

BRB No. 09-0472 BLA

VIOLET EWING)	
(Widow of WILLARD EWING))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	DATE ISSUED: 02/24/2010
CORPORATION)	
)	
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 on Modification – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita A. Roppolo (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification – Denying Benefits (2008-BLA-5286) of Administrative Law Judge Richard A. Morgan (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). When this case was previously before the administrative law judge, adjudicating the claim pursuant to 20 C.F.R. Part 718, he found that the miner had thirty-four years of qualifying coal mine employment, that the evidence was sufficient to establish the existence of clinical, but not legal, pneumoconiosis and that the presumption that pneumoconiosis arose out of coal mine employment was applicable in both the miner’s and the survivor’s claims. *See* 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that total disability and disability causation were established on the miner’s claim. *See* 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were awarded on the miner’s claim. Regarding the survivor’s claim, however, the administrative law judge denied benefits because claimant failed to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge found that the only evidence supportive of a finding of death due to pneumoconiosis, *i.e.*, the miner’s death certificate and Dr. Boustani’s opinion, was unreasoned and undocumented. Benefits on the survivor’s claim were, accordingly, denied. The administrative law judge also denied augmentation of benefits for the miner’s dependent adult son. Administrative Law Judge’s Decision and Order of December 19, 2006. Claimant requested modification of the denial of the survivor’s claim. Pursuant to claimant’s request for modification, the administrative law judge found that claimant failed to establish that a mistake in a determination of fact was made in the prior decision because claimant failed to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(death causation). Accordingly claimant’s request for modification was denied pursuant to 20 C.F.R. §725.310 and benefits were again denied on the survivor’s claim.

On appeal, claimant contends that the administrative law judge erred in discrediting the opinion of Dr. Boustani, the miner’s treating physician, who found that the miner’s death was due to pneumoconiosis, while crediting the contrary opinion of Dr. Zaldivar, on the issue of death causation at Section 718.205(c). Claimant contends that the administrative law judge should have credited the opinion of Dr. Boustani, over the opinion of Dr. Zaldivar, because she was the miner’s treating physician. Claimant also argues that the administrative law judge should have applied the doctrine of collateral estoppel to preclude employer from showing that the miner’s disabling respiratory impairment was due to interstitial pulmonary fibrosis, not pneumoconiosis, and that the miner’s death was not, therefore, due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge’s decision denying benefits. In response, the Director, Office of Workers’ Compensation Programs (the Director), argues that the administrative law judge erred in finding that death causation was not established at Section 718.205(c). In particular, the Director contends that, since all of the physicians

of record agreed that the miner died from a fatal respiratory condition, the real issue in the case, which the administrative law judge did not address, was the cause of that fatal respiratory condition. Relative to the issue, the Director contends that the administrative law judge erred in failing to consider whether the doctrine of collateral estoppel precluded employer from relitigating the issue of whether the miner's respiratory impairment was due to pneumoconiosis, an issue that was previously decided in the miner's case.¹

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law,² they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and 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; 718.203; 718.205. Failure to establish any one of these elements precludes entitlement. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivor's claims filed on or after January 1, 1982, the cause of death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if the miner's death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, pursuant to Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-

¹ The Director, Office of Workers' Compensation Programs (the Director), contends that the doctrine of collateral estoppel is applicable in this case, because it was determined that coal workers' pneumoconiosis was the cause of the miner's total disability in the miner's claim, the issue was critical and necessary to deciding the miner's claim, the decision in the miner's claim was final and valid, and employer had the opportunity to fully litigate that issue. Accordingly, the Director contends that the employer was estopped from relitigating the issue of whether the miner's totally disabling respiratory impairment was due to pneumoconiosis. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 29 (4th Cir. 1998).

² The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 7, 10.

(3). Pneumoconiosis is a substantially contributing cause of 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, 979-980, 16 BLR 2-90, 2-93 (4th Cir. 1992).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes the modification of an award or denial of benefits in a survivor's claim, based on a mistake in a determination of fact.³ Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001). In this case, a mistake in a determination of fact can be made, if the administrative law judge finds that the evidence of record establishes death causation pursuant to Section 718.205(c).

In considering the entire evidentiary record, the administrative law judge reiterated that the evidence he previously considered failed to establish death causation at Section 718.205(c). Specifically, the administrative law judge found the death certificate,⁴ signed by Dr. Boustani, listing respiratory failure due to pneumoconiosis and staphylococous bacteremia, entitled to little weight. In so finding, the administrative law judge noted that it was issued without the benefit of an autopsy and there was evidence that Dr. Boustani, despite being the miner's treating physician, may not have been present when the miner died and may not have seen him for four months prior to his death. *See* Decision and Order at 9. Further, the administrative law judge noted that the miner's hospital records indicated that he suffered from numerous conditions and that his most recent treatment was primarily related to conditions other than pneumoconiosis.⁵ Considering the March

³ Modification cannot be established in a survivor's claim based on a change in conditions. *See* 20 C.F.R. §725.310; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

⁴ The death certificate states that the miner died on April 7, 2002.

⁵ The administrative law judge noted that the most recent hospital records in evidence are the Appalachian Regional Hospital records from November 2001 (more than four months prior to the miner's death). (Director's Exhibit 10). Included in these records is a discharge summary, signed by Dr. Boustani, stating that the miner was hospitalized from November 16, 2001 until November 20, 2001. Although "Pneumoconiosis" is listed among the discharge diagnoses, the administrative law judge notes that the summary shows that the miner was primarily treated for his staphylococcus bacteremia. Moreover, the administrative law judge notes that the discharge diagnoses

8, 2005 letter from Dr. Boustani, attributing the miner's death to pneumoconiosis, the administrative law judge found it entitled to little weight as it was neither well-reasoned nor well-documented. Specifically, the administrative law judge found that Dr. Boustani: failed to specify the etiology of the miner's chronic obstructive pulmonary disease; failed to refer to any test results that could support a finding of pneumoconiosis other than undated, unspecified x-rays reportedly conducted during the miner's office visits; and

also included diabetes and generalized deconditioning with severe osteoarthritis (Director's Exhibit 10, Discharge Summary). Furthermore, the administrative law judge notes that Dr. Thair Barghouthi issued a Consultation Report, dated November 17, 2001, at the request of Dr. Boustani, in which "pneumoconiosis" was not even mentioned, but that Dr. Barghouthi reported: "LUNGS: Short of breath at rest secondary to pulmonary fibrosis." (Director's Exhibit 10). Moreover, the administrative law judge noted that Dr. Barghouthi reported the following under "IMPRESSION:"

1. Chest pain, probably unstable angina pectoris.
2. Recurrent septicemia, rule out recurrent endocarditis.
3. Coronary atherosclerosis, status post stenting.
4. Hypertensive heart disease.
5. Old cerebrovascular accident with left hemiparesis.
6. Hypercoagulable status, on chronic Coumadin therapy.

(Director's Exhibit 10, Barghouthi's Consultation report).

The administrative law judge further notes that the hospital records include another Consultation Report, dated November 17, 2001, in which Dr. Anthony T. Dinh evaluated the miner at Dr. Boustani's request (Director's Exhibit 10). Although "pneumoconiosis" was not mentioned, Dr. Dinh reported "Chronic obstructive pulmonary disease, pulmonary fibrosis" among various conditions. In summary, Dr. Dinh reported the following:

CLINICAL IMPRESSION

1. Staphylococcus epidermis sepsis, rule out endocarditis.
2. Insulin dependent diabetes mellitus.
3. Hypertension.
4. Chronic obstructive pulmonary disease, pulmonary fibrosis.
5. Coronary artery disease with occasional angina pectoris.
6. Cerebrovascular accident.
7. Status post fracture of the right ankle with open reduction and internal fixation.

(Director's Exhibit 10, Dinh's Consultation report).

failed to explain the mechanism by which pneumoconiosis caused, contributed to, or hastened the miner's death.⁶

Turning to the evidence submitted on modification, the administrative law judge credited Dr. Zaldivar's September 30, 2008 deposition, in which Dr. Zaldivar opined that pneumoconiosis did not play any role in the miner's death because Dr. Zaldivar's opinion was well-reasoned and well-documented. Specifically, the administrative law judge noted that Dr. Zaldivar opined that, even assuming the presence of pneumoconiosis and that the miner was disabled thereby, the pneumoconiosis did not cause, contribute to, or hasten the miner's death. The administrative law judge noted that, in so finding, Dr. Zaldivar explained that the miner's death was primarily due to non-pulmonary infections and that even if a pulmonary condition contributed to death, it was caused by the miner's interstitial fibrosis, which was unrelated to coal mine employment. Consequently, the administrative law judge concluded, citing *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), that Dr. Zaldivar's opinion was not contrary to the administrative law judge's finding in the miner's claim, that the miner was totally disabled due to pneumoconiosis.

Considering all of the relevant evidence of record, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). The administrative law judge further noted that, even if he accorded Dr. Zaldivar's recent deposition testimony little weight, he "would still find that

⁶ The administrative law judge noted that Dr. Boustani's March 8, 2005 letter consisted of the following:

[The miner] was followed by me until he died. He saw me for his pulmonary problems. The patient had multiple medical problems including COPD, chronic hypoxemia and pneumoconiosis. He had been chronically on oxygen during his last days. He had medical problems including a history of endocarditis and anemia. The patient was chronically anticoagulated. He also had severe pulmonary hypertension. He had recurrent hospital stays for COPD exacerbations and was severely limited in terms of his lung function to any activity. During his visits to the office where the patient had chest x-rays the patient was also described by the radiologist to have moderate end stage pneumoconiosis. This had a large impact in the patient's illness and ultimately his demise.

If you need any further information, please contact my office.

Director's Exhibit 40; Decision and Order at 10.

the [c]laimant failed to meet her burden of establishing [death causation] under [Section] 718.205(c)(1)-(5), because she has not submitted any well-reasoned, credible, probative medical evidence which establishes that pneumoconiosis caused, substantially contributed [to], or hastened the miner's death." Decision and Order at 11.

After consideration of the arguments on appeal, the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's Decision and Order is rational, supported by substantial evidence and in accordance with law. The administrative law judge properly found that the miner's death certificate, Dr. Boustani's March 8, 2005 letter and the miner's recent hospitalization records did not support a finding that pneumoconiosis caused the miner's death at Section 718.205(c). Specifically, the administrative law judge properly rejected the miner's death certificate attributing death to pneumoconiosis because it did not constitute a well-reasoned opinion.⁷ *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988). The administrative law judge also properly rejected Dr. Boustani's March 8, 2005 letter because it was cursory, Dr. Boustani did not link the miner's chronic obstructive pulmonary disease to coal mine employment, Dr. Boustani relied on undated, unspecified x-rays finding pneumoconiosis that were not part of the record, and Dr. Boustani did not sufficiently explain the process by which pneumoconiosis caused the miner's death. *See Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-892 (1984). Further, contrary to claimant's argument, the administrative law judge is not required to accord greater weight to the opinion of a treating physician that he finds to be unreasoned. *See* 20 C.F.R. §718.104(d)(5). Based on consideration of claimant's evidence, the administrative law judge properly found that claimant failed to carry her burden of establishing death causation at Section 718.205(c),⁸ and failed, therefore, to show that a mistake in a determination of fact had been made in the prior

⁷ While the fact that the miner did not have an autopsy does not render the death certificate unreliable, the administrative law judge could consider the fact that Dr. Boustani had not seen the miner for some time prior to his death as evidence, along with other evidence of record, that the death certificate standing alone did not establish death causation. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

⁸ Because the administrative law judge properly found that claimant failed to provide credible evidence in support of her case, we need not address the administrative law judge's finding regarding Dr. Zaldivar's opinion. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

decision denying benefits on the survivor's claim. *See* 20 C.F.R. §725.310. The administrative law judge's finding that claimant is not entitled to benefits in the survivor's claim is, therefore, affirmed.

Further, we reject the argument of claimant and the Director that the administrative law judge erred in not applying the doctrine of collateral estoppel in this case. Death causation was not an issue that was previously litigated in the miner's claim. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 29 (4th Cir. 1998). Moreover, contrary to the arguments of claimant and the Director, the existence of coal workers' pneumoconiosis was found by the administrative law judge in the survivor's claim. The administrative law judge did not find that death causation was not established on the basis that the miner did not have coal workers' pneumoconiosis. Rather, the administrative law judge simply found that the evidence attributing the miner's death to coal workers' pneumoconiosis was unreasoned, and properly denied benefits on that basis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge