

BRB No. 03-0139 BLA

CLARA S. HUGHES)
(Widow of JAMES HUGHES))
)
 Claimant-Petitioner)
)
 v.)
)
 CLINCHFIELD COAL COMPANY) DATE ISSUED: 10/20/2003
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Barry H. Joyner (Howard Radzely, Acting 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (02-BLA-0234) of Administrative Law Judge Mollie W. Neal denying benefits 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 instant case involves a survivor's claim filed on December 1, 1993.³ In the initial Decision and Order, Administrative Law Judge Edith Barnett determined that because Administrative Law Judge Giles J. McCarthy, in his adjudication of the miner's 1984 claim, had previously found that the evidence was sufficient to establish that the miner suffered from pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b) (2000), employer was collaterally estopped from relitigating those issues in the survivor's claim. Director's Exhibit 73. Judge Barnett further found that the new evidence developed in connection with the survivor's claim fully supported Judge McCarthy's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* Judge Barnett also found that the evidence was sufficient

¹ Claimant is the surviving spouse of the deceased miner who died on September 30, 1993. Director's Exhibit 6.

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 The miner filed a claim for benefits on December 12, 1984. Director's Exhibit 97. In a Decision and Order dated April 20, 1989, Administrative Law Judge Giles J. McCarthy found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.* Judge McCarthy further 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.* However, Judge McCarthy found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, Judge McCarthy denied benefits. *Id.* By Decision and Order dated January 29, 1991, the Board affirmed, *inter alia*, Judge McCarthy's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(c)(1) and (c)(3) (2000) as unchallenged on appeal. *Hughes v. Clinchfield Coal Co.*, BRB No. 89-1799 BLA (Jan. 29, 1991) (unpublished). The Board also affirmed Judge McCarthy's findings pursuant to 20 C.F.R. §718.204(c)(2) and (c)(4) (2000). *Id.* Having affirmed Judge McCarthy's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), the Board affirmed Judge McCarthy's denial of benefits. *Id.* There is no indication that the miner took any further action in regard to his 1984 claim.

to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). *Id.* Accordingly, Judge Barnett awarded benefits. *Id.*

By Decision and Order dated April 15, 1999, the Board reversed Judge Barnett's finding that employer was collaterally estopped from relitigating the issue of occupational pneumoconiosis. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). The Board also vacated Judge Barnett's findings pursuant to 20 C.F.R. §§718.202(a) and 718.205(c) (2000) and remanded the case for further consideration. *Hughes*, 21 BLR at 1-138-139.

Due to Judge Barnett's unavailability, Administrative Law Judge Clement J. Kichuk considered the claim on remand. Judge Kichuk found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Director's Exhibit 79. Judge Kichuk also 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) (2000). *Id.* Accordingly, Judge Kichuk denied benefits. *Id.* By Decision and Order dated February 8, 2001, the Board affirmed Judge Kichuk's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(3) as unchallenged on appeal. *Hughes v. Clinchfield Coal Co.*, BRB No. 00-0413 BLA (Feb. 8, 2001) (unpublished). The Board also affirmed Judge Kichuk's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(4). *Id.* Consequently, the Board affirmed Judge Kichuk's denial of benefits.⁴ *Id.* The United States Court of Appeals for the Fourth Circuit subsequently affirmed the Board's Decision and Order. *Hughes v. Clinchfield Coal Co.*, No. 01-1262 (4th Cir. Oct. 15, 2001) (unpublished).

Claimant subsequently filed a request for modification. Administrative Law Judge Mollie W. Neal (the administrative law judge) found that the evidence was insufficient to establish that the miner suffered from pneumoconiosis or that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000). On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Employer responds in support of the administrative law judge's denial

⁴ In light of its affirmance of Administrative Law Judge Clement J. Kichuk's findings pursuant to 20 C.F.R. §718.202(a)(1)-(4), the Board declined to address Judge Kichuk's finding pursuant to 20 C.F.R. §718.205(c). *Hughes v. Clinchfield Coal Co.*, BRB No. 00-0413 BLA (Feb. 8, 2001) (unpublished).

of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, requesting, *inter alia*, that the Board reject claimant's contention that diagnoses of anthracotic pigment and chronic obstructive pulmonary disease must be considered diagnoses of pneumoconiosis.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Board has held that the sole ground available for modification in a survivor's claim is that there was a mistake in a determination of fact.⁵ See 20 C.F.R. §725.310 (2000); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). 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).

Claimant initially argues that if the miner was found to have pneumoconiosis in his claim, "it didn't disappear" when she filed her survivor's claim. Claimant's Brief at 4. In its April 15, 1999 Decision and Order, the Board held that employer was not collaterally estopped from relitigating the issue of occupational pneumoconiosis. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). In its February 8, 2001 Decision and Order, the Board declined to revisit the issue of collateral estoppel, holding that its prior decision on the issue constituted the law of the case. *Hughes v. Clinchfield Coal Co.*, BRB No. 00-0413 BLA (Feb. 8, 2001) (unpublished). We reject claimant's current collateral estoppel argument for the same reasons set out in *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*). Thus, the administrative law judge properly considered whether the evidence of record was sufficient to establish the existence of pneumoconiosis.

Claimant also argues that the administrative law judge erred in failing to address whether the evidence was sufficient to establish the "irrebuttable presumption of cor pulmonale." Claimant's Brief at 6. As the Board previously explained, no such "cor

⁵ 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).

pulmonale” presumption exists under the Act or the regulations. *See Hughes v. Clinchfield Coal Co.*, BRB No. 00-0413 BLA (Feb. 8, 2001) (unpublished).

We now turn our attention to the administrative law judge’s consideration of whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

The administrative law judge found that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 7. Claimant, however, contends that employer’s “old x-rays” should have been accorded “no probative weight whatsoever” because the issue was “whether or not [pneumoconiosis] contributed to the miner’s death.” Claimant’s Brief at 5. The administrative law judge summarized the x-ray evidence as follows:

The record contains a total of 68 interpretations by 32 readers of 25 x-ray films taken from 1970 through 1993. All of the more recent x-rays by the more qualified readers are negative for the existence of pneumoconiosis. None of the 26 interpretations submitted in support of the widow’s claim were [sic] positive for the disease.

Decision and Order at 4. Upon review of Judge Kichuk’s Decision and Order, the administrative law judge found that Judge Kichuk had not made a mistake in determining that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order at 7. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge’s finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

The administrative law judge also properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).⁶ Decision and Order at 8.

In considering whether the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),⁷ the administrative

⁶ Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 and 718.306 presumptions are inapplicable because claimant filed the instant survivor’s claim after June 30, 1982. *See* 20 C.F.R. §§718.305(e), 718.306.

⁷ The administrative law judge found the biopsy evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and

law judge noted that the record contains autopsy evidence not previously considered by Judge Kichuk or the Board; specifically, an undated report from Dr. Segen and an August 7, 2002 report from Dr. Caffrey. Decision and Order at 7; *see* Claimant's Exhibit 1; Employer's Exhibit 1.

In his two-paragraph report, Dr. Segen states:

I have reviewed the glass slides on [the miner] (autopsy A-23-93) performed by Dr. Mario Stefanini at Clinch Valley Humana Hospital in Richlands in 1993. In forming my opinion, I found the following slides most informative: A93-3, -5, -7, -8, -10, -12, -13,-14,-17,-22, -23, -26, -27, -28, -30, -31, -33, -34, -37, -38, -41, -43. Histologic changes that support the claim of coal workers' pneumoconiosis include subpleural fibrosis accompanied by anthracotic pigment deposition, in a background of emphysema – a form of chronic obstructive pulmonary disease – which *may* be caused by coal and rock exposure.

The immediate cause of [the miner's] death was severe bronchopneumonia.”

Claimant's Exhibit 1 (emphasis added). The administrative law judge permissibly accorded less weight to Dr. Segen's opinion based upon its equivocal nature, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987), and because it was not sufficiently reasoned. *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 also properly credited Dr. Caffrey's opinion⁸ over that of Dr. Segen because he found that Dr. Caffrey's opinion was better reasoned⁹ and

Order at 7. Inasmuch as no party challenges this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁸ In a report dated August 7, 2002, Dr. Caffrey stated that:

The minimal amount of anthracotic pigment on [the miner's] autopsy slides did not stimulate the production of reticulin or fibrous tissue within the lungs. Also the emphysema present was not associated with the anthracotic pigment. The chronic obstructive pulmonary disease Dr. Segen notes was not caused by the minimal amount of pigment, but by his years of smoking cigarettes.

because of Dr. Caffrey's superior qualifications.¹⁰ *Lucostic*, 8 BLR at 1-47; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 7; Employer's Exhibit 1.

The administrative law judge concluded that:

I find that the two new reports concerning the autopsy evidence do not support a finding that a mistake of fact occurred in the determination that this type of evidence does not support the existence of pneumoconiosis under §718.202(a)(2). Moreover, after weighing these new reports with the original autopsy and consulting reports, as considered and analyzed by Judge Kichuk (and affirmed by the Board and the Fourth Circuit), I find that no mistake of fact has been made under this subsection of the regulations.

Decision and Order at 7-8. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the autopsy evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

The administrative law judge also found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge found that:

Even the autopsy pathologist, Dr. Stefanini said there were no macules nor nodules, and he did not diagnose CWP, and he noted that the autopsy had been requested to establish the presence of coal workers' pneumoconiosis.

In summary I do not agree with Dr. Segen's opinion, for the reasons expressed above, that the histologic changes support the claim of coal workers' pneumoconiosis.

Employer's Exhibit 1.

⁹ Claimant argues that Dr. Caffrey "makes more restrictive definitions of restrictive and obstructive disease than the Act and [r]egulations provide." Claimant's Brief at 4. However, because claimant fails to cite any evidence of Dr. Caffrey's utilization of an improper definition of pneumoconiosis, we reject this contention.

¹⁰ Dr. Caffrey is Board-certified in Anatomical and Clinical Pathology. Employer's Exhibit 1. Dr. Segen's qualifications are not found in the record.

The only new medical opinions are the consulting reports of Drs. Segen and Caffrey, described above. For the same reasons that I found these reports did not establish the existence of pneumoconiosis under §718.202(a)(2), I find that these reports do not establish the existence of pneumoconiosis under §718.202(a)(4), either alone or weighed along with all of the other medical opinions of record.

Decision and Order at 7-8. Claimant contends that the previously submitted opinions of Drs. Stefanini and Jones are sufficient to establish the existence of pneumoconiosis. However, in its February 8, 2001 Decision and Order, the Board rejected claimant's contention that Dr. Stefanini's autopsy report and Dr. Jones's pathology report supported a finding of pneumoconiosis as defined at 20 C.F.R. §718.201. The Board held that:

The record reflects that Dr. Stefanini did not make a conclusive determination on the absence or presence of coal workers' pneumoconiosis, nor did he diagnose any respiratory disease related to coal mine employment. Thus, [Judge Kichuk] properly found his report insufficient to meet claimant's burden of proof at Section 718.202(a)(4). *See Perry, supra; Neeley, supra; Director's Exhibit 8.* Moreover, as claimant makes no arguments regarding [Judge Kichuk's] basis for finding the medical opinion of Dr. Jones unreasoned, we affirm [Judge Kichuk's] decision not to credit this report. *See Skrack, supra.*

Hughes v. Clinchfield Coal Co., BRB No. 00-0413 BLA (Feb. 8, 2001) (unpublished), slip op. at 5-6. The administrative law judge, thus, reasonably adopted Judge Kichuk's findings that the opinions of Drs. Stefanini and Jones are insufficient to support a finding of pneumoconiosis. Decision and Order at 8.

We also reject claimant's assertion that Dr. Branscomb's opinion is sufficient to support a finding of pneumoconiosis. The Board previously noted that while Dr. Branscomb, in his February 27, 1996 report, diagnosed chronic bronchitis, he did not attribute it to coal dust exposure. *Hughes v. Clinchfield Coal Co.*, BRB No. 00-0413 BLA (Feb. 8, 2001) (unpublished); Director's Exhibit 42. Dr. Branscomb specifically opined that the miner did not suffer from coal workers' pneumoconiosis or any occupationally related impairments.¹¹ Director's Exhibit 42. Because it is supported by substantial evidence, the administrative law judge's finding that the medical opinion

¹¹ We reject claimant's assertion that chronic obstructive pulmonary disease should be considered a "sequela" of coal workers' pneumoconiosis. Claimant's Brief at 4. In order to constitute "legal pneumoconiosis," a miner's chronic obstructive pulmonary disease must be shown to have arisen out of his coal mine employment. *See* 20 C.F.R. §718.201(a)(2).

evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is affirmed.

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), we also 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).

Accordingly, the administrative law judge's 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