

BRB No. 07-0445 BLA

M.S.)	
(Widow of G.S.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CRYSTAL COAL COMPANY,)	
INCORPORATED)	DATE ISSUED: 02/29/2008
)	
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 Miner's Benefits and Denying Survivor's Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

M.S., Loyall, Kentucky, *pro se*.

Julie Ann Sharp (Boehl, Stopher & Graves, LLP), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Miner's Benefits and Denying Survivor's Benefits (2004-BLA-00137) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) on claims 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 The administrative law judge initially determined that this case involves two claims,² which were consolidated: claimant's second request for modification of her deceased husband's miner's claim, and claimant's first request for modification of the denial of her survivor's

¹ 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. The amended version of 20 C.F.R. §725.310 does not apply in this case, as the claims was pending when the amended regulations became effective on January 19, 2001. *See* 20 C.F.R. §725.2.

² The miner filed a claim for benefits on March 7, 1996. Director's Exhibit 1. On February 23, 1999, Administrative Law Judge Thomas F. Phalen, Jr., issued a Decision and Order denying benefits. Judge Phalen determined that while the evidence was sufficient to establish that the miner was totally disabled, the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 72. The miner appealed, and the Board affirmed Judge Phalen's total disability determination but vacated his finding pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case for further consideration as to whether claimant established the existence of legal pneumoconiosis as defined at 20 C.F.R. 718.201. *See [G.S.] v. Crystal Coal Co., Inc.*, BRB No. 99-0619 BLA (Mar. 17, 2000)(unpub.); Director's Exhibit 78. On remand, Judge Phalen issued a Decision and Order on August 31, 2000, denying benefits for failure to establish the existence of pneumoconiosis. Director's Exhibit 85. Prior to the issuance of Judge Phalen's remand decision, the miner died on May 20, 2000. Director's Exhibit 103. Claimant filed a survivor's claim on July 31, 2000. Director's Exhibit 90. Claimant also filed a request for modification of the denial of benefits in the miner's claim on October 5, 2000. Director's Exhibit 86. These cases were consolidated for hearing before Administrative Law Judge Joseph E. Kane, and a Decision and Order denying benefits was issued on July 30, 2002. Pursuant to Section 725.310 (2000), Judge Kane determined that there was no mistake in fact with regard to the prior denial of benefits in either claim. Judge Kane also specifically determined that the new evidence failed to establish a change in conditions pursuant to Section 725.310 (2000) since the evidence failed to establish the existence of pneumoconiosis in the miner's claim, or that the miner's death was due to pneumoconiosis in the survivor's claim. Thus, benefits were denied. Although claimant appealed to the Board, her appeal was dismissed as untimely filed. *[M.S.] v. Crystal Coal Co.*, BRB No. 03-0156 BLA (Nov. 25, 2002) (unpub. Order); Director's Exhibits 123, 124. The Board also denied claimant's request for reconsideration. *[M.S.]*, BRB No. 03-0156 BLA (Jan. 8, 2003) (unpub. Order on recon.); Director's Exhibit 125.

claim.³ Pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge determined that there was a mistake in fact with regard to the prior denial of the miner's claim, on the ground that the miner did not have pneumoconiosis, as she found the evidence to be sufficient to establish the existence of the disease pursuant to 20 C.F.R. §718.202(a). However, the administrative law judge also determined that the evidence was insufficient to establish that the miner was totally disabled due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c). With regard to the survivor's claim, the administrative law judge further found that claimant was unable to establish 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 in both the miner's claim and the survivor's claim.

On appeal, claimant generally disagrees with the denial of benefits. Employer responds to claimant's appeal, asserting that while the administrative law judge erred in finding that the miner had pneumoconiosis, the Board should affirm her denial of benefits with respect to both claims as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has declined to respond to this appeal unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3),

³ Claimant filed the instant request for modification on April 17, 2003, which stated: "I am filing again for my deceased husband's Black Lung benefits. I want my modification and I want my claim reviewed again. I disagree with the decisions that have been made about my case." Director's Exhibit 126. At the hearing held on August 23, 2006, Administrative Law Judge Adele Higgins Odegard (the administrative law judge) raised the issue of whether the claimant's request for modification included the denial of the miner's claim, as the district director issued a memorandum on July 6, 2004, stating that the miner's claim was administratively closed. *See* Director's Exhibit 133. By Order dated September 6, 2006, the administrative law judge requested that the parties address the issue of whether the claimant's request for modification of the denial of the miner's claim was properly before her, and whether the matter should be remanded to the district director. The parties responded that the miner's claim was properly before the administrative law judge, along with the survivor's claim, and requested that the claims be decided. Thereafter, the administrative law judge issued her Decision and Order Denying Miner's Benefits and Denying Survivor's Benefits on January 24, 2007.

⁴ Since the miner's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

Pursuant to Section 725.310 (2000), modification may be granted in a miner’s claim on the grounds of a change in conditions or a mistake in a determination of fact with regard to the prior denial of benefits. *See* 20 C.F.R. §725.310(a) (2000). In a request for modification with respect to a survivor’s claim, the administrative law judge may grant modification based upon the presence of a mistake in a determination of fact in the prior denial. 20 C.F.R. §725.310(a) (2000); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (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); *see Betty B. Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

A. The Miner’s Claim:

In accordance with Section 725.310 (2000), the administrative law judge properly examined the prior findings of Administrative Law Judge Joseph E. Kane, along with all of the record evidence, to determine whether there was a mistake in fact or a change in conditions that would warrant modification of the denial of benefits in the miner’s claim. Decision and Order Denying Miner’s Benefits and Denying Survivor’s Benefits (Decision and Order) at 6-8.

In order to establish entitlement to benefits under Part 718 in a living miner’s claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-5 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

With respect to the miner’s claim, the administrative law judge determined that there was no mistake in fact in Judge Kane’s assessment of the x-ray evidence as insufficient to establish the existence of pneumoconiosis, and further found that there was no new x-ray evidence to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge also determined that there was no evidence by which claimant could establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) or (3). Decision and Order at 11 n.16. However, after reviewing the medical opinions relevant to the existence of pneumoconiosis at 20

C.F.R. §718.202(a)(4),⁵ the administrative law judge found that Judge Kane erred in ignoring Dr. Dalloul's diagnosis of clinical pneumoconiosis, and by failing to give proper consideration to his status as claimant's treating physician.⁶ Decision and Order at 11-13. Considering all of the record evidence, the administrative law judge found that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(4).

Because the miner was previously determined to be totally disabled, the administrative law judge next considered whether the miner was totally disabled due to his clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge found that Dr. Baker did not address the issue of disability causation, and that Dr. Dahhan specifically opined that the miner was totally disabled due to heart disease, and not his coal dust exposure. In a letter dated October 1, 1997, Dr. Dalloul wrote:

This is to certify that [the miner] has been under my medical care for his medical condition. He does have [coal workers' pneumoconiosis] and [chronic obstructive pulmonary disease (COPD)] and that causes him a great deal of discomfort and breathing problems. Patient also has other medical problems, however his breathing is greatly affected by his black lung.

Director's Exhibit 56. In a second letter, dated April 27, 1998, Dr. Dalloul further stated:

⁵ The miner was examined by Dr. Baker, at the request of the Department of Labor, on March 29, 1996. Dr. Baker diagnosed coal workers' pneumoconiosis by chest x-ray, and attributed the condition to coal dust exposure. Director's Exhibit 15. Dr. Baker also diagnosed chronic bronchitis and "possible" chronic obstructive pulmonary disease (COPD), but he did not attribute these conditions to coal dust exposure. As the miner's treating physician from 1997 until 2000, Dr. Dalloul opined that the miner suffered from coal workers' pneumoconiosis and COPD. Director's Exhibits 56, 64, 103, 105.

⁶ The administrative law judge disagreed with Judge Kane that Dr. Dalloul's opinion was not reasoned with respect to the issue of the existence of pneumoconiosis, and determined that there was a mistake in fact. The administrative law judge determined that Dr. Dalloul diagnosed both clinical pneumoconiosis and COPD. Decision and Order at 11-12. Based on Dr. Dalloul's status as the miner's treating physician, and in light of the factors set forth at 20 C.F.R. §718.104(d), the administrative law judge determined that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because neither Dr. Dalloul or any of the record physicians attributed the miner's COPD to coal dust exposure, the administrative law judge also determined that the evidence was insufficient to establish that the miner's COPD constituted legal pneumoconiosis.

This is to certify that [the miner] is followed in my clinic for his medical condition. Patient has several medical conditions including [coal workers' pneumoconiosis] and COPD, coronary artery disease, peripheral vascular disease, insulin dependent diabetes mellitus and congestive heart failure. Patient is extremely debilitated and sick from the above mentioned medical problems. Patient is symptomatic on minimal exertion despite optimizing medical therapy. He is totally disabled and will not be able to carry on any gainful activities in the future. Patient also will not be able to go for any testing for his black lung and I feel that this might endanger his life and cause him to be sicker.

Director's Exhibit 64. The administrative law judge observed that Dr. Dalloul's 1998 letter provided the "most complete assessment of the causes of the miner's disabling condition[,]" but that Dr. Dalloul did not address whether claimant was totally disabled from a respiratory standpoint by his coal workers' pneumoconiosis. Decision and Order at 17. The administrative law judge found it "notable that the Miner's coronary artery bypass surgery was in 1997, prior to Dr. Dalloul's 1998 letter in which several heart problems are cited." *Id.* at n.34. The administrative law judge then stated:

Dr. Dalloul's 1996 assessment is consistent with Dr. Baker, who determined that the [m]iner had a mild impairment; his 1998 assessment is consistent with Dr. Dahhan, who stated that the [m]iner was totally impaired. However, in his 1998 letter, Dr. Dalloul does not indicate the relative roles that pneumoconiosis, or any of the other conditions, played in the [m]iner's total disability. Importantly, Dr. Dalloul, a cardiac physician, does not state that the [m]iner is totally disabled until 1998, when he also stated that the [m]iner had several heart conditions. This conclusion, along with other evidence of record concerning the [m]iner's heart procedures in 1997, 1999, and 2000, suggests strongly that the [m]iner's heart problems triggered his disability. Consequently, I must find that Dr. Dalloul's opinions are insufficient to establish that the [m]iner's total disability was due to pneumoconiosis.

Decision and Order at 17-18.

We conclude that the administrative law judge acted within her discretion in finding that the miner was not totally disabled due to pneumoconiosis.⁷ Section

⁷ Although employer challenges the administrative law judge's finding that the miner suffered from pneumoconiosis, it is not necessary that we address the propriety of her Section 718.202(a)(4) determination, as any error committed by the administrative law judge in weighing the evidence at Section 718.202(a)(4) is harmless, *see Larioni v.*

718.204(a) specifically states that a “non-pulmonary or non-respiratory condition or disease, which causes an independent disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis.” See 20 C.F.R. §718.204(a). The administrative law judge correctly determined that in his April 27, 1998 report, Dr. Dalloul did not address the extent to which the miner’s respiratory or non-respiratory conditions contributed to his total disability. As such, the administrative law judge was unable to discern whether the miner was totally disabled by a respiratory or pulmonary impairment due, at least, in part, to his coal dust exposure. Because the administrative law judge permissibly determined that Dr. Dalloul’s opinion was not well-explained, and failed to address whether the miner was totally disabled due to pneumoconiosis, we affirm her decision to accord his opinion little weight. Furthermore, as there was no other evidence upon which claimant could rely to establish disability causation, we affirm the administrative law judge’s finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(c).⁸ See *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989); Decision and Order at 18. Thus, we affirm the administrative law judge’s finding that claimant was not entitled to modification of the miner’s claim pursuant to Section 725.310 (2000). We therefore affirm the denial of benefits in the miner’s claim.

B. The Survivor’s Claim:

The administrative law judge further considered whether claimant was entitled to modification of her previously denied survivor’s claim pursuant to Section 725.310 (2000) based on a mistake in fact. Decision and Order at 20. In order to establish

Director, OWCP, 6 BLR 1-1276 (1984), in view of our affirmance of her determination that the miner was not totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

⁸ The administrative law judge properly noted that lay testimony on the issue of total disability and disability causation may be sufficient to establish that the miner was totally disabled due to pneumoconiosis only if there is no medical evidence on the issue. Decision and Order at 18; see 20 C.F.R. §718.204(d)(3). The administrative law judge found the lay witness testimony of Mr. Smith and Mr. Farmer, that the miner was totally disabled by black lung prior to his death, to be sincere and credible, but permissibly assigned that lay testimony less weight in view of the medical opinions of record that “establish that the miner was suffering from a multitude of medical problems,” which contributed to the miner’s disability. Decision and Order at 18. As noted by the administrative law judge, “the lay opinions do not address these other conditions, nor do they address the relative role that the [m]iner’s pneumoconiosis played in his total disability.” *Id.*

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, 1-87 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29, 1-30 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39, 1-40 (1988). 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); see also *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

In considering whether claimant satisfied her burden of proof under Section 718.205(c), the administrative law judge properly noted that the death certificate, signed by Dr. Baker, listed COPD as the sole cause of death, and that there was no autopsy performed. Decision and Order at 21; Director's Exhibit 81. In a report dated May 3, 2000, Dr. Baker recounted the miner's hospital course for end-stage cardiac disease and COPD. Dr. Baker diagnosed COPD as a cause of the miner's death, but he did not attribute that condition to coal dust exposure. Moreover, although Dr. Baker opined that the miner had "questionable" coal workers' pneumoconiosis, the doctor did not state that pneumoconiosis caused or hastened the miner's death. Director's Exhibit 101. The administrative law judge observed that it was unclear whether Dr. Baker found it questionable that the miner had pneumoconiosis or whether the doctor found it questionable that pneumoconiosis led to the miner's death. *Id.* The administrative law judge concluded, however, that under either circumstance, it was "clear that Dr. Baker was not able to assign a role to pneumoconiosis in the [m]iner's final illness and eventual death." Decision and Order at 23-24.

In contrast, Dr. Dalloul, provided a letter dated August 17, 2006, wherein the doctor stated that he "strongly believed" that the miner's death "was related to coal miners (sic) pneumoconiosis." Claimant's Exhibit 1. In weighing Dr. Dalloul's opinion, the administrative law judge properly determined that it was cursory and unexplained, and therefore, insufficient to satisfy claimant's burden of proof. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 23; Claimant's Exhibit 1. The administrative law judge thus concluded that the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205, and that there was no mistake in fact with regard to the denial of benefits in the survivor's claim. Decision and Order at 24.

In weighing the evidence at Section 718.205(c), the administrative law judge made credibility determinations that were rational and within her discretion as the trier of fact. *Worrell*, 27 F.3d at 231, 18 BLR at 298; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish that the miner's death was due to, or hastened by, pneumoconiosis pursuant to Section 725.205(c). *See Worrell*, 27 F.3d at 231, 18 BLR at 298; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89. Consequently, we affirm the administrative law judge's determination that the claimant was not entitled to modification of her survivor's claim pursuant to Section 725.310 (2000) and affirm the denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Miner's Benefits and Denying Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge