

BRB No. 03-0543 BLA

JENNIE LUE JUSTUS)
(Widow of ROGER JUSTUS))
)
 Claimant-Petitioner)
)
 v.)
)
KENTUCKY CARBON CORPORATION) DATE ISSUED: 04/22/2004
)
 and)
)
LIBERTY MUTUAL INSURANCE)
COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
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 Linda S. Chapman,
Administrative Law Judge, United States Department of Labor.

Jennie Lue Justus, Grundy, Virginia, *pro se*.

Melissa A. Young (Gentry Locke Rakes & Moore), Roanoke, Virginia, for
employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order Denying Benefits (02-BLA-0262) of Administrative Law Judge Linda S. Chapman on claimant's 2001 request for modification of the 1999 denial of benefits in the instant 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).² This case is before the Board for the third time.³ The administrative law judge considered the newly submitted evidence in

¹ Brenda Yates, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, filed an appeal on behalf of claimant, but is not representing her on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

² 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ Claimant filed her application for survivor's benefits on January 10, 1996. Director's Exhibit 1. Subsequent to a hearing, Administrative Law Judge Jeffrey Tureck found that employer conceded the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §718.202(a) (2000) and 20 C.F.R. §718.203(b) (2000). Director's Exhibit 29. Judge Tureck found, however, that claimant failed to establish that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c) (2000) and denied benefits. *Id.* Claimant appealed, and the Board, in *Justus v. Kentucky Carbon Corp.*, BRB No. 97-0946 BLA (Oct. 30, 1997)(unpublished), affirmed the denial of benefits based on claimant's failure to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c) (2000). Director's Exhibit 34. Claimant requested modification at 20 C.F.R. §725.310 (2000) of the prior denial of benefits and submitted new evidence. Director's Exhibit 37. Subsequent to a hearing, Administrative Law Judge Lawrence P. Donnelly denied claimant's request for modification by Decision and Order dated September 9, 1999. Director's Exhibit 45. Judge Donnelly found that the evidence of record failed to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c) (2000) and thus found no mistake in a determination of fact at 20 C.F.R. §725.310 (2000) in the prior denial. *Id.* Claimant appealed, and the Board, in *Justus v. Kentucky Carbon Corp.*, BRB No. 99-1322 BLA (Sept. 19, 2000)(unpublished), affirmed Judge Donnelly's findings at 20 C.F.R. §718.205(c) and 725.310 (2000). Director's Exhibit 52. The Board thus affirmed Judge Donnelly's denial of claimant's request for modification and the claim. *Id.*

On September 14, 2001, claimant filed a request for modification at 20 C.F.R. §725.310 (2000) and submitted new evidence. Director's Exhibits 53, 54. Claimant

conjunction with the previously submitted evidence, and concluded that claimant failed to establish a mistake in a determination of fact as the evidence was insufficient to establish that pneumoconiosis caused, contributed to or hastened the miner=s death pursuant to 20 C.F.R. §718.205 (2000) and 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied claimant’s request for modification and the claim. On appeal, claimant generally challenges the administrative law judge’s denial of claimant’s request for modification. Employer responds, and urges affirmance of the decision below as supported by substantial evidence. The Director, Office of Workers’ Compensation Programs, has not filed a brief in the instant 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *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 by 30 U.S.C. §932(a).

In order to establish entitlement to benefits 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, that the miner=s death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or that death was caused by complications of pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *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). The United States Court of Appeals for the Fourth Circuit held in *Shuff* that any condition that hastens the miner’s death is a substantially contributing cause of death for purposes of Section 718.205(c)(2). *Shuff*, 977 F.2d at 979-980, 16 BLR at 2-93.

Under the newly revised regulation at 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. Pursuant to 20 C.F.R. §718.205(c)(5), 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). Further, in order to establish modification of the

submitted, *inter alia*, the November 27, 2000 opinion of consulting pathologist Jeffrey A. Kahn. Director’s Exhibit 53. Employer submitted, *inter alia*, the December of 2002 consulting opinions of Drs. Fino and Naeye. Employer’s Exhibits 2, 3. Administrative Law Judge Linda S. Chapman denied claimant’s request for modification and the claim by Decision and Order dated May 5, 2003, which is the subject of the instant appeal.

prior denial of benefits in the instant survivor's claim, claimant must establish a mistake in a determination of fact in the prior denial, namely in the finding that death due to pneumoconiosis was not established at 20 C.F.R. §718.205(c). 20 C.F.R. §725.310 (2000); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). Claimant has established that the miner had simple coal workers' pneumoconiosis arising out of coal mine employment at 20 C.F.R. §718.202 and 20 C.F.R. §718.203(b). Director's Exhibits 28, 29.

In connection with the instant request for modification, claimant submitted the miner's death certification, the autopsy report, and Dr. Kahn's November 27, 2000 opinion. The miner's death certificate, completed by Dr. Stefanini, indicates that the miner died June 30, 1995 due to uremic coma, due to acute renal failure and acute tubular necrosis. Director's Exhibit 9. The death certificate further lists "adenocarcinoma, rectosigmoid, metastatic to liver, lungs" as "[o]ther significant conditions contributing to death but not resulting in the underlying cause given [above]." *Id.* Dr. Stefanini, in his November 3, 1995 autopsy report, included the following final anatomical diagnoses: failure to expectorate respiratory secretions; acute tubular necrosis and membranous nephropathy; marantic thrombosis; adenocarcinoma of colon; [chronic obstructive pulmonary disease]; atherosclerotic disease, aorta and major branches; coal workers' pneumoconiosis, simple. Director's Exhibit 10.⁴ Dr. Kahn, in his November 27, 2000 consulting pathology report, found colonic adenocarcinoma metastatic to lungs, liver, and lymph nodes, and simple coal workers' pneumoconiosis of moderate severity. Director's Exhibit 53. Dr. Kahn indicated that neither coal nodules nor "massive progressive fibrosis" was present. *Id.* Dr. Kahn added, "The degree of macule formation represents a moderate degree of [coal workers' pneumoconiosis] of sufficient severity to have been clinically significant, in my opinion." *Id.*

In response to claimant's request for modification, employer submitted the autopsy report and the opinions of Drs. Fino and Naeye rendered in 2002. Dr. Fino, in his December 18, 2002 report, indicated that his review of Dr. Kahn's report did not cause him to change his previous view, as expressed in his April 23, 1999 opinion that, "although coal workers'

⁴ The miner's death certificate and autopsy report, both signed by Dr. Stefanini, were previously considered by Judge Tureck in his 1997 denial of benefits and by Judge Donnelly in his 1999 denial of claimant's 1998 request for modification. Director's Exhibits 29, 45. In *Justus v. Kentucky Carbon Corp.*, BRB No. 97-0946 BLA (Oct. 30, 1997)(unpublished), slip op. at 3, the Board affirmed Judge Tureck's finding that Dr. Stefanini did not indicate whether the miner's simple coal workers' pneumoconiosis played a role in his death. Director's Exhibit 34. In *Justus v. Kentucky Carbon Corp.*, BRB No. 99-1322 BLA (Sept. 19, 2000)(unpublished) slip op. at 3-4, the Board indicated that a 1998 report by Dr. Sutherland was the only evidence supportive of claimant's burden of proof at 20 C.F.R. §718.205(c) (2000) and 20 C.F.R. §725.310 (2000), and the Board affirmed Judge Donnelly's discrediting of Dr. Sutherland's report. Director's Exhibit 52.

pneumoconiosis was present radiographically, there was no evidence that this man's death was caused by the inhalation of coal mine dust." Employer's Exhibit 2. Dr. Naeye, in his December 28, 2002 opinion found that the miner's simple coal workers' pneumoconiosis "is too mild to have caused impairments in lung function that would have produced disability or contributed in any measurable way to this man's death." Employer's Exhibit 3. Dr. Naeye added:

I also disagree with Dr. Jeffrey Kahn's conclusion that the [coal workers' pneumoconiosis] was of 'sufficient severity to have been clinically significant.' If all of the black pigment in the lungs was accompanied by fibrosis, Dr. Kahn's assessment would be correct. In fact, overall there is little such fibrosis and most often no fibrosis associated with the pigment.

Employer's Exhibit 3.

The administrative law judge properly reviewed the newly submitted evidence in conjunction with the previously submitted evidence and determined that there was no mistake in a determination of fact at 20 C.F.R. §725.310 (2000)⁵ when Judge Donnelly found the evidence of record insufficient to establish that pneumoconiosis caused, contributed to, or hastened the miner's death at 20 C.F.R. §718.205(c). 20 C.F.R. §725.310 (2000); *Jessee v. Director, OWCP*, 5 F.3d 408, 18 BLR 2-26 (4th Cir.1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Specifically, the administrative law judge correctly noted that while Dr. Kahn opined that the miner's simple coal workers' pneumoconiosis "was of sufficient severity to be clinically significant," Director's Exhibit 53, Dr. Kahn did not address whether the disease contributed to the miner's death or hastened it in any way. *Id.*; Decision and Order at 6. Within her discretion, the administrative law judge found that "[e]ven assuming that Dr. Kahn provided an objective basis for his conclusion that Mr. Justus's pneumoconiosis was clinically significant, his report does not establish that Mr. Justus's pneumoconiosis caused or even contributed to his death. I find that Dr. Naeye's thorough and well-reasoned opinion, as well as the new opinion of Dr. Fino, are consistent with and support the prior findings that Mr. Justus had pneumoconiosis, but that it did not cause, contribute to, or hasten his death." *Id.* at 7; *Akers v. Sterling Smokeless Coal Co.*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge explained that she agreed with the findings of Judges Tureck and Donnelly, as affirmed by the Board, that the

⁵The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. 20 C.F.R. §725.2.

evidence supportive of modification is outweighed by the contrary, better reasoned and documented reports of record. Decision and Order at 7.

The record supports the administrative law judge's finding that claimant failed to establish that the miner's death was caused, contributed to, or hastened by his coal workers' pneumoconiosis. 20 C.F.R. §718.205(c); Decision and Order at 7. Consequently, we affirm the administrative law judge's denial of claimant's request for modification at 20 C.F.R. §725.310 (2000) and the claim for survivor's benefits. 20 C.F.R. §725.310 (2000).

Accordingly, the Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge