

BRB No. 98-1075 BLA

RUTH E. ZURAT (Widow of)
JOSEPH ZURAT))
)
 Claimant-Petitioner)
)
 v.)
)
) DATE ISSUED:
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Ruth Zurat, Pine Grove, Pennsylvania, *pro se*.

Rodger Pitcairn (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, widow of the deceased miner, appeals, without the assistance of counsel, the Decision and Order Denying Modification (97-BLA-01719) of Administrative Law Judge Ainsworth H. Brown denying benefits on a 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). Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge found that modification pursuant to 20 C.F.R.

¹In a Decision and Order issued on July 18, 1991, the miner was awarded benefits on his claim filed on April 25, 1989. Director's Exhibits 18, 25. The miner

§725.310 was not appropriate because the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), thus claimant failed to establish a mistake in a determination of fact, and claimant could not establish a change in the miner's condition. Accordingly, benefits were denied.

On appeal, claimant generally contends that she is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

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. *McFall v. Jewell Ridge Coal Corp.*, 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 are in accordance with 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).

In order to establish entitlement to benefits in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis, and that the miner's pneumoconiosis arose out of coal mine employment. See 20 C.F.R. §§718.1, 718.201, 718.202, 718.203, 718.205(c);

died on October 7, 1993, Director's Exhibit 2, and claimant filed her claim for survivor's benefits on October 21, 1993. Director's Exhibit 1. In a Decision and Order issued on June 13, 1995, the administrative law judge denied benefits. Director's Exhibit 27. The Board affirmed the denial of benefits on June 27, 1996, Director's Exhibit 36, and denied claimant's motion for reconsideration by Order dated October 18, 1996. Director's Exhibit 41. Claimant subsequently submitted new evidence to the district director, which was considered a request for modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 49.

Trumbo v. Reading Anthracite Co., 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Third Circuit, within whose appellate jurisdiction this case arises, held in *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989), that any condition that actually hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205(c).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner's condition. The relevant inquiry for the administrative law judge is whether a mistake in a determination of fact was demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted, and, if so, whether reopening the case would render justice under the Act. See generally *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.* 404 U.S. 254 (1971). In the present case, the Director conceded that the miner had pneumoconiosis arising out of coal mine employment, thus the issue before the administrative law judge was whether modification was appropriate based on a mistake in his original finding that the evidence of record was insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c).

After consideration of the administrative law judge's Decision and Order on Modification, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. In evaluating the conflicting evidence pursuant to Section 718.205(c) in his original Decision and Order, the administrative law judge reasonably assigned greater weight to the opinions of the pathologists, Drs. Bindie and Naeye, because they were specially trained in identifying causes of death. See generally *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge determined that Dr. Bindie, the autopsy prosector, listed anthracosis among his findings but attributed the cause of death to bilateral bronchopneumonia, and that Dr. Naeye reviewed the autopsy protocol and slides and concluded that the miner's pneumoconiosis was too mild to have hastened death, which was due to cryptococcal pneumonia caused by complications of a prostatic carcinoma that had metastasized widely. Decision and Order at 4, 6. The administrative law judge gave little weight to Dr. Karlavage's opinion that pneumoconiosis hastened the miner's death because the physician's belief that the miner had been cured of his heart problems and was no longer medicated for heart disease was contrary to the record and cast doubt upon his conclusions. Decision and Order at 5; see generally *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

(1989)(*en banc*). Although Dr. Malik, the miner's treating physician, also opined that pneumoconiosis hastened the miner's death by leading to hypoxia and the lung infection which developed in the hospital, the administrative law judge was not persuaded because the contemporaneous hospital records did not indicate that dyspnea was a significant concern. Decision and Order at 5; see *generally Wetzel, supra*. The administrative law judge permissibly accorded determinative weight to the contrary opinion of Dr. Naeye based on his superior qualifications, and as supported by the opinion of Dr. Spagnolo, whose pulmonary credentials were superior to those of Drs. Karlavage and Malik. Decision and Order at 4-6; see *generally Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel, supra*.

In support of modification, claimant submitted multiple statements describing the miner's pulmonary symptoms prior to death, and two letters from Dr. Malik dated April 20, 1994 and July 14, 1997, opining that the miner's death was hastened by pneumoconiosis. Director's Exhibits 52, 55. Because of concerns expressed by the Director in his motion for remand dated December 4, 1995, Director's Exhibit 35, regarding the opinions of Drs. Naeye and Spagnolo,² the administrative law judge issued an Order on December 22, 1997, instructing the Director to have Dr. Spagnolo review all the relevant medical evidence of record and render an opinion, with supporting rationale, as to whether pneumoconiosis caused, substantially contributed to, or hastened, albeit briefly, the miner's demise. The administrative law judge accorded claimant the opportunity to obtain rebuttal evidence, but none was submitted.

²The Director argued that both Drs. Spagnolo and Naeye based their finding that pneumoconiosis did not hasten the miner's death in part upon their belief that the miner was not totally disabled by pneumoconiosis, which was contrary to the Director's concession. Moreover, Dr. Spagnolo did not review Dr. Bindie's autopsy report, and did not believe that the miner had pneumoconiosis. The Director also noted that Dr. Naeye ruled out clinical pneumoconiosis as a contributing cause of death, but did not directly address the question of whether pneumoconiosis as defined at 20 C.F.R. §718.201 was a cause of death. Director's Exhibit 35 at 3.

Upon reviewing the record evidence, Dr. Spagnolo acknowledged that the miner suffered from totally disabling pneumoconiosis, but he agreed with Dr. Naeye's earlier conclusion that the miner's death was due entirely to cryptococcal pneumonia which was the direct result of the miner's immunocompromised condition related to his cancer therapy and bone marrow failure, and that pneumoconiosis did not contribute to death in any way. Director's Exhibit 57. The administrative law judge noted that Dr. Spagnolo addressed the concerns raised by the Director in his motion for remand, and the administrative law judge was convinced that Dr. Spagnolo now had a complete understanding of the medical record. The administrative law judge then acted within his discretion as trier-of-fact in finding that Dr. Spagnolo's careful analysis established that no mistake in a factual determination had been made pursuant to Section 725.310. Decision and Order Denying Modification at 2-3; see *generally Wetzel, supra*. The administrative law judge's findings and inferences pursuant to Sections 718.205(c) and 725.310 are supported by substantial evidence, and the Board is not empowered to substitute its judgment on appeal. See *generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that claimant is not entitled to benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge