

BRB No. 01-0964 BLA

AGNES L. CATALDO)
(Widow of ERNEST CATALDO))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED:
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld Schiller & Holmes), Pittsburgh, Pennsylvania, for claimant.

Helen H. Cox (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (00-BLA-1032) of Administrative Law Judge Richard A. Morgan (the administrative law judge) on a survivor's claim¹ 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 This case is before the Board for

¹Claimant, the miner's widow, filed the instant claim on May 17, 1996. Director's Exhibit 1. The miner's death certificate indicates that he died on March 16, 1996 due to cardiogenic shock due to or as a consequence of acute inferior myocardial infarction and coronary artery disease. Director's Exhibit 5.

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

the second time. The Board, in *Cataldo v. Director, OWCP*, BRB No. 98-0677 BLA (April 20, 1999)(unpublished), affirmed the administrative law judge's denial of survivor's benefits based on claimant's failure to present any evidence to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c) (2000) and pursuant to *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Director's Exhibit 33. The Board subsequently denied claimant's Motion for Reconsideration. Director's Exhibit 35. Claimant timely sought modification of the Board's decision and submitted additional evidence, including medical reports from the miner's final hospitalization and Dr. Hansbarger's reviewing pathology report dated August 23, 1999. Director's Exhibits 36, 38. The Director, Office of Workers' Compensation Programs (the Director), submitted Dr. Perper's medical report dated January 2, 2001. Director's Exhibits 44, 45. The district director denied claimant's request for modification under 20 C.F.R. §725.310 (2000),³ and a hearing was held before the administrative law judge pursuant to claimant's request. Director's Exhibits 39, 40. In the ensuing Decision and Order, the administrative law judge found that there had been no mistake in a determination of fact in the prior denial under 20 C.F.R. §725.310 (2000). On the merits of the claim, the administrative law judge initially noted that it is undisputed that the miner had simple coal workers' pneumoconiosis which arose out of his coal mine employment. Decision and Order at 8; *see* 20 C.F.R. §§718.202, 718.203. He also found that the evidence relevant to the cause of the miner's death was insufficient to establish that the miner's coal workers' pneumoconiosis was a substantially contributing cause of his death under the revised regulation at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied claimant's request for modification and the claim.

On appeal, claimant contends that the administrative law judge's finding that claimant has not met her burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c) or to establish modification of the prior denial, is not supported by substantial evidence. Claimant thus urges the Board to reverse the administrative law judge's denial of

on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

benefits. The Director responds, and urges affirmance of the decision below as supported by substantial evidence.

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

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, such as in the instant case, 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. §§718.201, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Pursuant to the revised regulation at 20 C.F.R. §718.205(c)(5), 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). In the instant case, it is undisputed that the miner had pneumoconiosis which arose out of his coal mine employment. Decision and Order at 8; *see also* Director's Exhibit 42. Thus, claimant must establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c).

Claimant contends that the administrative law judge's denial of modification and of the claim for survivor's benefits is not supported by substantial evidence and cannot stand. The administrative law judge found, based on his review of the record evidence, that there was no mistake in a determination of fact in the prior denial under 20 C.F.R. §725.310 (2000). The administrative law judge also found that there was no evidence of record showing that the miner's death was related to his coal workers' pneumoconiosis. Specifically, he indicated:

I have carefully reviewed all the evidence in this matter including that summarized in my earlier Decision and Order. Once again, there is *no* evidence that the death of this seventy-year old man who had worked five years (45 years earlier) as a coal miner was related to coal workers' pneumoconiosis as defined by the Act and regulations. As the [sic] Dr. Perper pointed out, his lifetime symptoms were consistent with his cardiac affliction, CAD, and centrilobular emphysema. It is proven that his centrilobular emphysema was not a result of his brief period of exposure to coal mine dust, but rather his history of heavy smoking. Although Mr. Cataldo had mild, simple, CWP, he continued working for 36 years after he left the mines and it

is proven the CWP was far too mild to have contributed to or hasten [sic] his death.

I find that the evidence does not establish pneumoconiosis was a substantially contributing cause of death. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Decision and Order at 10. Claimant argues that Dr. Perper's opinion, that coal workers' pneumoconiosis and significant exposure to mixed coal mine dust containing silica *can* result in centrilobular emphysema, *see* Director's Exhibit 44 at 11, together with the evidence of pneumoconiosis found on autopsy, supports findings that (1) exposure to coal mine dust played a role in the development of the miner's centrilobular emphysema, and (2) that the miner's coal workers' pneumoconiosis played a role in his respiratory ailments. Claimant argues that in finding that the miner's coal workers' pneumoconiosis was not a substantially contributing factor in his death, the administrative law judge "misapprehended and misinterpreted the evidence concerning Mr. Cataldo's condition and improperly utilized the medical opinions of record in exploring the effect of pneumoconiosis on this gentleman's total physical condition." Claimant's Brief at 6. Claimant further asserts that the record shows that the miner's coal workers' pneumoconiosis compromised his lung tissue and thus supports a finding of modification of the prior denial and an award of survivor's benefits.

Claimant's contentions lack merit. The administrative law judge properly analyzed the relevant evidence to determine whether it was sufficient to meet claimant's burden to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c), and thereby sufficient to establish modification of the prior denial under 20 C.F.R. §725.310 (2000). The administrative law judge correctly noted that under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, and that pursuant to the revised regulation at 20 C.F.R. §718.205(c)(5), pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* Decision and Order at 9-10. Further, while Dr. Perper indicated that the "bulk of scientific literature in recent years has substantiated that coal workers' pneumoconiosis and significant exposure to mixed coal mine dust containing silica can result in centrilobular emphysema, he explained:

However, in this particular case one can confidently exclude a causal relationship between coal workers' pneumoconiosis and exposure to mixed coal mine dust and the development of centrilobular emphysema. The reason is that Mr. Cataldo's macular simple coal workers' pneumoconiosis was too slight to cause centrilobular emphysema. It is very obvious that the pneumoconiotic process was too mild, to reasonably opine that it resulted in any significant degree of centrilobular emphysema, if at all.

Director's Exhibit 44 at 11. Dr. Perper actually attributed the miner's centrilobular emphysema to his "long standing history of heavy smoking" and did not opine that the miner's centrilobular emphysema played any role in his death. *Id.* Rather, Dr. Perper stated that the miner's death was due to "acute myocardial infarction, of 2-3 days old, on the background of severe coronary artery disease with an old myocardial infarction," *Id.*, and that the miner's simple coal workers' pneumoconiosis was too mild to have either directly or indirectly caused, contributed to or hastened his death from acute myocardial infarction and coronary artery disease. *Id.* at 10. Thus, Dr. Perper's pathology report does not support claimant's burden at 20 C.F.R. §718.205(c).⁴

Based on the foregoing, we hold that substantial evidence supports the administrative law judge's finding that claimant did not meet her burden to establish death due to

⁴The remaining newly submitted medical evidence relevant to the cause of death, other than Dr. Perper's pathology report, does not link the miner's death to his coal workers' pneumoconiosis or coal workers' pneumoconiosis. Specifically, the medical reports from the miner's last hospitalization contain final diagnoses of cardiogenic shock, acute inferior myocardial infarction, coronary artery disease and diabetes mellitus. Director's Exhibit 38. While Dr. Reese, in a related report dated March 16, 1996, referred to the miner as having a "known history of black lung secondary to mine employment," he did not link the miner's death with black lung disease or any condition related to the miner's coal mine employment. *Id.* Rather, Dr. Reese detailed the emergency room physicians' efforts in response to the miner's "[c]ardiac arrest with complete heart block and ventricular escape rhythm." *Id.* Dr. Hansbarger, in his reviewing pathology report dated August 23, 1999, opined that the miner died as a result of atherosclerotic coronary heart disease, and did not render any opinion as to what role the miner's coal workers' pneumoconiosis played in his death. *Id.*

pneumoconiosis under 20 C.F.R. §718.205(c) and, thereby, to establish a mistake in a determination of fact in the prior denial under 20 C.F.R. §725.310 (2000). Accordingly, we affirm the administrative law judge's findings at 20 C.F.R. §718.205(c) and 20 C.F.R. §725.310 (2000), and further affirm his denial of claimant's request for modification and the claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge