BRB No. 02-0104 BLA

| | | |
|---|---|---|
| BELLE ANDERSON<br>(Widow of ARNIE ANDERSON) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| CONSOLIDATION COAL COMPANY/<br>VIRGINIA POCAHONTAS COMPANY | ) | |
| | ) | DATE ISSUED: |
| Employers-Respondents | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Belle Anderson, Vansant, Virginia, *pro se*.[1]

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for Virginia Pocahontas Company.

Barry H. Joyner (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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.

---

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant,[2] representing herself, appeals the Decision and Order (00-BLA-0972) of Administrative Law Judge Jeffrey Tureck denying benefits on claims 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 instant case involves the miner's request for modification of a 1990 duplicate claim and a survivor's claim filed on July 6, 1999.[4] In

[2]Claimant is the surviving spouse of the deceased miner who died on April 30, 1999. Director's Exhibit 136.

[3]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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4]The miner filed a claim for benefits on December 4, 1980. Director's Exhibit 67. By Decision and Order dated August 13, 1987, Administrative Law Judge Joel A. Harmatz credited the miner with more than thirty years of coal mine employment and found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* Judge Harmatz also found that the miner was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* Judge Harmatz found, however, that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Accordingly, Judge Harmatz denied benefits. *Id.*

The miner subsequently requested modification of his denied claim. The district director denied the miner's request for modification on August 3, 1988. Director's Exhibit 67. The miner subsequently filed a second request for modification. *Id.* The district director denied the miner's second request for modification on June 2, 1989. *Id.*

The miner filed a second claim on July 17, 1990. Director's Exhibit 1. By Decision and Order dated March 31, 1993, Administrative Law Judge Clement J. Kichuk found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 51. Accordingly, Judge Kichuk denied benefits. *Id.*

The miner subsequently requested modification of his denied claim. Finding that the miner failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), Administrative Law Judge Mollie W. Neal denied claimant's request for modification. Director's Exhibit

regard to the miner's request for modification, Administrative Law Judge Jeffrey Tureck (the administrative law judge) found that the evidence was insufficient to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied the miner's request for modification. The administrative law judge further found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also denied benefits in the survivor's claim. On appeal,

---

98.

The miner filed a timely request for modification on June 9, 1997. Director's Exhibit 99. The district director denied the miner's request for modification on July 23, 1997. Director's Exhibit 102. The miner filed another request for modification on April 1, 1998. Director's Exhibit 4. The district director denied the miner's request for modification on August 28, 1998. Director's Exhibit 114. At the miner's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 116, 122.

The miner died on April 30, 1999. Director's Exhibit 127. Claimant filed a survivor's claim on July 6, 1999. Director's Exhibit 144. By Order dated September 21, 1999, Administrative Law Judge Daniel F. Sutton remanded the miner's claim to the district director for consolidation with the survivor's claim. Director's Exhibit 134.

claimant generally contends that the administrative law judge erred in denying benefits. Virginia Pocahontas Company responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, contending that revised Section 718.201 is not impermissibly retroactive.[5]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

[5]The United States Court of Appeals for the District of Columbia Circuit recently held, *inter alia*, that revised Section 718.201 is not impermissibly retroactive. *Nat'l Mining Ass'n v. United States Dep't of Labor*, F.3d , 2002 WL 130007 (D.C. Cir. June 14, 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

We initially address the administrative law judge's denial of the miner's request for modification. The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000),[6] an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See 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). In the prior decision, Administrative Law Judge Mollie W. Neal denied the miner's request for modification of Administrative Law Judge Clement J. Kichuk's denial of his 1990 duplicate claim. In denying benefits, Judge Kichuk found that the miner failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence, *i.e*, the evidence submitted subsequent to Judge Neal's denial of benefits, was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

[6]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim.[7] 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). The miner's 1980 claim was denied because the miner failed to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).[8] Director's Exhibit 67. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of total disability. *See* 20 C.F.R. §718.204(b).

In his consideration of whether the newly submitted pulmonary function study evidence was sufficient to establish total disability, the administrative law judge properly noted that all five of the newly submitted pulmonary function studies[9] are non-qualifying.[10]

---

[7]Although Section 725.309 has been revised, these revisions apply only to claims filed after January 19, 2001.

[8]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[9]The newly submitted pulmonary function studies were conducted on January 27,

Decision and Order at 3; Director's Exhibits 99, 108, 109, 120, 121. We, therefore, affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(i).

---

1997, July 23, 1997, April 7, 1998, June 23, 1998 and October 21, 1998. Director's Exhibits 99, 108, 109, 120, 121.

[10]A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values which exceed the requisite table values.

In his consideration of whether the newly submitted arterial blood gas study evidence was sufficient to establish total disability,[11] the administrative law judge questioned the reliability of the miner's qualifying arterial blood gas study conducted on April 7, 1998 because a previous arterial blood gas study conducted on July 23, 1997 and two subsequent arterial blood gas studies conducted on June 23, 1998 and October 29, 1998 produced non-qualifying values. Decision and Order at 3; Director's Exhibits 106, 120, 121. The Board has held that an administrative law judge may reject an earlier qualifying objective study because he finds the values to be disparately low in comparison with later studies. *See generally Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). Such a finding is within the administrative law judge's purview to determine the credibility of the evidence. *Id.* The administrative law judge properly questioned the reliability of the miner's April 7, 1998 arterial blood gas study inasmuch as the respective values from that study were lower than the miner's subsequent June 23, 1998 and October 29, 1998 arterial blood gas studies. *Id.* The administrative law judge specifically noted that the miner's April 7, 1998 qualifying arterial blood gas study conducted by Dr. Thakkar produced significantly lower values than a subsequent arterial blood gas study conducted by Dr. Thakkar on October 29, 1998. Decision and Order at 3; Director's Exhibits 106, 121. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted arterial blood gas study evidence is insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(ii).

Inasmuch as there is no newly submitted evidence of record indicating that the miner suffered from cor pulmonale with right-sided congestive heart failure, the miner is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

In his consideration of whether the newly submitted medical opinion evidence of record

[11]The record contains four newly submitted arterial blood gas studies conducted on July 23, 1997, April 7, 1998, June 23, 1998 and October 29, 1998. Director's Exhibits 106, 120, 121.

was sufficient to establish total disability, the administrative law judge noted that Dr. Thakkar was the only physician to opine that the miner suffered from a totally disabling respiratory or pulmonary impairment.[12] Director's Exhibits 107, 136, 151. The administrative law judge found that Dr. Thakkar's finding of total disability set out in his April 21, 1998 report was not sufficiently reasoned. Decision and Order at 4. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge found that Dr. Thakkar failed to explain how the essentially normal results of the miner's non-qualifying pulmonary function study conducted on April 7, 1998[13] supported his finding of total disability. Decision and Order at 4.

The administrative law judge did not address Dr. Thakkar's subsequent report, dated May 18, 1999, wherein the doctor similarly opined that the miner was "totally disabled for any kind of work due to his chronic lung disease which was due to coal

---

[12]In a report dated April 21, 1998, Dr. Thakkar opined that:

> [The miner] is totally disabled to engage in any work related activity due to his breathing problems and due to chest pain; which is directly related to the problem with his lungs.

Director's Exhibit 107.

In a report dated May 18, 1999, Dr. Thakkar opined that the miner "suffered from coal worker's pneumoconiosis and he was quite symptomatic with his disease." Director's Exhibits 136, 151. Dr. Thakkar further opined that the miner was "totally disabled for any kind of work due to his chronic lung disease which was due to coal worker's pneumoconiosis." *Id.*

[13]The administrative law judge accurately noted that Dr. Thakkar mistakenly listed identical results for both the pre-bronchodilator and post-bronchodilator portions of the miner's April 7, 1998 pulmonary function study. Decision and Order at 4. Both the pre-bronchodilator and post-bronchodilator portions of the miner's April 7, 1998 pulmonary function study are non-qualifying. *See* Director's Exhibit 109. Although Dr. Thakkar, in a subsequent report dated May 18, 1999, interpreted the miner's non-qualifying April 7, 1998 pulmonary function study as revealing a reduction in the miner's forced vital capacity, he failed to explain how this supported his finding of total disability. *See* Director's Exhibits 136, 151.

workers' pneumoconiosis."[14] Director's Exhibits 136, 151 However, because Dr. Thakkar failed to provide an explanation for his finding of total disability in his May 18, 1999 report,[15] the administrative law judge's failure to address this evidence

[14]In considering whether the newly submitted medical opinion evidence was sufficient to establish total disability, the administrative law judge addressed only the newly submitted medical opinion evidence submitted prior to the miner's terminal hospitalization. The administrative law judge should have considered all of the newly submitted medical evidence of record relevant to the issue of total disability, including medical evidence submitted subsequent to the miner's death. Dr. Thakkar's May 18, 1999 report is the only newly submitted report not addressed by the administrative law judge that, if credited, could support a finding of total disability. Director's Exhibits 136, 151. However, because Dr. Thakkar failed to provide any explanation for his finding of total disability in his May 18, 1999 report, the administrative law judge's failure to consider this evidence constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[15]Although Dr. Thakkar referenced the results of the miner's qualifying April 7, 1998 arterial blood gas study, the administrative law judge found that the results of this study were not indicative of the miner's condition because they were lower than the miner's subsequent June 23, 1998 and October 29, 1998 arterial blood gas studies. Decision and Order at 4. In his May 18, 1999 report, Dr. Thakkar did not comment upon the substantially higher, non-qualifying results that he obtained from a subsequent arterial blood

constitutes harmless error. *See* *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

---

gas study conducted on October 29, 1998. *See* Director's Exhibit 121.

Moreover, the administrative law judge properly noted that Drs. Hippensteel, Michos, Dahhan, Jarboe, Fino and Zaldivar opined that the miner did not suffer from a totally disabling respiratory or pulmonary impairment. Decision and Order at 4; *see* Director's Exhibits 110, 120, 124, 125, 171; Employer's Exhibits 2, 5-13. The administrative law judge further noted that the autopsy evidence supported a finding that the miner's pneumoconiosis did not cause any impairment in his lung function.[16] Decision and Order at 6. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability, *see* 20 C.F.R. §718.204(b)(2) (i)-(iv), we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

[16]In a report dated July 6, 2000, Dr. Bush opined that the miner did not suffer from any respiratory impairment prior to his death. Employer's Exhibit 1. In a report dated September 20, 2000, Dr. Oesterling opined that the miner suffered from moderate centrilobular pulmonary emphysema. Employer's Exhibit 3. Dr. Oesterling opined that it was this disease that resulted partially in the miner's lifetime symptoms of shortness of breath. *Id.* Dr. Oesterling opined that the level of the miner's coal workers' pneumoconiosis was insufficient to alter pulmonary function. *Id.* In a report dated November 27, 2000, Dr. Caffrey opined that the miner's coal workers' pneumoconiosis did not cause a pulmonary impairment during his lifetime. Employer's Exhibit 4.

Modification may also be based upon a finding of a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[17] In reviewing the record as a whole 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 also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In the instant case, the administrative law judge stated:

> I have reviewed this enormous record, and carefully examined the decisions of Judges Harmatz, Kichuk and Neal. I find that their consistent conclusions that the miner has pneumoconiosis but was not totally disabled by the pneumoconiosis were correct based upon the respective records before them. Their findings are based on the almost unanimously non-qualifying ventilatory and arterial blood gas tests in evidence as well as the opinions of the most highly qualified physicians that the miner does not have a significant respiratory or pulmonary impairment.

Decision and Order at 3.

Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

[17]The United States Court of Appeals for the Fourth Circuit has held that a party need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

We now turn our attention to the administrative law judge's consideration of the survivor's claim. Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[18] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Dr. Sutherland completed the miner's death certificate on May 3, 1999. As noted by the administrative law judge, Dr. Sutherland attributed the miner's death to a cerebral infarction that was due to a "complication of surgery." Decision and Order at 5; Director's Exhibits 136, 147.

The administrative law judge further noted that Dr. Segen performed an autopsy limited to the chest on April 30, 1999. Decision and Order at 5; Director's Exhibits 136, 148. Dr. Segen's final diagnoses were (1) a recent myocardial infarction; (2) acute bilateral lower lobe pneumonia; (3) moderate simple coal workers' pneumoconiosis; (4) pulmonary edema; (5) chronic obstructive pulmonary disease; and (6) stenosis and occlusion of cerebral arteries

---

[18]Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (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).

with middle cerebral artery infarction. *Id.* The administrative law judge noted that Dr. Segen indicated that he was uncertain as to any contribution that coal workers' pneumoconiosis made to the miner's death.[19] *Id.*

The administrative law judge accurately noted that Dr. Thakkar was the only physician to opine that there was any connection between the miner's pneumoconiosis and his death. Decision and Order at 6. In a report dated September 14, 1999, Dr. Thakkar opined, *inter alia*, that the miner's "diminished lung function" contributed to and hastened his death by impairing his ability to recover from coronary artery bypass surgery. Director's Exhibits 136, 151. The administrative law judge discredited Dr. Thakkar's opinion because the doctor's "own test results showed that the miner did not have preexisting decreased lung function, eliminating the basis for his conclusion that the miner's pneumoconiosis contributed to his death." Decision and Order at 6. As discussed, *supra*, the administrative law judge properly found that Dr. Thakkar's finding of total disability was not sufficiently reasoned. The administrative law judge, therefore, properly questioned the basis for Dr. Thakkar's finding that pneumoconiosis hastened the miner's death.

Moreover, the administrative law judge found that Dr. Hippensteel's opinion, that the miner had no impairment in his lung function and would have died at the same time of the same causes had he never worked in the mines, was well-explained and amply supported by the evidence of record. Decision and Order at 6; Employer's Exhibit 13. The administrative law judge further found that Dr. Hippensteel's opinion was supported by the opinions of Drs. Dahhan, Zaldivar, Michos, Jarboe and Fino. *Id.*; *see* Director's Exhibit 171; Employer's Exhibits 2, 5-7, 10-13. The administrative law judge also noted that Drs. Naeye, Bush, Oesterling and Caffrey, four pathologists who reviewed the miner's autopsy slides, opined that the miner's pneumoconiosis did not contribute to his death. Decision and Order at 5; Director's Exhibit 149; Employer's Exhibits 1, 3, 4.

[19]The administrative law judge did not acknowledge that Dr. Segen completed a questionnaire on December 1, 2000 wherein he opined that the miner's death "was due solely to acute myocardial infarction related to atherosclerotic heart disease which occurred in a background of acute bronchopneumonia." *See* Employer's Exhibit 4. Dr. Segen further indicated that coal workers' pneumoconiosis did not cause, contribute to, or hasten the miner's death. *Id.*

Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

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

REGINA C. McGRANERY
Administrative Appeals Judge