

BRB No. 00-1041 BLA

ENOS MARIE COLE)
(WIDOW OF FRED COLE, JR.))
))
Claimant-Petitioner)
))
v.)
))
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
))
Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denial of Request for Modification of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Dr. J.D. Cole, Ph. D., Houston Texas, lay representative, for claimant.

Sarah M. Hurley (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 ¹ appeals the Decision and Order - Denial of Request for Modification (99-BLA-

¹Claimant is Enos Marie Cole, surviving spouse of Fred Cole, Jr., the miner, who died on October 4, 1996. Director's Exhibit 4. Claimant filed her application for survivor's benefits on October 18, 1996. Director's Exhibit 1. Following a hearing, Administrative Law Judge Gerald M. Tierney denied the claim in a Decision and Order dated September 23, 1998. Director's Exhibit 24. Claimant then filed an appeal, dated January 11, 1999. Director's Exhibit 25. The district director construed this appeal as a motion for modification, and a second hearing was conducted by Administrative Law Judge Robert L.

0898) of Administrative Law Judge Robert L. Hillyard (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).² The administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2000), and thereby, was insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied the claim.

On appeal, claimant challenges the administrative law judge's finding that she failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2000). Claimant asserts that the administrative law judge improperly discounted the opinions of Dr. Pflasterer and Dr. Goldsmith and improperly credited the opinion of Dr. Cander. The Director, Office of Workers' Compensation Programs (the Director), in response, asserts that the administrative law judge's decision is supported by substantial evidence. Accordingly, the Director urges affirmance of the administrative law judge's denial of benefits. Claimant replies, repeating her earlier contentions and noting her disagreement with the Director's position.³

Hillyard.

²The 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 they are found at 65 Fed. Reg. 80,045-80, 107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³No party has challenged the administrative law judge's findings that claimant established that the miner had four years of qualifying coal mine employment. We affirm this finding as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 23, 2001, to which both claimant and the Director have responded. Both claimant and the Director contend that the amended regulations which are the subject of litigation do not affect the outcome of the instant case. Based upon the briefs submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

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 applicable law, 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment and that pneumoconiosis caused or substantially contributed to the miner's death at 20 C.F.R. §718.205(c) in order to establish entitlement to survivor's benefits. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Evidence that pneumoconiosis hastened the miner's death is sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death. *See* 20 C.F.R. §718.205(c)(2), (c)(5); *Peabody Coal Co. v. Director, OWCP, [Railey]* 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Claimant challenges the administrative law judge's finding with respect to Section 718.205(c)(2000). The administrative law judge found that the record contained five relevant medical opinions, by Drs. Pflasterer, Long and Cander and including the opinions of Coroner Neil V. Birchler and Professor David Goldsmith, Ph. D.⁴ Decision and Order at 4-9.⁵ The

⁴No party has challenged the administrative law judge's weighing of the opinion of Dr. Long pursuant to 20 C.F.R. §718.205(c)(2000). We affirm this finding as unchallenged on appeal. *See Coen, supra; Skrack, supra.*

⁵The administrative law judge referred to Neil V. Birchler throughout the Decision and

administrative law judge initially noted a death certificate by Neil V. Birchler. He correctly found that Coroner Birchler issued a death certificate dated October 17, 1996, wherein he stated that the miner died as a result of carcinoma of the lung with metastasis, and listed essential vascular hypertension as a contributing cause of the miner's death. Director's Exhibit 4. He further found that in February of 2000, the coroner issued a "corrected" death certificate, based upon information given to the him by Dr. Pflasterer. The administrative law judge found the "corrected" death certificate similar to the original death certificate, but amended to include the statement that pneumoconiosis was a significant condition contributing to death. Claimant's Exhibit 1. The administrative law judge permissibly discounted Coroner Birchler's opinion, as he found it to be, *inter alia*, unreasoned, on the basis that Coroner Birchler failed to provide an adequate basis for amending the original death certificate. *See Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Director, OWCP*, 12 BLR 1-11 (1988); Decision and Order at 8-9. Further, the administrative law judge permissibly discounted Coroner Birchler's opinion, within his discretion, on the basis that it was unsupported by the evidence of record, having been based exclusively upon Dr. Pflasterer's opinion, which the administrative law judge also discounted. *See discussion, infra* at 4-5; *Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1- 39 (1985). We affirm, therefore, the administrative law judge's determination to accord the opinion of Coroner Birchler, as contained in his "corrected" death certificate, less weight.

Next, the administrative law judge considered the opinion of Dr. Pflasterer. Dr. Pflasterer initially opined that the miner's death was due to carcinoma of the lung. Director's Exhibit 6. Later, on May 30, 1997, Dr. Pflasterer stated that the miner's pneumoconiosis was a "likely contributor" to his demise. Director's Exhibit 14. Finally, on October 7, 1997, Dr. Pflasterer opined that the miner's chronic lung condition contributed to and hurried the miner's demise due to non small cell carcinoma of the lung. Director's Exhibit 22. The administrative law judge permissibly discounted Dr. Pflasterer's opinion on the basis that it was equivocal, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). In addition, the administrative law judge permissibly discounted the opinion because he found it to be unreasoned, as the doctor failed to explain his rationale for changing his prior opinions. *See Pettry, supra*; *Clark, supra*; *Tackett, supra*. The administrative law judge also permissibly discounted Dr. Pflasterer's opinion on the basis that it was unsupported by the evidence of record, as the doctor failed to account for the miner's extensive smoking history and provided no objective support for his conclusion. *See Decision and Order at 8; Cochran, supra; McMath, supra; Wetzel, supra.*

Order as "Dr. Birchler". The record indicates, however, that Coroner Birchler is not a licensed physician. Director's Exhibit 4; Claimant's Exhibit 1.

We affirm therefore, the administrative law judge's determination to discount Dr. Pflasterer's opinion as to the miner's cause of death.

Further, the administrative law judge considered the opinion of Professor David Goldsmith, Ph. D., who opined that the miner's fibrotic lung disease from exposure to silica dust was "more likely than not" the cause of the miner's lung cancer and a significant cause of the miner's death. Claimant's Exhibit 1. The administrative law judge permissibly discounted this opinion on the basis that it was equivocal, *see Justice, supra; Campbell, supra*, and that it was unreasoned and undocumented,⁶ *See Pettry, supra; Clark, supra; Tackett, supra*. Moreover, the administrative law judge permissibly found that since Professor Goldsmith was not a medical doctor, he was not qualified to render an opinion as to the miner's cause of death. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-133 (1986). We affirm, therefore, the administrative law judge's determination to discount the opinion of Professor Goldsmith.

The administrative law judge credited the opinion of Dr. Cander, who opined that the miner's death was due to lung cancer caused by his 75 pack- year smoking history and his exposure to asbestos. Director's Exhibit 23. We hold that the administrative law judge permissibly credited Dr. Cander's opinion on the basis that his was the best reasoned, well documented, *See Pettry, supra; Clark, supra; Tackett, supra*, and because it was supported by the objective evidence of record. *See Cochran, supra; McMath, supra; Wetzel, supra*; Decision and Order at 8. The record reflects that Dr. Cander reviewed all of the relevant records associated with the survivor's claim, considered an accurate coal mine employment history of four and one half years, and carefully explained all of his conclusions, with citations to medical literature. We therefore affirm the administrative law judge's determination to credit Dr. Cander's opinion.⁷ *See* 20 C.F.R. § §718.205(c)(2), (c)(5).⁸

⁶Dr. Goldsmith did not explain his opinion in light of the miner's seventy-five pack year smoking history, or cite any objective evidence which supported his conclusion. Claimant's Exhibit 1.

⁷We reject claimant's contention that Dr. Cander's opinion should be discounted on the basis of bias since the identity of the party who hires a medical expert does not, by itself, demonstrate a bias on the part of that medical expert. *See Urgolities v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992).

⁸ We decline to address claimant's arguments regarding the administrative law judge's alleged error concerning the timely filing of an appeal of Administrative Law Judge Tierney's September 23, 1998 decision, and his alleged mischaracterization of certain blood gas studies in the miner's claim, as they are not relevant to the determination of whether the

As the administrative law judge permissibly discounted all of the evidence of record which is supportive of a finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), we affirm the administrative law judge's finding that the evidence fails to establish death due to pneumoconiosis at Section 718.205(c)(2000), and thereby, is insufficient to establish a mistake in a determination of fact pursuant to Section 725.310(a)(2000). *See* 20 C.F.R. §718.205(c); 20 C.F.R. §725.310(a)(2000).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

evidence establishes death due to pneumoconiosis pursuant to Section 718.205(c). *See Cochran v. Director, OWCP*, 16 BLR 1-101 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1- 39 (1985).