

BRB No. 11-0354 BLA

PEGGY J. HOWERTON	)	
(Widow of ROOSEVELT HOWERTON)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 02/22/2012
	)	
EASTERN ASSOCIATED COAL	)	
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 Second Remand and Decision and Order-Denial of Reconsideration of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand and Decision and Order-Denial of Reconsideration (05-BLA-0023) of Administrative Law Judge Richard T. Stansell-Gamm denying claimant's request for modification and denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified

at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).<sup>1</sup> This case involves a survivor's claim filed on June 14, 1999, and is before the Board for the third time.<sup>2</sup>

In a Decision and Order on Remand issued on September 17, 2008, the administrative law judge determined that, because the miner established the existence of both clinical and legal pneumoconiosis<sup>3</sup> when he was awarded benefits on his lifetime claim, employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis in the survivor's claim. The administrative law judge therefore found that claimant established the existence of both clinical and legal pneumoconiosis in the survivor's claim, based on collateral estoppel. The administrative law judge further found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), thereby establishing a mistake in the previous determination denying the survivor's claim. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's determination that the district director found both clinical and legal pneumoconiosis established in his February 18, 1987 award of benefits in the miner's claim. *P.J.H.*

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<sup>1</sup> Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims. Pub. L. No. 111-148, §1556(a),(b). The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the claim in this case, because it was filed before January 1, 2005. Pub. L. No. 111-148, §1556(c).

<sup>2</sup> The full procedural history of this case is set forth in the Board's decisions in *P.J.H. [Howerton] v. Eastern Associated Coal Corp.*, BRB No. 08-0867 BLA (Sept. 29, 2009)(unpub.), and *Howerton v. Eastern Associated Coal Corp.*, BRB No. 06-0815 BLA (July 20, 2007)(unpub.).

<sup>3</sup> "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.202(a)(1). The definition of clinical pneumoconiosis "includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." *Id.* "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[*Howerton*] v. *Eastern Associated Coal Corp.*, BRB No. 08-0867 BLA, slip op. at 4-7 (Sept. 29, 2009)(unpub.) The Board noted that the district director explicitly determined that the miner had a “chronic respiratory disease diagnosed as coal workers’ pneumoconiosis, as that term is defined in the Act and the regulations. . . .” *Howerton*, slip op. at 6, *quoting* Director’s Exhibit 2. Because “coal workers’ pneumoconiosis” is defined in the regulations as a form of clinical pneumoconiosis, 20 C.F.R. §718.201(a)(1), the Board held that the findings set forth in the district director’s award of benefits in the miner’s claim, standing alone, did not establish that the miner had both clinical and legal pneumoconiosis. *Id.* Further, reviewing the record that was before the district director in the miner’s claim, the Board held that it was “not apparent that the medical evidence upon which the district director relied . . . included diagnoses of conditions that meet the definition of legal pneumoconiosis.” *Id.* at 6-7.

Therefore, the Board vacated the administrative law judge’s determination that claimant could rely upon collateral estoppel to bar employer from relitigating the issue of the existence of legal pneumoconiosis, and remanded the case to the administrative law judge. The Board instructed the administrative law judge, on remand, to reconsider whether the elements of collateral estoppel were met, while bearing in mind “the distinction between clinical and legal pneumoconiosis.”<sup>4</sup> *Howerton*, slip op. at 7. Further, the Board vacated the finding that claimant established that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and instructed the administrative law judge to reconsider that issue in light of his findings, on remand, regarding whether the existence of pneumoconiosis was established, whether by operation of collateral estoppel or by a preponderance of the evidence. *Howerton*, slip op. at 10-11.

On remand, the administrative law judge found that legal pneumoconiosis was not established in the miner’s claim. Therefore, he determined that employer was not precluded from litigating the issue of the existence of legal pneumoconiosis in the survivor’s claim. Weighing the medical opinion evidence in the survivor’s claim, the administrative law judge found that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>5</sup> The administrative law judge

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<sup>4</sup> The Board affirmed the administrative law judge’s finding that collateral estoppel precluded employer from relitigating the issue of the existence of clinical pneumoconiosis. *Howerton*, slip op. at 8.

<sup>5</sup> The administrative law judge also found that the evidence did not establish that the miner had complicated pneumoconiosis and thus, did not establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Decision and Order at 10-16.

further found that claimant did not establish that the miner's clinical pneumoconiosis was a substantially contributing cause of his death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied claimant's modification request, and denied benefits. Subsequently, the administrative law judge denied claimant's request for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant argues further that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. Claimant has filed a reply brief, reiterating her allegations of error.<sup>6</sup> The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.<sup>7</sup> 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).

Because this survivor's claim was filed after January 1, 1982 but before January 1, 2005, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's

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<sup>6</sup> Claimant does not challenge the administrative law judge's findings that legal pneumoconiosis was not established in the miner's claim, and that claimant did not establish that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Therefore, those findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>7</sup> The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibits 1, 2, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992).

The sole basis available for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *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).

### ***Legal Pneumoconiosis***

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Cohen, Branscomb, and Renn. Dr. Rasmussen opined that the miner had "coal workers' pneumoconiosis and related chronic dust disease of the lung," and that coal mine dust exposure was "at least a significant if not a more important factor" than smoking in causing the miner's chronic lung disease. Director's Exhibit 46 at 7; Claimant's Exhibit 1 at 2. Dr. Cohen opined that the miner had "coal workers' pneumoconiosis," and obstructive lung disease that was "substantially related" to both coal mine dust exposure and smoking. Claimant's Exhibit 2 at 13, 17. In contrast, Drs. Branscomb and Renn opined that the miner did not have clinical or legal pneumoconiosis, but suffered from chronic obstructive pulmonary disease (COPD) that was due solely to his smoking. Employer's Exhibits 1-5, 7.

The administrative law judge found that Drs. Rasmussen, Cohen, Branscomb, and Renn were "equally well qualified," and that their opinions were all "documented, reasoned, [and] probative." Decision and Order at 26. He therefore determined that the physicians' "probative, yet conflicting opinions st[ood] in equipoise." Decision and Order at 26. Consequently, the administrative law judge found that claimant did not carry her burden to establish, by a preponderance of the evidence, that the miner had legal pneumoconiosis. *Id.*

Claimant argues that the administrative law judge erred in finding the opinions of Drs. Branscomb and Renn, that the miner did not have legal pneumoconiosis, to be reasoned and probative, because their opinions are contrary to the district director's 1987 findings in the miner's claim that the miner had clinical pneumoconiosis, and was totally disabled due to clinical pneumoconiosis. Claimant's Brief at 7-12. Claimant's contention lacks merit. The regulations distinguish between clinical and legal pneumoconiosis, and the administrative law judge must bear the distinction in mind when weighing the medical evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210-11, 22 BLR 2-162, 2-172-73 (4th Cir. 2000). Thus, a medical opinion that the miner

did not have legal pneumoconiosis is not necessarily inconsistent with the district director's finding that the miner had clinical coal workers' pneumoconiosis. See *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 624-26, 21 BLR 2-654, 2-660-62 (4th Cir. 1999). We therefore reject claimant's contention that the administrative law judge was required to discredit the opinions of Drs. Branscomb and Renn that the miner did not have legal pneumoconiosis. As claimant raises no other arguments with respect to the administrative law judge's finding that the medical opinion evidence was in equipoise, we affirm the administrative law judge's determination that claimant did not carry her burden to establish that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Ceres Marine Terminals, Inc.*, 656 F.3d 235, 241 (4th Cir. 2011); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

### ***Death Due to Clinical Pneumoconiosis***

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the opinions of Drs. Rasmussen, Cohen, Branscomb, and Renn regarding the cause of the miner's death. Dr. Rasmussen opined that the miner had "coal workers' pneumoconiosis and related chronic dust disease of the lung. His chronic dust disease of the lung was a major contributing factor, not only to his disability, but also to his death." Director's Exhibit 46 at 7; Claimant's Exhibit 1 at 2. Dr. Cohen opined that the miner "died . . . as a result of his pulmonary disease, which was caused by [twenty-four] years of exposure to coal mine dust and his [fifteen to sixty] pack years of tobacco smoke exposure." Claimant's Exhibit 2 at 19. In contrast, Drs. Branscomb and Renn opined that the miner's death was due solely to COPD from smoking. Employer's Exhibit 1 at 8, 10; Employer's Exhibit 3 at 7; Employer's Exhibit 5 at 1; Employer's Exhibit 7 at 22-23.

The administrative law judge discounted Dr. Rasmussen's opinion, because he found that Dr. Rasmussen did not adequately explain how clinical pneumoconiosis hastened the miner's death, and instead essentially opined that legal pneumoconiosis hastened his death. Further, the administrative law judge found that Dr. Cohen concluded that miner died due to legal pneumoconiosis, but did not adequately address the question before the administrative law judge, specifically, the role that clinical pneumoconiosis may have played in hastening the miner's death. In contrast, the administrative law judge found Dr. Branscomb's opinion, that clinical coal workers' pneumoconiosis played no role in the miner's death, to be "documented, reasoned and probative."<sup>8</sup> Decision and Order at 29.

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<sup>8</sup> The administrative law judge discounted Dr. Renn's opinion for reasons that we need not discuss in order to address the arguments that claimant raises on appeal.

Claimant contends that substantial evidence does not support the administrative law judge's finding that Drs. Rasmussen and Cohen did not adequately address the issue of whether clinical coal workers' pneumoconiosis hastened the miner's death. We disagree. With respect to Dr. Rasmussen's opinion, claimant contends that the administrative law judge erred because Dr. Rasmussen diagnosed clinical pneumoconiosis, and never stated that the miner's death was due only to legal pneumoconiosis. Contrary to claimant's contention, the administrative law judge acted within his discretion in examining whether Dr. Rasmussen adequately explained how clinical pneumoconiosis hastened the miner's death. *See U. S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). We conclude that substantial evidence supports the administrative law judge's finding that Dr. Rasmussen did not set forth any "detailed analysis of the impact of clinical pneumoconiosis" on the miner's death. Decision and Order at 29.

Additionally, contrary to claimant's contention, substantial evidence supports the administrative law judge's permissible determination that Dr. Cohen opined that the miner died of obstructive lung disease due, in part, to coal mine dust exposure, but did not adequately address or explain how clinical pneumoconiosis hastened the miner's death. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Consequently, we reject claimant's allegations of error, and affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>9</sup>

Because claimant did not establish that the miner's death was due to pneumoconiosis, a necessary element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm the denial of benefits.

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<sup>9</sup> Therefore, we need not address claimant's allegations of error regarding the weight accorded to Dr. Branscomb's opinion regarding the cause of the miner's death.

Accordingly, the administrative law judge's Decision and Order on Second Remand and Decision and Order-Denial of Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge