

BRB No. 05-0391 BLA

ERMA MILLER BOTKINS)
(Widow of WILLIAM BOTKINS))
)
 Claimant-Petitioner)
)
 v.)
)
 K.A.S. COAL, INCORPORATED) DATE ISSUED: 09/06/2005
)
 and)
)
 KENTUCKY COAL PRODUCERS')
 SELF-INSURANCE FUND)
)
 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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Erma Miller Botkins, Middlesboro, Kentucky, *pro se*.

David H. Neeley (Neeley Law Office, P.S.C.), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order (03-

¹ Claimant is Erma Miller Botkins, the miner's widow. The miner, William Botkins,

BLA-5609) of Administrative Law Judge Robert L. Hillyard 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). The administrative law judge found thirty-one years of qualifying coal mine employment and that employer was the proper responsible operator. Decision and Order at 3-4. Considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) because she did not establish either the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.205(c). Decision and Order at 11-20. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order,

filed a claim for benefits on November 12, 1985, which was finally denied by the district director on June 12, 1986. Director's Exhibit 1. The miner died on September 27, 1997 and claimant filed a survivor's claim on January 13, 1998, which was denied by the district director on June 25, 1999. Director's Exhibits 1, 9. Claimant requested a hearing and Administrative Law Judge Robert L. Hillyard denied benefits on May 19, 2000. Director's Exhibit 8. The Board affirmed the denial of benefits on May 25, 2001. Director's Exhibit 16. Claimant timely requested modification, which the district director denied on November 12, 2002. Director's Exhibits 17, 20. Claimant then requested a hearing on her modification request before the Office of Administrative Law Judges. Director's Exhibit 21.

² Susie Davis, President of the Kentucky Black Lung Coalminers & Widows Association in Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

request modification of a denial of benefits. Modification may be granted if there are changed conditions or if there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310(a) (2000). The sole ground available for granting modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial of benefits. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). When a request for modification is filed, the administrative law judge has the authority "to reconsider all the evidence for any mistake of fact," including whether "the ultimate fact" of entitlement was wrongly decided. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).³

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). 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); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 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).

Pursuant to 20 C.F.R. §718.205, the administrative law judge found that even assuming that claimant established the existence of pneumoconiosis, she did not prove that the miner's death was due to pneumoconiosis. In making this determination, the administrative law judge considered the miner's death certificate, two letters from Dr. Morgan, who was the miner's treating physician, and a consultation report from Dr. Burki.⁴ The death certificate, completed by Dr. Morgan, listed the cause of death as congestive heart failure. Director's Exhibit 1; Claimant's Exhibit 1. Dr. Morgan listed no other causes or contributing conditions on the death certificate. Subsequently, in a letter dated December 9, 1998, Dr. Morgan stated that "black lung disease was a contributing issue to [the miner's] cardiac disease and his ultimate death." Claimant's Exhibit 2. Thereafter, in a September 21, 2002 letter, Dr. Morgan stated that pneumoconiosis was "an incriminating element" in the

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1.

⁴ The administrative law judge noted accurately that the medical opinions and treatment records from Drs. Anderson, Baker, Bushey, Hoadley, Myers, and Wright did not address the cause of the miner's death.

miner's death because "the pneumoconiosis effect on his lungs induced right heart failure and strain which aggravated the left heart condition accelerating his deterioration." Claimant's Exhibit 3. By contrast, Dr. Burki reviewed the medical evidence at the request of the Department of Labor and concluded that the miner "died of severe left heart failure NOT associated with pneumoconiosis." Director's Exhibit 34 (emphasis in original).

The administrative law judge permissibly found that although Dr. Morgan "treated the [m]iner for several months prior to his death," Dr. Morgan's letters merited "less weight" because they were not well reasoned or documented. Decision and Order at 19; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003)(holding that "the opinions of treating physicians get the deference they deserve based on their power to persuade"). Specifically, the administrative law judge was within his discretion to find that Dr. Morgan's letters were unexplainedly inconsistent with both the death certificate he completed and his treatment records of the miner's final hospitalization, neither of which "mention[ed] the existence of pneumoconiosis and/or its contribution to [the miner's] death."⁵ Decision and Order at 19; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge also permissibly concluded that Dr. Morgan did not provide "objective data that supports his new finding that the [m]iner's death was aggravated by the previously unmentioned pneumoconiosis." Decision and Order at 19; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Finally, the administrative law judge properly considered "Dr. Morgan's lack of specialty credentials" in deciding how much weight to give his opinion. Decision and Order at 19; *see Williams*, 338 F.3d at 518, 22 BLR at 2-655.

Substantial evidence supports the administrative law judge's findings, which are in accordance with law. *McFall*, 12 BLR at 1-177. Review of the record discloses no other evidence that pneumoconiosis caused or hastened the miner's death. We therefore affirm the administrative law judge's finding pursuant to Section 718.205(c). Because claimant failed to establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

⁵ As summarized by the administrative law judge, Dr. Morgan diagnosed ten different conditions during the miner's final hospitalization, including severe congestive heart failure, but did not diagnose or mention pneumoconiosis. Decision and Order at 7; Director's Exhibit 32.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge