

BRB No. 07-0953 BLA

I.C.)
(Widow of E.C.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 08/26/2008
)
SHAMROCK COAL COMPANY)
)
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 Denying Request for Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Request for Modification (2004-BLA-06370) of Administrative Law Judge Alice M. Craft rendered 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).¹

¹ Claimant is the widow of the miner who died on January 9, 1999. Director's Exhibit 6. The record contains the miner's application for benefits, filed on May 7, 1999,

The administrative law judge noted that the case before her contained two applications for survivor's benefits.² The administrative law judge determined that because the district director erred in granting claimant's request to withdraw her initial claim, filed on February 1, 1999, claimant's 2002 claim constituted a request for modification pursuant to 20 C.F.R. §725.310 (2000).³ The administrative law judge accepted employer's stipulation to 12.5 years of coal mine employment and considered whether claimant established the elements of entitlement set forth in 20 C.F.R. Part 718. The administrative law judge found that the medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that claimant did not prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

and the miner's requests for modification of the denials of his claim rendered by the district director, Administrative Law Judge John C. Holmes, and Administrative Law Judge Rudolph L. Jansen. Director's Exhibits 1, 54, 100, 117, 142, 159, 181. Claimant filed her survivor's claim on February 1, 1999. Director's Exhibit 160. In a Decision and Order issued on July 24, 2000, Judge Jansen denied benefits in both the miner's claim and the survivor's claim. Director's Exhibit 181. The Board affirmed Judge Jansen's Decision and Order on August 24, 2001. *[I.C.] v. Shamrock Coal Co.*, BRB No. 00-1055 BLA (Aug. 24, 2001) (unpub.); Director's Exhibit 181. Claimant took no further action with respect to the miner's claim.

² Claimant filed a motion to withdraw her survivor's claim on April 19, 2002, which the district director granted over employer's objection. Director's Exhibit 181. In a Decision and Order issued on December 18, 2002, the Board dismissed employer's appeal of the district director's Order, holding that it had no jurisdiction to consider the appeal. *[I.C.] v. Shamrock Coal Co.*, BRB No. 02-0676 BLA (Dec. 18, 2002) (unpub. Order); Director's Exhibit 181. On June 26, 2002, while employer's appeal of the district director's decision to grant claimant's request to withdraw her initial survivor's claim was pending before the Board, claimant filed a second application for survivor's benefits. Director's Exhibit 182. The district director eventually consolidated claimant's two applications for survivor's benefits and transferred the case to the Office of Administrative Law Judges for hearing.

³ The new version of 20 C.F.R. §725.310, which became effective on January 19, 2001, does not apply in this case, as the 1999 survivor's claim was pending at the time of the effective date of the amended regulations. Director's Exhibit 1; 20 C.F.R. §725.2(c).

On appeal, claimant generally contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1), (4). Claimant also generally contends that the administrative law judge erred in finding that pneumoconiosis was not an underlying cause in the miner's death at Section 718.205(c). In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has stated that he will not file a response brief in this appeal.⁴

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.⁵ 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

⁴ The parties do not challenge the administrative law judge's decision to credit the miner with 12.5 years of coal mine employment, her finding that claimant's second application for survivor's benefits constituted a request for modification, or her finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (3). These findings are, therefore, affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibits 1, 160-162. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

In order to be entitled to modification in a case involving a survivor's claim, claimant must establish that the prior denial contained a mistake in a determination of fact. 20 C.F.R. §725.310(2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230-231, 18 BLR 2-290, 2-294 (6th Cir. 1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In his July 24, 2000 Decision and Order denying benefits, Administrative Law Judge Jansen found that the evidence was insufficient to establish the existence of pneumoconiosis or that pneumoconiosis caused, contributed to, or hastened the miner's death. Thus, claimant was required to prove that Judge Jansen's Decision and Order contained a mistake in a determination of fact regarding the issues of the existence of pneumoconiosis or death due to pneumoconiosis pursuant to Section 725.310 (2000) to proceed on the merits of her claim. *Wojtowicz*, 12 BLR at 1-164.

Claimant initially argues that the administrative law judge erred in finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). This contention is without merit. The administrative law judge reviewed the x-ray interpretations of record, including the qualifications of the readers, and determined that the preponderance of x-ray evidence was negative for pneumoconiosis, as six of the films were positive for pneumoconiosis, while fourteen of the x-rays were negative. Decision and Order at 26. Thus, contrary to claimant's assertion, the record indicates that the administrative law judge based her finding upon a proper qualitative analysis of the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Sheckler*, 7 BLR at 1-131. Consequently, claimant's arguments that the administrative law judge improperly relied solely on the readers' credentials, merely counted the negative readings, and may have selectively analyzed the readings, lack merit.⁶ We affirm, therefore, the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) as it is rational and supported by substantial evidence.

In challenging the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge erred by failing to determine that the reports in which Drs. Bushey and DeLara diagnosed pneumoconiosis were sufficient to establish the existence of the disease. This contention is without merit. The administrative law judge reviewed all of the medical reports relevant to Section 718.202(a)(4) and acted within her discretion in according

⁶ We reject claimant's assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence," as she has not identified any statement in the administrative law judge's Decision and Order that provides support for her contention. Claimant's Brief at 3.

greatest weight to the opinions in which Drs. Rosenberg and Vuskovich stated that the miner did not have pneumoconiosis, as they provided more thorough explanations of their reasoning and their conclusions were better supported by the objective evidence of record, including the weight of the x-ray and autopsy evidence. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Decision and Order at 28; Employer's Exhibits 1, 2. Because claimant does not otherwise allege any error in the administrative law judge's weighing of the medical opinion evidence, we affirm her finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant also argues that the administrative law judge erred by failing to conclude that the opinion of Dr. DeLara, that pneumoconiosis was a contributing cause of the miner's death due to lung cancer, was sufficient to satisfy claimant's burden of proof under Section 718.205(c).⁷ We disagree. The administrative law judge rationally determined that Dr. DeLara's opinion was entitled to little weight on the grounds that Dr. DeLara's "analysis is conclusory and he does not sufficiently explain his observations." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003); *Anderson*, 12 BLR at 1-113; Decision and Order at 25, 28; Director's Exhibits 181, 198. Because claimant does not otherwise allege any error in the administrative law judge's weighing of the medical evidence at Section 718.205(c), we affirm her finding that claimant failed to establish that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to Section 718.205(c). *Cox*, 791 F.2d at 445, 9 BLR at 2-46; *Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109.

In light of our affirmance of the administrative law judge's findings under Sections 718.202(a) and 718.205, we also affirm the administrative law judge's determination that claimant has not established a mistake of fact in the prior denial of her claim for survivor's benefits pursuant to Section 725.310 (2000). We must also affirm, therefore, the denial of benefits. 20 C.F.R. §725.310 (2000); *Worrell*, 27 F.3d at 230-231, 18 BLR at 2-294; *Wojtowicz*, 12 BLR at 1-164.

⁷ We reject claimant's assertion that the administrative law judge "may have once again 'selectively analyzed' the medical evidence," as she has not identified any statement in the administrative law judge's Decision and Order that provides support for her contention. Claimant's Brief at 6.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge