

BRB No. 07-0189 BLA

P. A.)
(Widow of P. A.))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 09/28/2007
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

P. A., Frackville, Pennsylvania, *pro se*.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (06-BLA-0019) of Administrative Law Judge Ralph A. Romano (the administrative law judge) 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). Claimant filed this application for benefits on November 8, 1993. Director's Exhibit 1. It is now before the Board for the sixth time. The Board previously discussed this claim's full procedural history.¹ In this decision we shall discuss only that

¹ [P.A.]. *v. Director, OWCP*, BRB No. 02-0228 BLA (Dec. 23, 2002) (unpub.); Director's Exhibit 64.

procedural history related to the administrative law judge's denial of claimant's request for modification and the denial of benefits.

In a Decision and Order on Remand issued on June 13, 2003, Administrative Law Judge Robert D. Kaplan found the medical evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Judge Kaplan specifically found that Dr. Sherman's opinion that pneumoconiosis played no role in the miner's death outweighed the contrary opinion of Dr. Simelaro that pneumoconiosis hastened the miner's death, because Dr. Sherman's opinion was better supported by the objective evidence, was better explained, and was supported by Dr. Spagnolo's reasoned and documented opinion. Director's Exhibit 68.

On appeal, the Board affirmed the finding that the evidence was insufficient to establish death due to pneumoconiosis. [*P.A.*] *v. Director, OWCP*, BRB No. 03-0650 BLA (June 8, 2004) (unpub.); Director's Exhibit 75.

The Board subsequently denied claimant's motion for reconsideration on August 24, 2004. Director's Exhibit 77. Claimant timely requested modification pursuant to 20 C.F.R. §725.310 (2000), submitting no new evidence. Director's Exhibit 78.

After reviewing the record, the administrative law judge found that there was no mistake in a determination of fact in the prior denial. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's 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 Co.*, 12 BLR 1-176, 1-177 (1989). 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).

The administrative law judge may grant modification based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a) (2000). If the modification request relates to a survivor's claim, however, a change in physical condition cannot be established because a deceased miner's condition cannot change. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). Thus, claimant may establish a basis for modification only by proving a mistake in a determination of fact.

See Keating v. Director, OWCP, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995). As the Director points out, proving a mistake in a determination of fact would be particularly difficult in the circumstances presented here, where the prior decision affirming benefits had been affirmed by the Board and claimant submitted no new evidence.

After reviewing the evidence of record, the administrative law judge specifically detected no mistake in the determination to credit Dr. Sherman's opinion that pneumoconiosis played no role in the miner's death from an acute cardiac event, over Dr. Simelaro's contrary opinion. This determination was rational and is supported by substantial evidence. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-476, 2-481 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Director's Exhibits 54, 56; Decision and Order at 3.

Because the administrative law judge has the discretion to resolve conflicts in the medical evidence, his findings will not be disturbed if they are supported by substantial evidence. *Lafferty v. Cannelton Indus., Inc.* 12 BLR 1-190 (1989). We, therefore, affirm the administrative law judge's finding that claimant failed to carry her burden of establishing that the miner's death was due to pneumoconiosis, since the medical opinion of Dr. Simelaro was properly found to be outweighed by the contrary opinion of Dr. Sherman. Therefore, the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and his determination that claimant failed to establish a mistake in a determination of fact, are affirmed. *See Lango*, 104 F.3d at 576, 21 BLR at 2-18; *Keating*, 71 F.3d at 1123, 20 BLR at 2-63.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge