

BRB No. 03-0714 BLA

BEATRICE SHELTON)
(Widow of IRA B. SHELTON))
)
 Claimant-Petitioner)
)
 v.)
)
MAGGARD COAL COMPANY,)
INCORPORATED)
)
 and)
) DATE ISSUED: 06/28/2004
OLD REPUBLIC 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 Widow's Claim and Modifying Award of Benefits in Miner's Claim of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, W. Andrew Delph, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Widow's Claim and Modifying Award of Benefits in Miner's Claim (2002-BLA-00230) of Administrative Law Judge Jeffrey Tureck rendered 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).¹ The miner died of lung cancer on December 28, 2000. Director's Exhibit 86. At the time of the miner's death, he was receiving benefits awarded on his claim for total disability due to pneumoconiosis filed June 4, 1984.² Director's Exhibit 1. Claimant filed her survivor's claim on January 10, 2001. Director's Exhibit 90.

No autopsy was performed. Director's Exhibit 86. The evidence submitted in the survivor's claim consisted of the record of the miner's claim, the miner's medical records covering the period from February 1988 through December 2000, a death certificate completed by his treating physician, and a medical opinion requested by the Department of Labor from its medical consultant, Dr. Michos. Director's Exhibits 1-33, 96-104, 121, 122.

The miner's medical records related primarily to the diagnosis and successful treatment of lung cancer in 1988, follow-up evaluations of the miner, and the diagnosis of recurrent lung cancer with metastases to the liver in December 2000. Director's Exhibits 96-101. These records included multiple chest x-rays, CT-scans, a bronchoscopy with biopsy report, a lung scan, and physicians' treatment and consultation reports. The only mention of pneumoconiosis in these records was a notation by the miner's treating physician, Dr. Moore, listing "COPD/CWP" as one of five diagnoses during a September 8, 2000 office visit. Director's Exhibit 100 at 3. Review of the medical records reveals no opinion relating the miner's lung cancer to coal mine dust exposure. Physicians who examined or treated the miner recorded that he was smoking one pack of cigarettes per day. Director's Exhibit 99, 100, 101.

¹ 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.

² The miner's claim had a lengthy procedural history involving several decisions by administrative law judges and the Board. Director's Exhibits 36, 47, 49, 56, 66, 71, 78, 80. Ultimately, Administrative Law Judge Stuart A. Levin awarded benefits in a decision issued on July 29, 1997, which the Board affirmed on August 21, 1998. Director's Exhibits 71, 78. The Board summarily denied employer's motion for reconsideration on October 8, 1998. Director's Exhibit 80.

On the miner's death certificate, Dr. Moore identified the immediate cause of death as cancer of the left lung with metastasis, and listed "COPD/CWP" as one of four "[o]ther significant conditions contributing to death" Director's Exhibit 86.

Dr. Michos reviewed the entire record and concluded that the miner did not have pneumoconiosis and died from lung cancer due to "significant tobacco abuse" Director's Exhibit 121 at 1-2. Assuming that the miner had "simple CWP," Dr. Michos indicated that "it did not hasten or cause this gentleman's death from terminal lung cancer." Director's Exhibit 121 at 2.

In light of the evidence developed in the survivor's claim, on March 6, 2001, employer filed a timely request for modification of the miner's claim with the district director alleging that the award "was based upon a mistake in fact." Director's Exhibit 111 at 7-8; *see* 20 C.F.R. §725.310(2000)(providing for modification within one year of the last payment of benefits).³ The record contains no acknowledgment of employer's modification petition by the district director.

On June 15, 2001 and again on October 31, 2001, the district director denied survivor's benefits. Director's Exhibits 105, 125. Claimant requested a hearing, Director's Exhibit 127, and employer notified the district director that its modification request was pending. Director's Exhibits 126, 130. However, when the district director referred the case to the Office of Administrative Law Judges for a hearing the list of hearing issues did not include modification. Director's Exhibit 131.

Before the administrative law judge, claimant requested, in writing, a decision on the record. Motion for Hearing on the Record, Oct. 28, 2002; *see* 20 C.F.R. §725.461(a)(providing for waiver of the right to appear and present evidence). Employer indicated that it had no objection to claimant's request, and notified the administrative law judge that its request for modification of the miner's claim was still pending. Employer's Letters, Jun. 4, Aug. 5, Sep. 20, and Oct. 29, 2002. After holding a telephone conference with the parties, the administrative law judge issued an order cancelling the hearing and specifying that "[b]oth the employer's petition for modification of the award of benefits in the miner's claim and the widow's claim for benefits are at issue." Order Closing the Record, Nov. 1, 2002.

In the administrative law judge's Decision and Order, he credited the miner with "at least 20 years" of coal mine employment and found that "the miner smoked a pack of

³ The revised version of Section 725.310 does not apply to claims that were pending on January 19, 2001. 20 C.F.R. §725.2(c). The miner's claim is considered pending on January 19, 2001 because "it was not finally denied more than one year prior to that date." *Id.* Therefore, the former Section 725.310 applies to the miner's claim.

cigarettes daily for 50 years.” Decision and Order at 3, 4. Reviewing the entire record, the administrative law judge found that “the miner did not have pneumoconiosis in either its clinical or legal manifestations” Decision and Order at 10; *see* 20 C.F.R. §718.201(a). Consequently, he determined that the prior administrative law judges made “material mistakes in determinations of fact” when they found that the miner established the existence of pneumoconiosis. Decision and Order at 6. The administrative law judge explained that “the x-ray evidence in the record is even more overwhelmingly negative for pneumoconiosis than it was previously.” Decision and Order 7. He also found that there was no autopsy evidence, that the biopsy evidence did not diagnose pneumoconiosis, and that the CT-scan readings and lung scan did not mention pneumoconiosis. *Id.* The administrative law judge additionally found that the opinions of Drs. Brooks, Buddington, and Robinette from the miner’s claim diagnosing obstructive lung disease related to coal mine dust were not credible. Director's Exhibits 10, 11, 28. The administrative law judge found the opinions seriously undermined by inadequate reasoning, inaccurate smoking histories, and, in Dr. Robinette’s case, equivocation as to the existence of pneumoconiosis. Decision and Order at 7-9. The administrative law judge additionally found that Dr. Moore provided no explanation for his September 8, 2000 notation of “COPD/CWP,” or for listing “COPD/CWP” as a contributing condition on the death certificate. Decision and Order at 4 n.4, 9. The administrative law judge found Dr. Michos’s consulting opinion flawed, but determined that it did “not aid the claimant’s case.” Decision and Order at 10. Finding “no credible evidence in the record to support a diagnosis of pneumoconiosis,” the administrative law judge granted employer’s request for modification, denied the miner’s claim, and denied benefits on the survivor’s claim. Decision and Order at 10.

On appeal, claimant contends that the administrative law judge erred by addressing the modification issue. Claimant also generally challenges the administrative law judge’s decision to deny benefits on both claims. Employer responds, urging affirmance, and the Director Office of Workers’ Compensation Programs (the Director), has not responded to claimant’s appeal.

The Board’s scope of review is defined by statute. The administrative law judge’s Decision and Order must be affirmed if it is 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’Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, the miner had to demonstrate by a preponderance of the evidence that he was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. The miner did so previously, but employer timely requested modification of that benefits determination pursuant to Section 725.310(2000). When a request for

modification is filed, “any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility.” *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. §718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor’s claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (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).

Claimant contends that the administrative law judge erred in granting modification because the modification issue was not before him. Claimant’s Brief at 4. Claimant’s contention lacks merit. Despite the district director’s failure to note modification as a hearing issue, employer repeatedly raised it and the administrative law judge ordered that modification of the miner’s claim was an issue for decision. Order Closing the Record, Nov. 1, 2002. Claimant recognized that modification was at issue before the administrative law judge, as she argued, by counsel, that “[e]mployer’s request for modification should be denied.” Brief in Support of Award of Benefits, Jan. 6, 2003 at 4. Therefore, we reject claimant’s contention that employer’s request for modification of the miner’s claim was not before the administrative law judge for decision.

Claimant contends generally that the miner established his entitlement to benefits, and that she has established her entitlement to survivor’s benefits. However, the Board is not authorized to undertake a de novo adjudication of the claim. To do so would upset the carefully allocated division of authority between the administrative law judge as trier-of-fact, and the Board as a reviewing tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). As we have emphasized previously, the Board’s circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order with specificity and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Sarf*, 10 BLR at 1-120; *Cox*, 791 F.2d at 446, 9 BLR at 2-47; *Slinker*

v. Peabody Coal Co., 6 BLR 1-465, 1-466 (1983); *Fish*, 6 BLR at 1-109. A petitioner who fails to comply with the requisite regulations provides the Board with no basis to reach the merits of an appeal. *Id.* In this case, claimant generally asserts that she is entitled to benefits. Claimant's Brief at 3-5. Claimant, however, fails to identify any error made by the administrative law judge in his evaluation of the evidence or in his application of the law pursuant to 20 C.F.R. Part 718. Thus, as claimant's counsel has failed to adequately raise or brief any issues arising from the administrative law judge's denial of the claims for benefits, the Board has no basis upon which to review the decision. Thus, we decline to review the Decision and Order of the administrative law judge and we affirm the administrative law judge's denial of benefits on the miner's and survivor's claims. *See Sarf*, 10 BLR at 1-121.

Accordingly, the administrative law judge's Decision and Order Denying Widow's Claim and Modifying Award of Benefits in Miner's Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge