

BRB No. 02-0191 BLA

NANCY IDA POTTER)
(Widow of GLYDAS YOUNG))
)
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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Nancy Ida Potter, Brownsville, Indiana, *pro se*.

Jennifer U. Toth (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow and without the assistance of counsel, appeals the Decision and Order (2001-BLA-0049) of Administrative Law Judge Robert L. Hillyard denying modification and benefits 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).¹ Considering entitlement in this survivor's claim pursuant to the

¹The 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 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.

provisions of 20 C.F.R. Part 718, the administrative law judge determined that the instant survivor's claim is a request for modification.² Decision and Order at 2-3. The administrative law judge noted the proper standard and found that based on the evidence of record, claimant failed to establish a mistake in fact pursuant to 20 C.F.R. §725.310 as the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000). Decision and Order at 4-7. Accordingly, benefits were denied.³ On

²This case has a long procedural history that the administrative law judge meticulously outlined in his decision of November 6, 2001. Thus, most of this history does not bear repeating. Pertinent to this appeal is that by letter dated October 20, 1998, claimant filed her second request for modification. On February 9, 1999, the Director denied this request. Claimant subsequently made a request for a hearing by telephone on September 13, 1999. On April 17, 2000, claimant filed a new application for benefits. The Director denied this claim on July 31, 2000. Director's Exhibits 1, 3, 4, 11. Claimant's claim was thereafter forwarded to the Office of Administrative Law Judge's for a hearing.

³The administrative law judge also noted that claimant's request for a hearing, following the Proposed Decision and Order Denying Request for Modification issued on February 9, 1999, was not made until after the thirty days allowed for such a request had passed. However, given the circumstances surrounding the delay, *i.e.*, the death of claimant's attorney, as well as the record in this case, which establishes claimant's intent to pursue her claim, the administrative law judge accepted the request as a valid pursuit of the request for modification.

appeal, claimant generally contends that the evidence of record is sufficient to establish entitlement to benefits. The Director, Office of Workers' Compensation Programs, responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge 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 pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. See 20 C.F.R. §718.205(c)(5); see also *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).⁴

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative

⁴This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein.⁵

⁵As the instant case is a survivor's claim, modification can not be established based on a change in conditions. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In determining whether claimant established a basis for modification in this case, the administrative law judge reviewed the evidence submitted in the prior claims and the newly submitted evidence.⁶ The administrative law judge properly considered the entirety of the medical opinion evidence of record and rationally found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge properly noted that the opinions of Drs. Paterson, Becknell and O'Daniel, as well as the Amended death certificate were submitted previously and found to be insufficient to carry claimant's burden of proof. Decision and Order at 6-7. The administrative law judge further considered the opinion of Dr. Katzman, who is board-certified in internal medicine, opining that the miner did not suffer from simple or complicated pneumoconiosis and that the miner's death was due to coronary thrombosis. Decision and Order at 6; Director's Exhibit 11. The administrative law judge properly considered this evidence as well as the previous decisions and rationally concluded that claimant failed to carry her burden of proof pursuant to 20 C.F.R. §§725.310 and 718.205 as it does not indicated that the miner's death was in any way related to pneumoconiosis.⁷ See *Worrell, supra*; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Director's Exhibit 11; Decision and Order at 6-7. Consequently, we affirm the administrative law judge's finding that the evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 as it is supported by substantial evidence and is in accordance with law.⁸ See *Worrell, supra*; *Neeley, supra*; *Trumbo, supra*.

⁶The Board, in *Young v. Director, OWCP*, BRB No. 97-1311 BLA (May 27, 1998)(unpub.) and *Young v. Director, OWCP*, BRB No. 95-0405 BLA (October 30, 1995)(unpub.), affirmed the administrative law judge's credibility determinations and his weighing of the previously submitted evidence. See Director's Exhibit 11.

⁷The presumption at 20 C.F.R. §718.304 is not applicable in this case as the record indicates that there is no evidence of complicated pneumoconiosis contained therein. See 20 C.F.R. §718.205(c)(3).

⁸Since the determination of whether the miner's death is due to pneumoconiosis is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's findings and therefore could not satisfy claimant's burden of proof on this issue. See 20 C.F.R. §718.205; *Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Matteo v. Director, OWCP*, 8 BLR 1-200 (1985).

Inasmuch as claimant has failed to establish a basis for modification in the administrative law judge's prior determination that the miner's death was not due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, entitlement thereunder is precluded. See *Worrell, supra*; *Trumbo, supra*; *Neeley, supra*.

Accordingly, the administrative law judge's Decision and Order denying modification and benefits in this survivor's claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge