

BRB Nos. 09-0529 BLA  
and 09-0529 BLA-A

|                               |   |                         |
|-------------------------------|---|-------------------------|
| SANDRA COLEGROVE              | ) |                         |
| (Widow of FREDDIE COLEGROVE)  | ) |                         |
|                               | ) |                         |
| Claimant-Petitioner           | ) |                         |
|                               | ) |                         |
| v.                            | ) |                         |
|                               | ) |                         |
| ISLAND CREEK COAL COMPANY     | ) | DATE ISSUED: 04/28/2010 |
|                               | ) |                         |
| 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.

Leonard Stayton, Inez, Kentucky, for claimant.

Douglas A. Smoot and William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals, and employer cross-appeals, the Decision and Order on Modification – Denying Benefits (2008-BLA-18) of Administrative Law Judge Richard A. Morgan rendered on a request for modification of the denial of her survivor's claim

---

<sup>1</sup> Claimant is the widow of the miner, whose award of lifetime benefits became final on September 27, 1991. Director's Exhibits 1, 5, 27. The miner died on August 21, 1999, and claimant filed her survivor's claim on September 23, 1999.

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>2</sup> This case is before the Board for the second time. In a Decision and Order issued on June 11, 2003, Administrative Law Judge Daniel L. Leland accepted employer's concessions that the miner established thirty-eight years of qualifying coal mine employment and had simple pneumoconiosis arising out of coal mine employment. Judge Leland rejected claimant's argument that, because the miner was determined to be totally disabled due to pneumoconiosis in his lifetime claim, the doctrine of collateral estoppel was applicable to preclude consideration of any medical opinion on the cause of the miner's death where the doctor found that the miner's pneumoconiosis caused no significant pulmonary impairment. Judge Leland then found that the evidence of record was insufficient to establish either that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), or that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, benefits were denied. Director's Exhibit 58.

On appeal, the Board affirmed Judge Leland's determination that the doctrine of collateral estoppel was inapplicable under the facts of this case, and affirmed his findings that the evidence was insufficient to establish either that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), or that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304. Accordingly, the Board affirmed Judge Leland's denial of survivor's benefits. Director's Exhibit 67; *Colegrove v. Island Creek Coal Co.*, BRB No. 03-0630 BLA (May 26, 2004) (unpub.). Upon claimant's appeal to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, the Court affirmed the decision of the Board.<sup>3</sup> Director's Exhibit 72. Claimant subsequently filed a timely modification petition on January 14, 2008, pursuant to 20 C.F.R. §725.310 (2000), and submitted additional evidence.<sup>4</sup> Director's Exhibit 73. The case was assigned to Administrative

---

<sup>2</sup> The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the survivor's claim herein was filed before January 1, 2005.

<sup>3</sup> The law of the United States Court of Appeals for the Fourth Circuit is applicable, 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 Exhibit 2.

<sup>4</sup> The former version of the regulation, found at 20 C.F.R. §725.310 (2000), applies to the survivor's claim herein, as it was filed prior to, and was pending on, January 19, 2001, the effective date of the revised regulation at 20 C.F.R. §725.310. *See* 20 C.F.R. §725.2.

Law Judge Richard A. Morgan (the administrative law judge), who found that the evidence submitted in support of modification, considered in conjunction with the earlier evidence, was insufficient to establish either the existence of complicated pneumoconiosis pursuant to Section 718.304, or death due to pneumoconiosis pursuant to Section 718.205(c). Finding that claimant established no mistake in a determination of fact pursuant to Section 725.310 (2000), the administrative law judge denied claimant's request for modification, and denied benefits.

In the present appeal, claimant challenges the administrative law judge's determination that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), contending that the administrative law judge erred in failing to apply the doctrine of collateral estoppel in weighing the conflicting medical opinions of record. Employer responds, urging affirmance of the denial of benefits, and cross-appeals, arguing, in the alternative, that the reports of Drs. Takubo and Kahn should have been excluded from the record due to claimant's failure to exercise diligence in obtaining the reports.<sup>5</sup> The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this case.<sup>6</sup>

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. 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).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made. *Wojtowicz v. Duquesne Light Company*, 12 BLR 1-162, 1-164 (1989). The modification procedure allows for the review of factual errors in an effort to render justice under the Act by vesting the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

---

<sup>5</sup> Employer concedes that its arguments on cross-appeal need not be reached if the Board affirms the administrative law judge's denial of benefits. Employer's Brief at 25.

<sup>6</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that the weight of the evidence was insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Initially, we reject claimant's argument that the doctrine of collateral estoppel is applicable in this case to preclude consideration of a doctor's report regarding the cause of the miner's death, if the doctor also found that the miner's pneumoconiosis was not totally disabling. Claimant's Brief at 11-14. The Board addressed this argument in claimant's last appeal, and held that Judge Leland correctly determined that the doctrine of collateral estoppel was inapplicable because the issue of total disability was not identical to the issue of the cause of the miner's death, the relevant issue in the survivor's claim. *Colegrove*, slip op. at 3. Because claimant has not set forth any valid exception to the law of the case doctrine, we adhere to our previous holding regarding this issue. See *U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

Claimant next maintains that the administrative law judge should have found that the newly submitted opinions of Drs. Kahn and Takubo, along with the earlier opinion of Dr. Grey, were sufficient to establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death pursuant to Section 718.205(c), consistent with *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Claimant asserts that these were the only medical opinions of record consistent with the finding of total disability due to pneumoconiosis in the miner's claim. Thus, claimant contends that the administrative law judge erred in according greater weight to the contrary opinions of Drs. Zaldivar, Castle, Ghio, Spagnolo, and Fino, that the miner's death was caused by complications of lung cancer unrelated to coal dust exposure, and that pneumoconiosis had no significant effect on the miner's condition. Claimant's Brief at 14-16. Claimant's arguments are without merit.

In finding the evidence of record insufficient to establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death pursuant to Section 718.205(c), the administrative law judge incorporated, by reference, the summary of evidence contained in Judge Leland's Decision and Order dated June 11, 2003, and accurately summarized the newly submitted evidence on modification. Decision and Order at 5-10. The administrative law judge acted within his discretion in finding no mistake in a prior determination of fact, as he concurred with Judge Leland's finding, as affirmed by the Board, that the opinion of Dr. Grey was undocumented, unreasoned, and outweighed by the remaining medical opinions concluding that pneumoconiosis was not a contributing cause of the miner's death. Decision and Order at 13, n.13, 14-15. In reviewing the newly submitted evidence, the administrative law judge determined that Dr. Takubo based his opinion, that the miner had pneumoconiosis and a severe pulmonary impairment, on pictures of the miner's lungs showing black pigmentation on the lung surfaces; pulmonary function studies showing severe obstructive defects; multiple hospital admissions for respiratory failure/recurrent basilar pneumothoracies; and the opinion of the miner's pulmonologist, that he was totally disabled. Dr. Takubo

further opined that lung cancer did not cause the miner's death because there were no signs of active malignancy during the miner's final hospitalization, noting Dr. Grey's opinion, that the miner's death was a direct consequence of coal workers' pneumoconiosis and respiratory failure.<sup>7</sup> Decision and Order at 12-13; Claimant's Exhibit 2. Finding that Dr. Takubo failed to explain how pneumoconiosis was a contributing cause of the miner's death, the administrative law judge permissibly found that Dr. Takubo's opinion was conclusory, not well-reasoned, and entitled to diminished weight.<sup>8</sup> Decision and Order at 13; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Similarly, in evaluating Dr. Kahn's opinion,<sup>9</sup> the administrative law judge determined

---

<sup>7</sup> The administrative law judge noted that Dr. Takubo never directly stated that the miner's death was due to pneumoconiosis, but rather, opined that "pathology from this direct lung biopsy revealed a large anthocotic [sic] macule consistent with complicated coal workers' pneumoconiosis." Claimant's Exhibit 2. Dr. Takubo further stated that, during the miner's final hospitalization, "repeat CT scans and pathology obtained from a repeat bronchoscopy confirmed his cancer to be in regression . . . I strongly feel that [the miner's] black lung benefits should be rightfully restored." *Id.* Thus, the administrative law judge liberally construed Dr. Takubo's statements to mean that the miner had coal workers' pneumoconiosis and that the miner's death was due to pneumoconiosis. Decision and Order at 12, n.11.

<sup>8</sup> The administrative law judge additionally noted that, because no autopsy was performed, Dr. Takubo could not conclusively state that the miner's death was not due to lung cancer, and he failed to explain how the severity of pneumoconiosis could be measured by the extent of black pigment in the lungs. As Dr. Takubo did not address the miner's smoking history, was not a pulmonary specialist, and did not review the extensive medical data and history considered by Drs. Zaldivar, Castle, Ghio, Spagnolo and Fino, the administrative law judge properly concluded that Dr. Takubo had a less complete picture of the miner's health when forming his opinion. Decision and Order at 14; see *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

<sup>9</sup> Dr. Kahn, a Board-certified pathologist, diagnosed coal workers' pneumoconiosis as well as other "significant disease processes" and opined, in part, that:

From a pathophysiologic standpoint, multiple disease processes act synergistically when they are present, so that the effect of any one abnormal process is multiplied by the presence of the others. In a circumstance in which only one process is present, it may not be of sufficient degree to be clinically relevant. However, when multiple disease processes are involved, the presence of each has greater import because of the adverse

that the physician indicated that the miner's pneumoconiosis and other significant disease processes acted synergistically to affect his respiratory function. However, as Dr. Kahn failed to explain, with particularity, how he determined that the miner's disease processes were affecting each other, how pneumoconiosis contributed to the miner's death, and how the underlying documentation supported his conclusions, the administrative law judge acted within his discretion in finding that Dr. Kahn's opinion was based on generalities, and thus, was unreasoned and entitled to little weight. Decision and Order at 14; Claimant's Exhibit 1; *see Hicks*, 138 F.3d at 532-533 n.9, 21 BLR at 2-335 n.9; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). By contrast, the administrative law judge determined that Drs. Zaldivar, Castle, Ghio, Spagnolo, and Fino all possessed superior qualifications as Board-certified internists and pulmonary specialists, and that they reviewed extensive medical documentation, including the reports of Drs. Tabuko and Kahn, before explaining that simple pneumoconiosis, while present, was not a significant contributor to the miner's death. Decision and Order at 14; Employer's Exhibits 1, 3, 5, 6, 7, 8, 9. Finding that the opinions of Drs. Zaldivar, Castle, Ghio, Spagnolo, and Fino were well-reasoned and persuasive, the administrative law judge properly concluded that they were entitled to greater weight. Decision and Order at 14; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

Because the administrative law judge permissibly discounted the only medical opinion evidence of record supportive of claimant's burden, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), as supported by substantial evidence. Consequently, we affirm the administrative law judge's denial of modification and survivor's benefits, and need not reach employer's arguments on cross-appeal. *See* 20 C.F.R. §725.310 (2000); *O'Keeffe*, 404 U.S. at 257; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993); *Wojtowicz*, 12 BLR at 1-164.

---

synergistic effects. Thus, it is only reasonable to conclude that each disease process that was present in the lungs did significantly contribute to [the miner's] pulmonary disability and to his death.

Claimant's Exhibit 1.

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