, 2004 and, on June 14, 2004, the administrative law judge issued the Decision and Order denying benefits from which claimant now appeals.

⁴ Pursuant to 20 C.F.R. §725.310, claimant may, within a year of a final order, request modification of a denial of benefits. *See Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). In survivors' claims, the sole ground for modification is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner's condition. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). At the hearing, in this case, employer argued that the instant claim should have been denied as a duplicate survivor's claim pursuant to 20 C.F.R. §725.309. *See* Hearing Transcript at 7-10. The administrative law judge rejected this assertion, however. Because claimant's initial claim had been withdrawn, that claim was considered to have never been filed. *See* 20 C.F.R. §725.306(a), (b); *Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-188 (2002)(*en banc*). This finding is not challenged by employer.

The administrative law judge found that the evidence of record established a coal mine employment history of thirty-one years, that claimant established that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4) and that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 9-10. The administrative law concluded, however, that the evidence of record failed to establish that the miner's pneumoconiosis caused or hastened his death pursuant to 20 C.F.R. §718.205(c). Decision and Order at 11-12. Accordingly, the administrative law judge found that claimant failed to establish a mistake in the prior determination of fact and thus denied benefits.

On appeal, claimant, without the assistance of counsel, generally challenges the administrative law judge's denial of survivor's benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief in this appeal.⁵

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the

⁵ We affirm the administrative law judge's determinations: that the instant claim constitutes a request for modification, *see* 20 C.F.R. §§725.306, 725.309, 725.310; that thirty-one years of coal mine employment were established and that the miner suffered from pneumoconiosis arising out of coal mine employment, *see* 20 C.F.R. §§718.202(a), 718.203(b), as these findings are not adverse to claimant and are not challenged on appeal. *See Skrack v. Island Creek Coal Co.* 6 BLR 1-710 (1983).

presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In concluding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge found that Drs. Perper, Patel, Caffrey, Green, O'Neill, Thakar, Rosenberg, Jarboe and Broudy, Director's Exhibits 1, 9, 13; Employer's Exhibits 2, 3, 5, 6, all specifically opined that pneumoconiosis did not cause, contribute to, or hasten the miner's death. Decision and Order at 11-12. The administrative law judge further determined that only the opinion of Dr. Gibson, Director's Exhibit 22, and the revised death certificate, Director's Exhibit 27, supported a finding that pneumoconiosis contributed to the miner's death. Decision and Order at 12. In a permissible exercise of his discretion, the administrative law judge accorded greatest weight to the opinions of Drs. Rosenberg, Jarboe, Broudy, Caffrey and Perper based on their expertise as pathologists and/or pulmonary specialists. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Corp.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986). Further, the administrative law judge rationally found the opinion of Dr. Gibson entitled to little weight as it was cursory, not supported by objective criteria, and did not discuss the extent to which the miner's myocardial infarction contributed to his death. This was rational. Decision and Order at 11; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-624 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002). Moreover, the administrative law judge found the amended death certificate entitled to little weight as there was no information regarding who amended the certificate or for what purpose, and there was no evidence of record indicating the medical basis that led to a revision of the certificate. Decision and Order at 11. This, too, constitutes a permissible exercise of the administrative law judge's discretion. *See Williams*, 338 F.3d 501, 22 BLR 2-624; *Napier*, 301 F.3d 703, 22 BLR 2-537; *Stephens*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002). Because the administrative law judge has considered the entirety of the evidence of record and has provided affirmable bases for crediting or not crediting the evidence, we affirm the administrative law judge's determination that the evidence of record was insufficient to establish that the miner's death was caused or hastened by his pneumoconiosis, 20 C.F.R. §718.205(c); *Griffith*, 49 F.3d 184, 19 BLR 2-111; *Brown*, 996 F.2d 812, 17 BLR 2-135, and we further affirm the administrative law judge's conclusion that claimant failed to establish a mistake in a prior determination of fact. 20 C.F.R. §725.310; *Worrell*, 27 F.3d 227, 18 BLR 2-290; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge