

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 15-0329 BLA

REBECCA JEAN RILEY)
(Widow of ROBERT RAY RILEY))
)
 Claimant-Petitioner)
)
 v.)
)
 ISLAND CREEK COAL COMPANY)
 c/o WELLS FARGO DISABILITY)
 MANAGEMENT)
) DATE ISSUED: 04/18/2016
 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 of Adele Higgins Odegard,
Administrative Law Judge, United States Department of Labor.

Daniel K. Evans and Timothy C. MacDonnell (Black Lung Legal Clinic,
Washington and Lee University School of Law), Lexington, Virginia, for
claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for
employer.

Before: BOGGS, BUZZARD, and ROLFE, Administrative Appeals
Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (2012-BLA-05786) of Administrative Law Judge Adele Higgins Odegard denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's third request for modification of the denial of a survivor's claim filed on December 11, 2002.² Director's Exhibit 3.

In the initial Decision and Order, Administrative Law Judge Daniel L. Leland credited the miner with forty-two years of coal mine employment³ and noted that the case involved a petition for modification.⁴ Judge Leland found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), but did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Leland denied benefits. Director's Exhibit 77. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *R.J.R. [Riley] v. Island Creek Coal Co.*, BRB No. 07-0579 BLA (Mar. 21, 2008) (unpub.); Director's Exhibit 66.

Claimant filed a second request for modification on May 5, 2008, and submitted a report written by Dr. Kahn in support of her request. Director's Exhibit 67. Administrative Law Judge Michael P. Lesniak found that claimant did not establish a

¹ Claimant is the widow of the miner, who died on December 3, 2002. Director's Exhibit 9. The miner filed an application for benefits on May 31, 1973, which was denied on September 3, 1980. Director's Exhibit 1. Claimant filed her survivor's claim on December 11, 2002. Director's Exhibit 3.

² Because this claim was filed before January 1, 2005, amendments to the Act that became effective on March 23, 2010, and which establish a rebuttable presumption in certain cases that a miner's death or disability was due to pneumoconiosis, do not apply to this case.

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 6.

⁴ Claimant's application for benefits was denied by the district director on March 23, 2004, because the evidence did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 30. In a letter to the district director dated November 12, 2004, claimant submitted a report written by Dr. Perper, and stated that "this evidence is to support my request for modification." Director's Exhibit 32.

mistake in a determination of fact in the previous decision. *See* 20 C.F.R. §725.310. Accordingly, Judge Lesniak denied benefits.

Claimant filed her third and current request for modification on November 3, 2010, and submitted a report written by Dr. Green in support of her request. Director's Exhibits 83, 93, 106. In a Proposed Decision and Order dated May 9, 2012, the district director found that claimant established that pneumoconiosis hastened the miner's death, thereby demonstrating a mistake of fact in the previous determination. Director's Exhibits 109-111. The district director therefore proposed modification of the prior decision and, at employer's request, forwarded the case to the Office of Administrative Law Judges for a hearing. Director's Exhibits 111, 113.

In a Decision and Order dated May 8, 2015, Administrative Law Judge Adele Higgins Odegard (the administrative law judge) found that the miner had clinical pneumoconiosis⁵ arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), (4); 718.203(b), as well as legal pneumoconiosis,⁶ in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to both coal mine dust exposure and cigarette smoking, pursuant to 20 C.F.R. §718.201(a)(2). Decision and Order at 6, 22. The administrative law judge further found, however, that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).⁷ Decision and Order at 5, 25. The administrative law judge, therefore, found that the evidence did not establish a mistake in the determination of the ultimate

⁵ "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. §718.201(a)(1).

⁶ "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).

⁷ The Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. Thus, the provisions that were applied by Administrative Law Judges Daniel L. Leland and Michael P. Lesniak at 20 C.F.R. §718.205(c) are now set forth at 20 C.F.R. §718.205(b).

fact of entitlement, pursuant to 20 C.F.R. §725.310.⁸ Accordingly, the administrative law judge denied claimant's modification request, and denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Claimant filed a reply brief, reiterating her contentions on appeal.

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).

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(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). 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(b)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes entitlement. See *Trumbo*, 17 BLR at 1-87; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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).

⁸ Although the administrative law judge denied modification, she also addressed and rejected employer's argument that it did not render justice under the Act to consider claimant's third modification request. Decision and Order at 30-32.

Relevant to the cause of the miner's death, the administrative law judge considered the miner's death certificate, signed by Dr. Sine, which stated that the miner's death was due to a cerebrovascular accident, or stroke, due to diabetes mellitus type II, due to coronary artery disease. Director's Exhibit 9. Dr. Swedarsky performed the miner's autopsy and diagnosed severe atherosclerotic vascular disease, severe atherosclerotic coronary artery disease, status post 2-vessel bypass surgery, cardiomegaly, ischemic myocardial injury, COPD/emphysema, bilateral pulmonary congestion with acute pneumonia, and simple coal workers' pneumoconiosis. Director's Exhibit 11. Dr. Swedarsky was deposed, and testified that the degree of clinical pneumoconiosis present was "towards the minimal end," and would not have affected the miner's respiratory function, or played a significant role in the miner's death due to a stroke. Director's Exhibit 55 at 11, 21-22, 44. Similarly, Drs. Bush, Oesterling, Bellotte, and Vey opined that the miner's clinical and legal pneumoconiosis were too mild to have hastened his death due to a stroke. Director's Exhibits 34, 40, 83; Employer's Exhibits 3, 4, 6, 7. In contrast, Drs. Perper, Kahn, and Green opined that the combined effect of the miner's clinical and legal pneumoconiosis significantly contributed to and hastened his death from a stroke. Director's Exhibits 32, 55, 67, 106; Claimant's Exhibit 1.

The administrative law judge accorded the greatest weight to the opinion of Dr. Swedarsky that the degree of the miner's clinical pneumoconiosis was "towards the minimal end." Decision and Order at 19, *quoting* Director's Exhibit 55 at 44. The administrative law judge discredited the opinions of Drs. Perper, Kahn, and Green, however, because they each considered a degree of clinical pneumoconiosis that was more severe than that observed by Dr. Swedarsky. Decision and Order at 27. Thus, the administrative law judge concluded that claimant failed to meet her burden to establish that pneumoconiosis was a substantially contributing cause of the miner's death. Decision and Order at 29.

Claimant contends that the administrative law judge overlooked pertinent medical treatment records which, claimant asserts, establish that the miner's hypoxemia, atrial fibrillation, and COPD/legal pneumoconiosis were more severe than the administrative law judge found them to be. Claimant's Brief at 11-20. Thus, claimant contends, the administrative law judge erroneously discredited the opinion of any physician who opined that the miner's severe hypoxemia, atrial fibrillation, and COPD/legal pneumoconiosis combined to contribute to his death from a stroke. Claimant's Brief at 21-25. Claimant further asserts that the administrative law judge erred in finding that the miner had a forty pack-year smoking history, ending in 1978, and contends that this error tainted her evaluation of the medical opinion evidence. Claimant's Brief at 25-30. Therefore, claimant asserts, the administrative law judge's denial of benefits is not supported by substantial evidence. Claimant, however, does not specifically challenge the administrative law judge's decision to credit Dr. Swedarsky's opinion regarding the

severity of the miner's clinical pneumoconiosis, which formed a basis for her determination to discount the opinions of claimant's physicians as to whether pneumoconiosis hastened the miner's death. Therefore, as we will set forth, we conclude that substantial evidence supports the administrative law judge's decision denying benefits.

After summarizing the medical evidence of record, the administrative law judge found that the "overwhelming consensus of the medical opinions is that the precipitating cause of the [m]iner's death was a stroke." Decision and Order at 22. The administrative law judge further found that the physicians agreed that the miner suffered from clinical and legal pneumoconiosis, but disagreed as to the severity of the miner's clinical pneumoconiosis and, consequently, disagreed as to whether it contributed to his fatal stroke. Decision and Order at 22.

Relevant to the severity of the miner's clinical pneumoconiosis, the administrative law judge noted that Dr. Swedarsky, the autopsy prosector, opined that the miner's clinical pneumoconiosis was "towards the minimal end of the disease."⁹ Director's Exhibit 55 at 44. Drs. Oesterling and Bush similarly opined that the miner's clinical pneumoconiosis was relatively mild. In contrast, Dr. Perper opined that the miner's clinical pneumoconiosis was "mild to moderate" in degree,¹⁰ Dr. Kahn estimated that the miner had a "significant" degree of clinical pneumoconiosis,¹¹ and Dr. Green opined that

⁹ In his autopsy report, Dr. Swedarsky stated that both of the miner's lungs demonstrated "simple coal workers' pneumoconiosis characterized by the presence of numerous dust macules and an occasional coal nodule" with "minimal fibrosis." Director's Exhibit 11. Dr. Swedarsky testified that there were "no particularly palpable nodules that were significant," and "no significant fibrosis" and emphasized that "there really [was] very, very little [coal workers' pneumoconiosis] – we're not talking about a lot of macules and a lot of nodules here. We're talking about at towards the minimal end of the disease" Director's Exhibit 55 at 15-16, 21-22, 44.

¹⁰ Dr. Perper diagnosed "[c]oal workers' pneumoconiosis macular, micronodular and interstitial type, mild to moderate severity with marked, focal, interstitial type of pneumoconiosis." Director's Exhibit 32 at 22. Dr. Perper concluded that the pathology evidence "clearly substantiated the presence of significant coal workers' pneumoconiosis." *Id.* at 25. During his deposition, Dr. Perper reiterated his opinion and stated that Dr. Swedarsky had "somewhat downgrad[ed]" the severity of the miner's coal workers' pneumoconiosis. Director's Exhibit 55 at 24, 26.

the miner's clinical pneumoconiosis was of "moderate severity."¹² Director's Exhibits 32, 67; Claimant's Exhibit 1.

The administrative law judge initially found that, as the prosector, Dr. Swedarsky alone had the advantage of observing the entirety of the miner's lungs and of being able to palpate the miner's lung tissue for nodules and, therefore, had the best opportunity to make a well-informed determination as to the severity of the miner's clinical pneumoconiosis. Decision and Order at 19. Thus, the administrative law judge accorded the most weight to Dr. Swedarsky's opinion to find that the miner's fibrosis was "minimal" and the miner's clinical pneumoconiosis was "towards the minimal end of the disease."¹³ Decision and Order at 19, *quoting* Director's Exhibit 55 at 44. As claimant raises no challenge to this credibility determination, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

¹¹ Dr. Kahn estimated that the miner's pneumoconiosis involved "30% of his lung's terminal respiratory units" representing "a significant degree of coal workers' pneumoconiosis." Director's Exhibit 67. Dr. Kahn reiterated his conclusion during his deposition. Director's Exhibit 70 at 39, 46, 53, 58.

¹² Dr. Green diagnosed "simple coal workers' pneumoconiosis comprising macules, micronodules and interstitial fibrosis (overall moderate severity)." Claimant's Exhibit 1; Director's Exhibit 106 at 17.

¹³ The administrative law judge further found that, as all of the physicians agreed that coal mine dust exposure contributed to the miner's chronic obstructive pulmonary disease (COPD), and all of the physicians who rendered opinions on the issue characterized the miner's COPD/emphysema as at least "moderate," the preponderance of the evidence established that the miner's legal pneumoconiosis was moderate in extent. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); Decision and Order at 20-22.

Relevant to whether the miner's pneumoconiosis contributed to his death, the administrative law judge accurately found that Drs. Perper,¹⁴ Kahn,¹⁵ and Green,¹⁶ "the physicians who concluded that the [m]iner's clinical pneumoconiosis was significant, also concluded that the [m]iner's respiratory condition . . . played a significant role in causing the [m]iner's stroke or hastening the [m]iner's death – either by increasing the risk of cardiac arrhythmia, or by causing hypoxia that complicated the [m]iner's condition." Decision and Order at 27. Contrary to claimant's contention, having earlier found that the most probative pathology evidence established that the miner's clinical pneumoconiosis was "towards the minimal end of the disease," the administrative law judge rationally discounted the opinions of Drs. Perper, Kahn, and Green, that the combined effect of clinical and legal pneumoconiosis was a significant contributing factor to the miner's death, because they each relied, in part, on their belief that the miner's clinical pneumoconiosis was more severe than the "minimal" degree of disease

¹⁴ Dr. Perper, who is Board-certified in Anatomic, Surgical, and Forensic Pathology, reviewed the miner's autopsy slides and medical records and opined that the miner's clinical pneumoconiosis and causally associated COPD/legal pneumoconiosis contributed to pulmonary insufficiency and hypoxemia, which precipitated or aggravated the miner's cardiac arrhythmia, which contributed to his stroke. Director's Exhibits 32 at 28-29; 55 at 19-21, 30.

¹⁵ Dr. Kahn, who is Board-certified in Anatomic and Clinical Pathology, reviewed the miner's autopsy slides and medical records and opined that the miner's clinical pneumoconiosis, together with his pulmonary emphysema, compromised his pulmonary function and predisposed him to develop bronchopneumonia when he suffered his stroke, and thus hastened the miner's death. Director's Exhibit 67. Dr. Kahn explained that the combined effect of the miner's multiple disease processes shortened his life. Director's Exhibit 70 at 34-35.

¹⁶ Dr. Green, who is Board-certified in Anatomic Pathology, reviewed the miner's autopsy slides and medical records and opined that the miner's clinical pneumoconiosis contributed to hypoxemia, cardiac arrhythmia, and cor pulmonale, which increased the risk, and severity, of stroke. Dr. Green opined that COPD/legal pneumoconiosis also increases the risk of stroke. Claimant's Exhibit 1; Director's Exhibit 106 at 32-34, 39-41, 48-49, 53. Dr. Green stated that medical and legal pneumoconiosis both contributed to the miner's cor pulmonale, Claimant's Exhibit 1 at 9; Director's Exhibit 106 at 34, 39, 67, and concluded that "without the additional risk factors due to medical and legal pneumoconiosis, it is likely that [the miner] would not have had a stroke on that particular day and/or the stroke would have been much milder in severity." Claimant's Exhibit 1 at 9.

found by the administrative law judge. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 533, 21 BLR 2-323, 2-326, 2-335 (4th Cir. 1998); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-107 (1986); Decision and Order at 27.

Because we have affirmed the administrative law judge's finding that the opinions of Drs. Perper, Kahn, and Green were based on an incorrect premise regarding the severity of the miner's clinical pneumoconiosis, the administrative law judge provided a valid basis for discrediting their opinions that the combined effects of the miner's clinical and legal pneumoconiosis hastened the miner's death. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Thus, as we have affirmed the administrative law judge's determination to discredit the opinions of Drs. Perper, Kahn, and Green, the only opinions supportive of a finding that the miner's death was hastened by pneumoconiosis, we affirm the administrative law judge's finding that claimant did not establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(b).¹⁷ Consequently, we affirm the administrative law judge's conclusion that claimant failed to establish a mistake in the determination of the ultimate fact of entitlement, pursuant to 20 C.F.R. §725.310. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Wojtowicz*, 12 BLR at 1-164. We therefore affirm the administrative law judge's denial of claimant's request for modification.

¹⁷ We, therefore, need not address claimant's challenges to the administrative law judge's findings regarding the length of the miner's smoking history, or the severity of the miner's hypoxemia, atrial fibrillation, and COPD/legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Nor need we address employer's contention that claimant's "duplicative modification request should not even have been considered. . . ." Employer's Brief at 22.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge