

BRB No. 04-0618 BLA

BARBARA JEAN SUMNER)
(Widow of RONNIE CHARLES SUMNER))
)
 Claimant-Petitioner)
)
 v.)
)
 DOUBLE N CORPORATION)
)
 and)
)
 LIBERTY MUTUAL INSURANCE) DATE ISSUED: 03/30/2005
 COMPANY)
)
 Employer/Carrier-)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order-Denial of Request for Modification of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Barbara Jean Sumner, Delphia, Kentucky, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order - Denial of Request for Modification (2001-BLA-1168) of Administrative Law Judge

¹ Claimant, Barbara Jean Sumner, is the widow of the miner, Ronnie Charles Sumner, who died on February 22, 1996. The miner's death certificate indicates that he died due to disseminated toxoplasmosis, immunocompromised state, allogenic bone

Joseph E. Kane on a 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 The administrative law judge found, based upon the stipulation of the parties, that the miner worked at least ten years in coal mine employment. The administrative law judge further found that the evidence of record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2), but failed to establish that the miner’s pneumoconiosis caused or hastened his death pursuant to 20 C.F.R. §718.205. The administrative law judge thus determined that claimant failed to establish a basis for modification of the prior denial of benefits pursuant to 20 C.F.R. §725.310 and denied benefits.³

marrow transplant and acute leukemia. “Treatment of chronic graft versus host disease” is listed as a significant condition which contributed to death but did not result in the underlying cause of death. Director’s Exhibit 9.

² There is no record of a separate miner’s claim having been filed in this case. Claimant filed her survivor’s claim on September 3, 1996. Director’s Exhibit 1. In a Decision and Order issued on October 27, 1999, Administrative Law Judge Daniel J. Roketenetz denied benefits, determining that while the evidence of record established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), the evidence failed to establish that the miner’s death was caused or hastened by pneumoconiosis. 20 C.F.R. §718.205. After an appeal by claimant, the Board affirmed the denial of survivor’s benefits. *Sumner v. Double N Corp.*, 00-0238 BLA (Nov. 17, 2000) (unpub.). Subsequently, the Board summarily denied a Motion for Reconsideration filed by claimant. *Sumner v. Double N Corp.*, 00-0238 BLA (May 10, 2001)(unpub.). Claimant then filed a timely request for modification with the district director. After denial by the district director, Director’s Exhibit 102, claimant requested a hearing. Following a hearing, Administrative Law Judge Joseph E. Kane issued the Decision and Order denying claimant’s request for modification from which claimant now appeals.

³ 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 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);

On appeal, claimant generally challenges the administrative law judge's denial of survivor's benefits. Neither employer nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in response to claimant's appeal.

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).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence in accordance with law and contains no reversible error. In considering the request for modification, the administrative law judge considered whether claimant established a mistake in the prior determination that the evidence of record did not establish that the miner's death was due to pneumoconiosis.⁴ Reviewing all of the evidence of record, the administrative law judge accorded greater weight to the opinions of Drs. Hutchins, Kleinerman, Naeye, Caffrey, Dennis and Cibull, that pneumoconiosis played no role in the miner's death, Director's Exhibits 11, 14, 47, 48, 53, 56, 71, 72, and permissibly accorded little weight to the opinions of Drs. Bielecki, Breeding and Goodman, that pneumoconiosis did play a role in the miner's death, Director's Exhibit 50, 55; Claimant's Exhibits 1, 4, 5, as their opinions were not supported by objective evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).⁵ Specifically, the administrative law found that Drs. Bielecki and

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).

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 survivor's claims, the sole ground for modification is that a mistake in the 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).

⁵ The administrative law judge stated that Dr. Cibull's opinion deserved greater weight because he performed the miner's autopsy. Decision and Order at 10. The opinion of an autopsy prosector may not automatically be granted greater weight merely

Breeding offered no objective evidence to support their conclusion that the miner's pneumoconiosis weakened his lungs, thereby, hastening his death. Decision and Order at 10. Further, the administrative law judge also found that Dr. Goodman, Director's Exhibit 79, did not state what data she was relying upon when she concluded that it was "quite clear from the data" that pneumoconiosis was a contributing factor to the miner's death. Decision and Order at 10. Additionally, the administrative law judge permissibly concluded that Dr. Westerman's opinion, that pneumoconiosis "could have" made claimant more susceptible to the cancer which played a role in the miner's death, Director's Exhibit 78, and Dr. Lair's opinion that he could not "unequivocally state" that pneumoconiosis played a role in the miner's death, Director's Exhibits 11, 52, were equivocal opinions and thus could not support claimant's burden at Section 718.205(c). *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-117 (6th Cir. 1995); *see Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). The administrative law judge, therefore, permissibly accorded the opinions of these physicians little weight, and we affirm the determination that claimant has not established a mistake in the prior determination that the evidence of record was insufficient to establish that the miner's death was due to or hastened by his pneumoconiosis. 20 C.F.R. §718.205(c). We, therefore, affirm the administrative law judge's determination that claimant has not established a basis for modification. 20 C.F.R. §725.310; *see Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

based on the physician's status, however. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992). Any error in this regard is harmless, however, in view of our conclusion that the administrative law judge permissibly found the opinions offered in support of claimant's burden to establish that the miner's death was due to pneumoconiosis failed to carry that burden. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1985).

Accordingly, the administrative law judge's Decision and Order-Denial of 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