

BRB Nos. 09-0779 BLA  
and 10-0148 BLA

CHRISTINE SMITH	)	
(Widow of EDWIN SMITH)	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	
	)	
and	)	
	)	
THE PITTSSTON COMPANY	)	DATE ISSUED: 08/09/2010
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Modification in Living Miner’s Claim and Denial of Modification in Survivor’s Claim of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order – Denial of Modification in Living Miner’s Claim and Denial of Modification in Survivor’s Claim (07-BLA-5636 and 07-BLA-5637) of Administrative Law Judge Thomas F. Phalen, Jr., on claims 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 involves a miner’s subsequent claim<sup>3</sup> filed on August 1, 2001, and a survivor’s claim filed on February 25, 2003. Director’s Exhibits 3, 47. The Board has consolidated both appeals for purposes of decision only.

Initially, in a Decision and Order dated April 20, 2006, Administrative Law Judge Joseph E. Kane credited the miner with eighteen years of coal mine employment.<sup>4</sup> In regard to the miner’s subsequent claim, Judge Kane found that the medical evidence developed since the denial of the miner’s previous claim established that the miner was totally disabled by a respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2), and thus, established a change in an applicable condition of entitlement

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<sup>1</sup> Claimant is the surviving spouse of the deceased miner, Edwin Smith, who died on January 12, 2003. Director’s Exhibit 11.

<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 both the miner’s claim and the survivor’s claim were filed before January 1, 2005. Director’s Exhibits 3, 47.

<sup>3</sup> The miner’s first claim, filed on June 25, 1970, was denied by the Social Security Administration on March 14, 1979, on the basis that the miner did not have pneumoconiosis. Director’s Exhibit 1-329, 1-360, 1-404. That claim was forwarded to the Department of Labor, where it was denied by the district director on June 13, 1980, because the miner did not establish that he had pneumoconiosis or that he was totally disabled. Director’s Exhibit 1-269. The miner’s second claim, filed on August 8, 1984, was denied by the district director on January 31, 1985, and again on January 20, 1987, because the record “d[id] not contain sufficient evidence to allow a finding of entitlement. Accordingly, [the] application . . . [was] denied under . . . 20 C.F.R. [§]725.309(d).” Director’s Exhibit 1-2, 1-176, 1-240. The miner filed his current claim on August 1, 2001. Director’s Exhibit 3.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because the miner’s coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director’s Exhibit 4.

pursuant to 20 C.F.R. §725.309(d).<sup>5</sup> On the merits, however, Judge Kane found that the evidence did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Kane denied benefits in the miner's claim. Turning to the survivor's claim, Judge Kane found that the evidence did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Kane denied benefits in the survivor's claim.

Claimant appealed Judge Kane's decision to the Board, but thereafter, timely requested modification in both claims pursuant to 20 C.F.R. §725.310, and moved that her appeal be dismissed. Director's Exhibits 123, 126, 127. Accordingly, the Board dismissed claimant's appeal, subject to reinstatement, and remanded the case to the district director for modification proceedings. Director's Exhibit 134. On remand, the district director proposed granting modification in both claims and, pursuant to employer's request, transferred the claims to the Office of Administrative Law Judges for a hearing. Director's Exhibits 86, 87, 156, 157.

Following a hearing, Administrative Law Judge Thomas F. Phalen, Jr., (the administrative law judge), conducted a *de novo* review of all the evidence of record in both claims. With respect to the miner's subsequent claim, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). He therefore determined that claimant did not establish a change in conditions or a mistake in a determination of fact under 20 C.F.R. §725.310. With respect to the survivor's claim, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore, did not establish that there was a mistake in a determination of fact under 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification in both claims.

On appeal,<sup>6</sup> claimant asserts that the administrative law judge erred in his analysis of the medical opinion evidence in both claims, when he found that it did not establish that the miner had legal pneumoconiosis<sup>7</sup> under 20 C.F.R. §718.202(a)(4). Employer

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<sup>5</sup> Because the district director's decision denying the miner's 1984 claim did not specify which elements of entitlement were not established, Administrative Law Judge Joseph E. Kane considered whether the new evidence established any element.

<sup>6</sup> Claimant has not requested reinstatement of her previous appeal.

<sup>7</sup> 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

responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.<sup>8</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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits in the miner's claim under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To be entitled to survivor's benefits under the Act, 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.<sup>9</sup> See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 725.310 provides that a party may request modification of an award or denial of benefits within one year, on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in 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 decision. *Wojtowicz v.*

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“significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

<sup>8</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), in either claim. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>9</sup> For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). Pneumoconiosis is a substantially contributing cause of 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, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

*Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). When a request for modification is filed, the administrative law judge has the authority “to reconsider all the evidence for any mistake of fact,” including whether “the ultimate fact” of entitlement was wrongly decided. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Relevant to the existence of legal pneumoconiosis in both claims,<sup>10</sup> pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Baker, Hussain, Vellayan, and Jain, submitted by claimant, and those of Drs. Fino, Repsher, and Rosenberg, submitted by employer. Dr. Baker opined that the miner had chronic obstructive pulmonary disease (COPD) that was due to both smoking and coal mine dust exposure. Director’s Exhibit 127-8. Dr. Hussain diagnosed the miner with pneumoconiosis and COPD, and he listed “dust exposure” and “tobacco abuse” as the etiologies for his diagnoses. Director’s Exhibit 13. Dr. Vellayan, who was one of the miner’s treating physicians, opined that the miner’s COPD was aggravated by coal mine dust exposure. Director’s Exhibits 16, 55. Dr. Jain, who also treated the miner, opined that the miner’s chronic lung disease was “100% due to black lung.” Director’s Exhibit 58.

The administrative law judge discounted Dr. Baker’s opinion because he found that Dr. Baker did not “specify what specific objective medical evidence he relied upon to formulate his opinions,” or sufficiently connect the medical literature that he referenced to the miner’s specific case. Decision and Order at 26. The administrative law judge found that Dr. Hussain’s diagnosis of clinical pneumoconiosis merited less weight because it was based solely on a chest x-ray and a history of coal dust exposure. Additionally, the administrative law judge found that Dr. Hussain “failed to provide a basis for his COPD diagnosis,” or explain how the underlying documentation supported his diagnosis.<sup>11</sup> Decision and Order at 26-27. Further, the administrative law judge discounted the opinions of Drs. Vellayan and Jain, finding that the physicians failed to

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<sup>10</sup> With respect to the existence of pneumoconiosis, claimant designated and submitted the same evidence in both claims for purposes of the evidentiary limitations of 20 C.F.R. §§725.414, 725.310(b). Further, the basis for the administrative law judge’s decision was the same in both claims, namely, he discredited claimant’s evidence of the existence of pneumoconiosis. Therefore, we will address, in one discussion, the administrative law judge’s analysis of the pneumoconiosis issue in both claims.

<sup>11</sup> Claimant does not challenge the administrative law judge’s credibility determination with respect to Dr. Hussain’s opinion. It is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

discuss the miner's "significant" smoking history<sup>12</sup> and failed to specify the objective evidence upon which they based their diagnoses. Decision and Order at 27, 29-30. The administrative law judge additionally found that Dr. Vellayan did not provide "the reasoning for his conclusions." Decision and Order at 27. The administrative law judge also discounted the treatment records of Drs. Vellayan and Jain, because the physicians did not link their diagnoses of COPD and emphysema in those records to coal mine dust exposure, or provide the bases for their diagnoses. *Id.* Finding all of the medical opinion evidence of record to be "insufficiently well-reasoned,"<sup>13</sup> the administrative law judge found that claimant failed to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) in either the miner's or the survivor's claim. *Id.* at 28, 29.

Claimant asserts that the administrative law judge erred in failing to credit the opinions of Drs. Baker, Vellayan, and Jain. Specifically, claimant argues that, "Dr. Baker's opinion is entitled to controlling weight because of a combination of factors: his impressive credentials; the clarity, reasoning and documentation of his opinion; its consistency with medical science and the Act; and its corroboration by the opinions of the [m]iner's family and treating physicians. . . ." Claimant's Brief at 22.

Claimant essentially asks the Board to reweigh the evidence, which we are not authorized to do. *Anderson*, 12 BLR at 1-113. Substantial evidence supports the administrative law judge's findings that Dr. Baker did not specify what objective evidence he based his opinion on, or integrate the medical literature that he referenced with the specific facts of this case. Contrary to claimant's assertion, therefore, the administrative law judge permissibly discounted Dr. Baker's opinion. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

We additionally reject claimant's contention that the administrative law judge erred in failing to assign greater weight to the opinions of Drs. Vellayan and Jain in light of their status as the miner's treating physicians. Claimant's Brief at 2, 7. Contrary to claimant's contention, the status of Drs. Jain and Vellayan as the miner's treating physicians does not automatically entitle their opinions and treatment records to additional weight. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003). Substantial evidence supports the

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<sup>12</sup> The administrative law judge found that the miner had a 37.5 pack-year smoking history. Decision and Order at 19. Claimant does not challenge this finding, which is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

<sup>13</sup> The administrative law judge discredited the opinions of Drs. Fino, Repsher, and Rosenberg that the miner did not have legal pneumoconiosis. Decision and Order at 26, 28-29.

administrative law judge's permissible determinations that Drs. Vellayan and Jain failed to adequately address the miner's smoking history, did not specify the objective basis for their opinions, and did not provide the reasoning for their conclusions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, the administrative law judge did not err in according less weight to their opinions. *See* 20 C.F.R. §718.104(d)(5).

Claimant argues that the administrative law judge erred in crediting the opinions of employer's experts, Drs. Fino, Repsher, and Rosenberg, that the miner did not have pneumoconiosis. Claimant alleges that those opinions should not have been credited because they were based on statements that are contrary to the regulatory definition of pneumoconiosis. Claimant's Brief at 10, 12, 22. Contrary to claimant's characterization, the administrative law judge discredited the opinions of all of employer's experts on the issue of legal pneumoconiosis, because he found that they were not well-reasoned. Decision and Order on Remand at 26, 28, 29. Since the administrative law judge did not rely on the opinions of employer's experts, claimant's allegation of error lacks merit. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638-39, 24 BLR 2-199, 2-215-16 (6th Cir. 2009).

Because substantial evidence supports the administrative law judge's findings that claimant failed to establish, in either claim, that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), those findings are affirmed. Since claimant did not establish the existence of pneumoconiosis, a necessary element of entitlement in both a miner's claim and a survivor's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of modification and denial of benefits in both the miner's claim and the survivor's claim. 20 C.F.R. §725.310; *Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order – Denial of Modification in Living Miner's Claim and Denial of Modification in Survivor's Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge