



BRB Nos. 16-0228 BLA
and 16-0229 BLA

MARILYN R. KERSTETTER, o/b/o and)
Widow of JOSEPH W. KERSTETTER)

Claimant-Respondent)

v.)

KERRIS & HELFRICK, INCORPORATED)

and)

LACKAWANNA CASUALTY COMPANY)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 12/19/2016

DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Awarding
Survivor's Benefits of Theresa C. Timlin, Administrative Law Judge,
United States Department of Labor.

Tullio DeLuca, Scranton, Pennsylvania, for claimant.

A. Judd Woytek (Marshall, Dennehey, Warner, Coleman & Goggin),
Allentown, Pennsylvania, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Maia Fisher,
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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Modification and Awarding Survivor's Benefits (08-BLA-5616 and 08-BLA-5617) of Administrative Law Judge Theresa C. Timlin rendered on a miner's subsequent claim¹ and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The miner's claim, filed on February 28, 2001, and the survivor's claim, filed on October 6, 2006, were consolidated for purposes of rendering a decision on the merits in each claim.²

¹ The miner's first two claims for benefits, filed on July 9, 1986 and September 30, 1996, each resulted in a final denial of benefits. Miner-Director's Exhibits 31, 32. The miner filed a third claim on October 18, 1999, but requested that it be withdrawn. Miner-Director's Exhibit 1c. The miner filed his fourth and final application for benefits on February 28, 2001. Miner-Director's Exhibit 1. In a Decision and Order issued on June 30, 2003, Administrative Law Judge Janice K. Bullard found that even though the miner established the existence of pneumoconiosis arising out of coal mine employment, he failed to establish either total respiratory disability or a change in an applicable condition of entitlement. Accordingly, Judge Bullard denied benefits, and the Board affirmed the denial of benefits on appeal. *Kerstetter v. Kerris & Helfrick Inc.*, BRB No. 03-0719 BLA (July 19, 2004) (unpub.); Miner-Director's Exhibit 53. The Board denied the miner's request for reconsideration, *Kerstetter v. Kerris & Helfrick Inc.*, BRB No. 03-0719 BLA (Mar. 25, 2005) (unpub. Order); Miner-Director's Exhibit 56, and the United States Court of Appeals for the Third Circuit dismissed the miner's appeal. *Kerstetter v. Kerris & Helfrick Inc.*, No. 05-2675 (3d Cir. Aug. 2, 2005) (unpub. Order); Miner-Director's Exhibit 58. On March 24, 2006, the miner requested modification of the denial, and the case was referred to the Office of Administrative Law Judges for a formal hearing. Miner-Director's Exhibits 59, 64. Prior to issuance of a decision, however, the miner died on August 22, 2006, and claimant, his surviving spouse, is pursuing the miner's claim on behalf of his estate. Survivor-Director's Exhibit 9.

² In identifying the "filing date" of a claim, the Board refers to the date the claim was received by the office of the district director, rather than the date the claim was signed, as referenced by the administrative law judge in this case. See 20 C.F.R. §725.303(a)(1). We note, however, that the use of either date does not affect the adjudication of the claims herein.

Adjudicating the miner's March 24, 2006 request for modification of Administrative Law Judge Janice K. Bullard's denial of his fourth claim pursuant to 20 C.F.R. Parts 718 and 725, Administrative Law Judge Ralph A. Romano determined that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, therefore, was insufficient to demonstrate a basis for modification by establishing either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. Adjudicating the survivor's claim, Judge Romano found that, because the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) in the miner's claim, claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).³ Judge Romano further found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, by Decision and Order issued on June 7, 2011, Judge Romano denied benefits in both the miner's and survivor's claims. Miner-Director's Exhibit 70; Survivor-Director's Exhibit 29. Claimant appealed the denial of both claims to the Board, Survivor-Director's Exhibit 30, but while her appeal was pending, claimant filed a Motion to Remand in order to pursue modification before the district director. Survivor-Director's Exhibit 35. On January 19, 2012, the Board granted claimant's motion, dismissed her appeals, and remanded the case to the district director for modification proceedings. *Kerstetter v. Kerris & Helfrick Inc.*, BRB Nos. 11-0648 BLA and 11-0649 BLA (Jan. 19, 2012) (unpub. Order); Survivor-Director's Exhibit 37.

Following the district director's denial of modification in both claims, claimant requested a formal hearing, which was held on December 17, 2012 before Administrative Law Judge Theresa C. Timlin (the administrative law judge). In her Decision and Order issued on January 27, 2016, the administrative law judge credited the parties' stipulation

³ Relevant to the survivor's claim, Section 411(c)(4) of the Act provides, in pertinent part, a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012). The provisions of Section 411(c)(4) do not apply to the miner's claim, as it was filed before January 1, 2005. *See* 20 C.F.R. §718.305.

Under Section 422(l) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012). Section 422(l) is inapplicable to the instant survivor's claim because the administrative law judge found that the miner was not entitled to benefits. Decision and Order on Modification at 27.

that the miner worked for at least nineteen years in surface coal mine employment in conditions substantially similar to those in an underground mine. After considering the new evidence submitted in support of modification in conjunction with the earlier evidence, the administrative law judge found that claimant established total respiratory disability pursuant to Section 718.204(b) and a mistake in a determination of fact in the previous denial of both claims pursuant to Section 725.310. However, the administrative law judge determined that claimant failed to establish that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c), and denied benefits in the miner's claim. Relevant to the survivor's claim, the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(4) presumption of death due to pneumoconiosis, and that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer argues that the administrative law judge erred in granting modification pursuant to Section 725.310, based on a change in conditions, and in awarding benefits in the survivor's claim. Claimant responds, urging affirmance.⁴ The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge's "unfortunate language choice" cannot preclude entitlement in this case because the administrative law judge's award of survivor's benefits is based on a mistake in a determination of fact analysis, not a change in conditions analysis. Director's Letter Brief at 3.⁵

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.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30

⁴ Contrary to the Board's Order dated March 10, 2016, employer only appealed the award of benefits in the survivor's claim. As claimant did not appeal the administrative law judge's denial of benefits in the miner's claim, that decision is final. 20 C.F.R. §§725.481, 802.201(a).

⁵ We affirm, as unchallenged on appeal, the administrative law judge's finding in the survivor's claim of at least fifteen years of qualifying coal mine employment, her finding that claimant established the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b) and invocation of the Section 411(c)(4) presumption, and her finding that employer failed to rebut the presumption. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director*, 12 BLR 1-200 (1989)(en banc); Survivor-Director's Exhibit 3.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in granting modification in the survivor’s claim pursuant to Section 725.310, based on a change in conditions, after explicitly noting that “modification on the basis of a change in conditions is not available in a survivor’s claim.” Employer’s Brief at 4-5, *quoting* Decision and Order on Modification at 27.

A review of the administrative law judge’s Decision and Order on Modification in its entirety belies employer’s argument. By finding the claimant invoked the section 411(c)(4) presumption and the employer failed to rebut that presumption, the administrative law judge determined that claimant successfully established a mistake in a determination of fact in the prior denial of her claim and successfully proved her entitlement to benefits.

In summarizing the contested issues before her, the administrative law judge noted that claimant sought modification of the prior denial of benefits in both the miner’s and survivor’s claims, and stated:

Logically, [c]laimant cannot establish that [m]iner’s condition has changed since the denial of the previous modification request. *Cf. Coleman v. Director, OWCP*, 345 F.3d 861, 863 (11th Cir. 2003) (noting that a subsequent survivor’s claim is different than a subsequent miner’s claim “because a deceased miner’s condition is not subject to change”); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989) (holding that modification on the basis of a change in conditions is not available in a survivor’s claim). Therefore, to obtain modification, [c]laimant must demonstrate that the finding in the denial of the previous modification request, that the [m]iner was not totally disabled, *was a mistake of fact*.

Decision and Order on Modification at 6 [emphasis added]. In adjudicating the miner’s claim, the administrative law judge stated, “It is [c]laimant’s burden to establish that the previous finding that [m]iner was not totally disabled was *a mistake in fact*” and “[u]pon consideration of the old and new medical evidence, [c]laimant has done so.” Decision and Order on Modification at 20 [emphasis added]. After reviewing and weighing the evidence relevant to the issue of total respiratory disability, the administrative law judge concluded, “[c]laimant has established *a mistake in fact* in that the pulmonary function test evidence, considered with the arterial blood gas studies and medical opinion evidence, does establish that [m]iner was totally disabled during his lifetime from a pulmonary condition.” Decision and Order on Modification at 27 [emphasis added]. Finally, in assessing the merits of entitlement in the survivor’s claim, the administrative

law judge stated “[b]ecause modification on the basis of a change in conditions is not available in a survivor’s claim . . . , to modify her claim, [c]laimant must demonstrate that Judge Romano’s finding - that [c]laimant failed to prove that [m]iner’s death was due to pneumoconiosis - was *a mistake in fact*.” *Id.* [emphasis added].

Employer correctly avers that the administrative law judge subsequently stated that “[c]laimant has established a change in condition entitling her to modification of her claim.” Decision and Order on Modification at 27; Employer’s Brief at 5. Nevertheless, the administrative law judge’s multiple, consistent references to the correct standard, acknowledging that the sole ground for establishing modification in a survivor’s claim is a mistake in a determination of fact, demonstrates that the administrative law judge applied the proper standard in granting modification in the survivor’s claim. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). She found a mistake of fact in Judge Bullard’s prior determination that the miner was not totally disabled, which enabled claimant to invoke the Section 411 (c)(4) presumption of death due to pneumoconiosis. Decision and Order on Modification at 27-28. By finding that employer failed to rebut the presumption, the administrative law judge additionally found a mistake of ultimate fact in the prior determination that claimant was not entitled to survivor’s benefits. Decision and Order on Modification at 27-31; *see Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-53 (2012). We, therefore, deem the administrative law judge’s reference to “a change in condition” to be harmless error. Decision and Order on Modification at 27; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because employer has not otherwise challenged the administrative law judge’s credibility determinations and conclusions of law in adjudicating the merits of the survivor’s claim, we affirm her award of benefits.⁷

⁷ We note that, in its Brief in Support of Petition for Review, employer listed four allegations of error under the “Questions Presented” section of its brief challenging the administrative law judge’s determinations that: claimant established a change in conditions since the prior denial of her claim; claimant is entitled to invocation of the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4); employer failed to establish rebuttal of the presumption; and the opinion of Dr. Levinson was insufficient to rebut the presumption. Employer’s Brief at 3. However, employer only argued one issue—the administrative law judge’s change in conditions determination—in its brief. Employer’s Brief at 4-6. It is well established that a party challenging the administrative law judge’s decision “must demonstrate with some degree of specificity the manner in which substantial evidence precludes the [award] of benefits or why the [administrative law judge’s] decision is contrary to law.” *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986). Hence, employer’s failure to adequately brief the remaining three issues precludes the Board’s review of these issues on appeal.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge