

BRB No. 00-1122 BLA

CARMIE J. LOWE)
(Widow of EVERETT D. LOWE)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
)
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Modification of John C. Holmes,
Administrative Law Judge, United States Department of Labor.

Carmie J. Lowe, Vansant, Virginia, *pro se*.

Barry H. Joyner (Howard M. Radzely, Acting 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order Denying Modification (00-BLA-734) of Administrative Law Judge John C. Holmes denying benefits on a request for modification in 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.*

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

(the Act).² This case is before the Board for a second time.³ Pursuant to claimant's timely

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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ Claimant is the widow of Everett Lowe, a miner who died on January 12, 1994. Director's Exhibits 1, 9. Claimant filed her application for survivor's benefits on April 7, 1994 which the district director denied. Director's Exhibits 1, 13. At the hearing on the claim, the parties agreed to a decision on the record. Director's Exhibit 19. Administrative Law Judge Julius A. Johnson found the evidence of record insufficient to establish the existence of pneumoconiosis or that pneumoconiosis caused, contributed to or hastened the miner's death. Accordingly, benefits were denied. Director's Exhibit 20. On appeal, the Board affirmed the findings of Judge Johnson as supported by substantial evidence and the denial of benefits. *See Lowe v. Director, OWCP*, BRB No. 96-1599 BLA (July 15, 1997);

request for modification, the administrative law judge determined that since the miner was deceased there could be no change in conditions and, after a review of the evidence of record, found that there was no mistake in a determination of fact by Administrative Law Judge Julius A. Johnson regarding the insufficiency of the evidence of record to meet claimant's burden of proving the existence of pneumoconiosis and death due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant generally challenges the findings of the administrative law judge on the existence of pneumoconiosis and death due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.⁴

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *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 by 30 U.S.C. §932(a).

Director's Exhibit 25.

⁴ On August 9, 2001, the United States District Court for the District of Columbia issued its decision in *National Mining Association v. Chao*, D.D.C., 00-3086 (Aug. 9, 2001), granting summary judgment defending final regulations issued on December 20, 2000, 65 Federal Register 79920-80107 under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. In its decision, the court also dissolved the Preliminary Injunction Order that it had issued on February 9, 2001. As a result of the court's decision, the issue raised by the Preliminary Injunction Order is now moot, and we will not address the briefs submitted by the parties in response to the Board's order of May 21, 2001.

In order to establish entitlement to survivor's benefits, 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. 20 C.F.R. §§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). In a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304 is applicable.⁵ See 20 C.F.R. §§718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993).

⁵ Since the miner's last coal mine employment took place in Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order Denying Modification, the arguments raised on appeal and the evidence of record we conclude that the administrative law judge's decision is supported by substantial evidence and must be affirmed. The administrative law judge correctly concluded that modification could not be based on a change in conditions and that a mistake in a determination of fact was the sole ground for modification in a survivor's claim. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Director's Exhibit 9. In deciding whether to grant modification, the administrative law judge properly reviewed all the evidence of record to determine if Judge Johnson had made a mistake in his factual determinations. *Id.*; *see Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992), *modifying*, 14 BLR 1-156 (1990); Decision and Order at 1-2. Based on his review, the administrative law judge permissibly found that the references to coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD) in the submitted records did not constitute reasoned medical opinions or a diagnosis of pneumoconiosis as the records did not contain any objective evidence which would support the diagnosis.⁶ *See Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, the administrative law judge properly concluded that Judge Johnson did not make a mistake in a determination of fact in his Decision and Order denying benefits. 20 C.F.R. §725.310. We, therefore, affirm the administrative law judge's denial of benefits on modification as it is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

⁶ Claimant submitted reports from Dr. Baxter with her first request for modification and office notes from the Sutherland Clinic with her second request for modification. Director's Exhibits 26, 32. The administrative law judge properly found that these reports had been previously submitted to Judge Johnson. *See* Director's Exhibits 11, 12. The medical reports from Dr. Baxter consist of admission, history, treatment, and discharge summaries for the miner's numerous hospitalizations between 1988 and his death on January 12, 1994. *Id.* These reports include numerous x-ray interpretations, which are not classified in accordance with 20 C.F.R. §718.102 and do not diagnose pneumoconiosis. *Id.* Although these reports list coal workers' pneumoconiosis and COPD as conditions from which the miner suffered, Dr. Baxter never discusses how he reached the diagnosis of pneumoconiosis nor does he relate the COPD diagnosis to the miner's coal mine employment. *Id.*; 20 C.F.R. §§718.201, 718.202(a)(4). Likewise, the Sutherland Clinic notes reference COPD, but do not relate this diagnosis to the miner's coal mine employment. *Id.*

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge