

BRB No. 11-0493 BLA

SUE C. BELILES)
(Widow of JACKIE WAYNE BELILES))
)
 Claimant-Respondent)
)
 v.)
)
 PITTSBURGH & MIDWAY COAL)
 MINING COMPANY) DATE ISSUED: 04/19/2012
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John C. Morton (Morton Law LLC), Henderson, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Modification and Awarding Benefits (2008-BLA-5911) of Administrative Law Judge Joseph E. Kane (the administrative law judge) rendered 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).¹ This case involves claimant's request for modification of the denial of a survivor's

¹ Because the survivor's claim was filed before January 1, 2005, recent amendments to the Act do not affect this case. *See* Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l)).

claim filed on August 24, 2004. Director's Exhibit 3. Initially, the claim was denied by Administrative Law Judge Jeffrey Tureck on November 21, 2007, because claimant did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 62-2. Claimant timely requested modification, *see* 20 C.F.R. §725.310, which the district director denied because claimant failed to establish a mistake in the prior determination that she was not entitled to benefits. Director's Exhibits 38, 68-4. Claimant requested a hearing, and the case was assigned to the administrative law judge. Director's Exhibit 70.

In his decision, the administrative law judge found that the miner worked in underground coal mine employment from 1975 until 1998, and he applied the doctrine of collateral estoppel to preclude employer from relitigating the issue of the existence of pneumoconiosis arising out of coal mine employment, which the miner had established in his successful claim for benefits.² The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and, therefore, established a mistake in the prior determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge granted claimant's request for modification, and awarded benefits.

On appeal, employer argues that the administrative law judge erred in his length of coal mine employment determination. Employer also contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.³

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.⁴ 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).

² At the time of his death, the miner was receiving federal black lung benefits pursuant to an administrative law judge's award on his lifetime claim. Director's Exhibit 1.

³ We affirm, as unchallenged, the administrative law judge's determination that claimant established the existence of pneumoconiosis, arising out of coal mine employment, through the application of the doctrine of collateral estoppel. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United

Employer initially asserts that the administrative law judge erred in finding that the miner worked in underground coal mine employment from 1975 until 1998, for a total of twenty-three years. We agree. The record reflects that the miner worked underground from 1975 to 1979, worked in a surface mine from 1980 to 1985, and he again worked in underground mining from 1995 to 1998, for a total of approximately fourteen years of coal mine employment. Director's Exhibit 4. Employer has failed to explain how the administrative law judge's misstatement was "materially prejudicial" to employer. Employer's Brief at 5. The administrative law judge found the existence of legal pneumoconiosis established by collateral estoppel, and employer does not challenge that finding. Moreover, Dr. Houser, whose opinion the administrative law judge credited to find that legal pneumoconiosis hastened the miner's death, relied on a history of thirteen years of mixed underground and surface coal mine employment, consistent with the record. Claimant's Exhibit 1. We therefore hold that the administrative law judge's error regarding the length of the miner's coal mine employment was harmless. See *Shinseki v. Sanders*, 556 U.S. 396, 413, 129 S.Ct. 1696, 1708 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

We next address employer's contentions of error regarding the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). 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(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, but on or before January 1, 2005, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

A party may request modification of an award or denial of benefits within one year of the prior decision. 20 C.F.R. §725.310(a). 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

States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record as a whole on modification, an administrative law judge is authorized “to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” See *O’Keeffe v. Aerojet- General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). In this case, the administrative law judge considered whether there was a mistake in a determination of fact regarding Judge Tureck’s finding that the evidence did not establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

The administrative law judge considered the miner’s medical treatment records and death certificate, together with the medical report of Dr. Amundson, the miner’s treating physician, and the reports of Drs. Rasmussen, Houser, and Selby. The miner’s medical treatment records do not address the cause of the miner’s death. Director’s Exhibits 17, 18. The miner’s death certificate, completed by a coroner, lists the immediate cause of death as cancer of the liver and lung, with pneumoconiosis listed as a significant condition contributing to death. Director’s Exhibit 13. Drs. Amundson, Rasmussen, and Houser also opined that pneumoconiosis contributed to or hastened the miner’s death. Director’s Exhibit 15; Claimant’s Exhibits 1, 2. In contrast, Dr. Selby opined that the miner did not suffer from pneumoconiosis, and, therefore, that pneumoconiosis did not contribute to his death. Employer’s Exhibit 1.

The administrative law judge noted that the United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis only “hastens” a death if it does so through a specifically defined process that reduces the miner’s life by an estimable time. Decision and Order at 9, citing *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The administrative law judge further noted that the Sixth Circuit has held that a medical opinion, that pneumoconiosis makes someone weaker, and therefore less resistant to some other trauma, is legally insufficient to satisfy the “hastening” standard. Decision and Order at 10, citing *Conley v. Nat’l Mines Corp.*, 595 F.3d 297, 303, 24 BLR 2-257, 2-266 (6th Cir. 2010).

The administrative law judge found that Dr. Houser’s opinion was reasoned and sufficient to establish that pneumoconiosis hastened the miner’s death.⁵ Decision and Order at 9, 12. In contrast, the administrative law judge discredited the opinion of Dr. Selby, that the miner’s death was not due to pneumoconiosis, because he opined that the

⁵ The administrative law judge discounted the miner’s death certificate, and the opinions of Drs. Rasmussen and Amundson, for reasons that we need not discuss in order to address the arguments that employer raises on appeal. Decision and Order at 8-10.

miner did not suffer from pneumoconiosis, contrary to the administrative law judge's finding.⁶ Decision and Order at 10-11. The administrative law judge determined that the miner's treatment notes lacked probative value because they are "silent on the issue of death causation." Decision and Order at 8. The administrative law judge, therefore, found that the evidence established that the miner's death was due to pneumoconiosis. Decision and Order at 12.

Employer argues that the administrative law judge erred in discounting the miner's medical treatment notes as not probative on the issue of death causation. Employer's Brief at 5-8. Employer contends that the miner's treatment notes document his treatment for multiple medical conditions, and illustrate that the effects of pneumoconiosis did not concern the miner's treating physicians.⁷ Employer's Brief at 5-7. We disagree. The miner's treatment notes document his treatment from April 24, 2000 to April 10, 2001 for multiple medical conditions, and from January 9, 2004 to June 22, 2004, primarily for metastatic small cell carcinoma of the lung. However, as there are no treatment records addressing the cause of the miner's death on July 8, 2004, the administrative law judge acted within his discretion in concluding that the records were of little probative value in determining whether legal pneumoconiosis hastened the miner's death from metastatic lung cancer. See *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Employer also argues that the administrative law judge erred in his consideration of Dr. Houser's opinion. Employer asserts that Dr. Houser's opinion is speculative, and too general to establish that pneumoconiosis hastened the miner's death, pursuant to the standard articulated by the Sixth Circuit. Employer's Brief at 8-12. We disagree.

The administrative law judge noted that Dr. Houser testified that he examined the miner on May 29, 2002, and reviewed his hospital treatment records, the death certificate, and the report of Dr. Amundson. Decision and Order at 9; Claimant's Exhibit 1 at 21-24.

⁶ As employer does not challenge the administrative law judge's decision to discount the opinion of Dr. Selby, it is affirmed. *Skrack*, 6 BLR at 1-711.

⁷ The treatment records from 2000 to 2001 include treatment for chronic obstructive pulmonary disease (COPD), bronchitis, hypothyroidism, myxedema, pulmonary hypertension, hypoxemia, probable pneumonia, and asthma, and document a history of congestive heart failure, pacemaker implantation, and mixed edematous coma. The treatment notes from 2004 largely document the diagnosis and treatment of the miner's metastatic small cell carcinoma of the lung, in addition to COPD, hypothyroidism, and other, non-pulmonary conditions. Director's Exhibits 17, 18.

Dr. Houser testified that, in addition to lung cancer, the miner suffered from legal pneumoconiosis,⁸ in the form of oxygen dependent COPD, emphysema, and chronic bronchitis all due, in part, to coal mine dust exposure. Claimant's Exhibit 1 at 22, 27-28. Dr. Houser opined that the miner's COPD, emphysema, and bronchitis were severe, life threatening pulmonary conditions. Claimant's Exhibit 1 at 27-28. The administrative law judge noted that, while Dr. Houser acknowledged that lung cancer was the primary cause of the miner's death, the doctor opined that due to these additional respiratory conditions, the miner's lungs were already in a weakened state when he developed lung cancer, which "certainly diminishe[d]" his life expectancy.⁹ Decision and Order at 9; Claimant's Exhibit 1 at 30-31.

The administrative law judge noted further that Dr. Houser explained his opinion that pneumoconiosis hastened the miner's death by an estimable time by stating that the miner "survived from January to July, roughly six months, with lung cancer. The average person with lung cancer survives probably around 12 months, so his . . . life expectancy was significantly less than . . . the average person with lung cancer."¹⁰ Decision and Order at 9; Claimant's Exhibit 1 at 31. Thus, Dr. Houser concluded that legal pneumoconiosis hastened the miner's death by approximately six months. Claimant's Exhibit 1 at 31. Dr. Houser added that legal pneumoconiosis contributed to the miner's death regardless of the other co-existing factors documented in the miner's treatment records. The administrative law judge noted that Dr. Houser summarized his opinion, stating that legal pneumoconiosis was "a significant contributing factor . . . complicating [the miner's] treatment and contributing to a premature death even though he had cancer." Claimant's Exhibit 1 at 72.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

⁸ Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁹ More specifically, Dr. Houser explained that "[t]he presence of lung disease limits the ability of the person to be able to overcome other problems, including pneumonia, bronchitis and certainly lung cancer. It complicates the treatment." Claimant's Exhibit 1 at 29.

¹⁰ In support of his opinion, Dr. Houser submitted a medical study documenting the shorter survival times of cancer patients who had COPD. Claimant's Exhibit 1.

Contrary to employer's arguments, the administrative law judge acted within his discretion in finding that Dr. Houser's opinion, that pneumoconiosis "certainly diminish[e]d" the miner's life expectancy, by approximately six months, was reasoned, and sufficiently specific to establish that pneumoconiosis hastened the miner's death because it specified the method, and estimated the time, by which legal pneumoconiosis hastened death. *See Conley*, 595 F.3d at 303, 24 BLR at 2-266; *Williams*, 338 F.3d at 518, 22 BLR at 2-655; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 9, 12. Substantial evidence supports the administrative law judge's findings. Therefore, we reject employer's argument that the administrative law judge erred in finding that Dr. Houser's opinion was sufficient to establish that pneumoconiosis hastened the miner's death. *See Conley*, 595 F.3d at 303, 24 BLR at 2-266; *Martin*, 400 F.3d at 306, 23 BLR at 2-285. We, therefore, affirm the administrative law judge's determination to grant claimant's request for modification and award survivor's benefits. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

Accordingly, the administrative law judge's Decision and Order Granting Modification and Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge