BRB Nos. 05-0593 BLA
and 05-0593 BLA-A

LORENE BUCKLEN (Widow of KERMIT BUCKLEN)	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
JEWELL SMOKELESS COAL CORPORATION	)	DATE ISSUED: 02/15/2006
Employer-Respondent Cross-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Rejection of Claims of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Sparkle Bonds (Virginia Black Lung Association), Richlands, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Sarah M. Hurley (Howard Radzely, Solicitor of Labor; Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals and employer cross-appeals, the Decision and Order (03-BLA-109 and 03 BLA 5467) of Administrative Law Judge Edward Terhune Miller denying modification on a miner's claim 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). The miner, Kermit Bucklen, filed his claim for black lung benefits on November 4, 1980. The miner's claim has been before the Board previously and has a lengthy procedural history. The history of the case is set forth in the Board's prior decision in *Bucklen v. Jewell Smokeless Coal Corp.*, BRB No. 00-1069 BLA (Oct. 31, 2001)(unpub.). When the case was most recently before the Board, the Board affirmed Administrative Law Judge Stuart A. Levin's findings that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), sufficient to establish rebuttal of the presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.305, and that there was no mistake of fact in the previous denials. The Board thus affirmed Judge Levin's finding that claimant failed to establish a basis for modification under 20 C.F.R. §725.310 and affirmed the denial of benefits.

On June 18, 2001, while the miner's claim was pending with the Board, the miner died. Director's Exhibit 1. On October 1, 2001, the miner's widow, claimant herein, filed her survivor's claim and on December 10, 2001, following the issuance of the Board's October 31, 2001 affirmance of Judge Levin's denial of benefits on the miner's claim, she submitted new medical evidence and requested modification of the miner's claim, alleging a mistake in a determination of fact in the previous denials. Director's Exhibit 1.

Modification of the miner's claim was granted and benefits were awarded by the district director on September 9, 2002. Decision and Order at 2; Director's Exhibit 1. On September 11, 2002, the district director awarded benefits on the survivor's claim. On September 23, 2002, employer requested a hearing and, subsequently, the miner's claim and the survivor's claim were consolidated and the cases were referred to the Office of Administrative Law Judges. At the parties' request, the administrative law judge decided the respective claims on their records and referred to the earlier finding that the miner had twenty-seven and one-half years of qualifying coal mine employment. The administrative law judge adjudicated the request for modification in the miner's claim and the merits of the survivor's claim separately pursuant to the regulations contained in

[1] Claimant is Lorene Bucklen, the widow of the miner, Kermit Bucklen, who died on June 18, 2001. Director's Exhibit 1. Claimant filed her survivor's claim on October 1, 2001. Director's Exhibit 3. She is represented on appeal by a lay representative.

20 C.F.R. Part 718, noting that, based on the filing date of the survivor's claim, the amended regulations are fully applicable to the survivor's claim. *See* 20 C.F.R. §725.2(c).

With regard to the modification request in the miner's claim, the administrative law judge acknowledged the standard set forth in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), and found that the evidence developed since the denial of the miner's prior claim established invocation of the rebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.305, but also established rebuttal of the presumption since the miner did not have pneumoconiosis. The administrative law judge also found that there was no mistake of fact in the previous denials. Accordingly, the administrative law judge denied modification and benefits on the miner's claim.

With respect to the survivor's claim, the administrative law judge considered all of the relevant admissible evidence of record in that claim and found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that the existence of pneumoconiosis was not established and that the evidence was sufficient to establish rebuttal of the 20 C.F.R. §718.305 presumption. Additionally, claimant argues that the administrative law judge erred in giving any weight to the opinions of employer's medical experts stating that the miner's death was unrelated to pneumoconiosis, and contends that the administrative law judge erred in finding that the evidence was insufficient to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) in the survivor's claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits on the merits in both claims as supported by substantial evidence. On cross-appeal, employer asserts that the administrative law judge erred in excluding certain evidence from the record of the survivor's claim. The Director has filed a letter indicating that he will not file a substantive response to the merits of claimant's appeal, but argues that employer's contentions on cross-appeal are without merit. Employer has filed a reply brief wherein it reiterates the contentions raised in its cross-appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law 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 into the Act 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 in the miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Pursuant to 20 C.F.R. §718.305, in a claim filed before January 1, 1982, a miner with a minimum of fifteen years of qualifying coal mine employment, who submitted a negative x-ray interpretation, will be entitled to a rebuttable presumption of total disability due to pneumoconiosis if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Trent*, 11 BLR at 1-27.

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error.[2]

Claimant asserts that the autopsy evidence establishes that the miner had coal workers' pneumoconiosis and that it contributed to his death and argues that the administrative law judge erred in finding that the rebuttable presumption contained in Section 718.305, was rebutted by proof that he did not have pneumoconiosis. Claimant's Brief at 3; Decision and Order at 32-33. Claimant specifically contends that: Dr.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in Virginia. *See* Director's Exhibits 1, 4; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Turjman's opinion was entitled to greater weight because he was the autopsy prosector; it was error to reject the opinions of Drs. Forehand and Mitchell; it was error to admit Dr. Tomashefski's deposition and that his opinion is hostile to the Act; and it was error to fail to address the existence of legal pneumoconiosis. We do not find merit in claimant's arguments. Claimant's contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Claimant may establish a basis for modification in the miner's claim by establishing either a change in conditions or a mistake in a determination of fact.[3] 20 C.F.R. §725.310 (2000). In considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The administrative law judge has the authority to consider all the evidence for any mistake of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Claimant asserts that the administrative law judge erred by admitting Dr. Tomashefski's deposition testimony in the miner's claim record. Employer's Exhibit 6. By Order–Denying in Part and Granting in Part Respondent's Motion to Submit Additional Evidence dated August 7, 2003, the administrative law judge, referencing 20 C.F.R. §725.414(a)(3)(ii), permitted employer to depose Dr. Tomashefski as an extension of his initial report with respect to the survivor's claim, but noted that it would be untimely with respect to the miner's claim. In his Decision and Order, however, the administrative law judge reconsidered his ruling in light of the changed schedule for the submission of evidence and, noting that the deposition was of limited probative value as it was merely an extension of Dr. Tomashefski's reports already admitted, and that any prejudice to claimant was deemed negligible, he also admitted the deposition into evidence as a supplemental report with respect to miner's claim. Decision and Order at 5 n.4. We reject claimant's assertion of reversible error as the administrative law judge acted within his discretion in allowing the deposition into evidence in the miner's claim,

[3] The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as the miner's, which were pending on January 19, 2001. 20 C.F.R. §725.2(c).

and furthermore, claimant has not specifically identified how she was prejudiced by the ruling and any error would not affect the outcome of this case and thus would constitute harmless error. *See United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant also contends that the administrative law judge erred in his evaluation of the medical opinion evidence pursuant to Section 718.305, arguing that in finding the evidence sufficient to establish rebuttal at Section 718.305, the administrative law judge erred in according greater weight to the opinions of Drs. Crouch and Tomashefski than to the opinions of Drs. Turjman and Perper, offered after reviewing the autopsy results. Drs. Crouch[4] and Tomashefski[5] opined that the miner's disabling respiratory impairment was due to emphysema and associated interstitial fibrosis due to cigarette smoking, whereas Dr. Turjman,[6] the autopsy prosector, and Dr. Perper[7] opined that the miner suffered from simple and complicated pneumoconiosis as well as emphysema caused by coal mine employment, which caused a disabling impairment during the miner's lifetime and contributed to his death. Director's Exhibits 10, 13, 21; Claimant's Exhibit 1; Employer's Exhibit 4.

In considering the medical opinions, the administrative law judge rationally found that the reports of Drs. Crouch and Tomashefski, both of whom opined that the miner did not suffer from pneumoconiosis or any disease arising out of coal dust exposure, Directors Exhibits 13, 21; Employer's Exhibit 1**,** were entitled to the greatest weight based on the qualifications of these physicians and the fact that they provided the best-reasoned opinions of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Upon a comparison of the physicians' respective credentials, the administrative law judge found that the opinions of. Drs Turjman and Perper, Director's Exhibits 10; Claimant's Exhibit 1, were outweighed by the contrary detailed and reasoned opinions of Drs. Crouch and Tomashefski. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269.

---

[4] Dr. Crouch is a Board-certified pathologist.

[5] Dr. Tomashefski is a Board-certified anatomic and clinical pathologist.

[6] Dr. Turjman is a Board-certified pathologist.

[7] Dr. Perper is a Board-certified anatomic pathologist with a subspecialty in forensic pathology.

The administrative law judge noted that although Dr. Turjman was the autopsy prosector, his opinion was not entitled to superior weight as he failed to fully account for the miner's lengthy smoking history. Decision and Order at 6, 26; *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. Contrary to claimant's assertion of error, the administrative law judge was not required to credit the opinion of the autopsy prosector solely because Dr. Turjman had performed the autopsy. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

Likewise, the administrative law judge permissibly discounted the opinions of Drs. Forehand and Mitchell since these physicians relied solely on Dr. Turjman's unreliable autopsy report in reaching their diagnoses. *Akers*, 131 F.3d 438, 21 BLR 2-269; Decision and Order at 9-10; Claimant's Exhibit 2. In addition, the administrative law judge noted that although Dr. Perper possessed "extensive credentials," Dr. Tomashefski "has had a continuing association with a large medical center as chief of pathology and with teaching responsibilities at Case Western Reserve Medical School as well as a medical practice treating patients," "Dr. Crouch has high ranking academic responsibilities at the Washington University in St. Louis Medical School, as well as a teaching and treating practice," and "[b]oth physicians are extensively published." Decision and Order at 28-29. The administrative law judge thus permissibly relied on the associations with academic and large medical institutions in positions of high responsibility to resolve the conflicting views of the physicians and rationally concluded that the reasoned opinions of Drs. Tomashefski and Crouch established that the miner "did in fact not have coal workers' pneumoconiosis in any of its forms including complicated pneumoconiosis" and that "coal workers' pneumoconiosis was not a contributing cause of the Miner's death or disability prior to his death." Decision and Order at 29; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269.

Whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge to decide. *Clark*, 12 BLR at 1-155; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). The administrative law judge permissibly accorded determinative weight to the opinions of Drs. Crouch and Tomashefski as he found these physicians offered well reasoned and documented opinions and in light of their superior credentials in the field of pathology. *See Sparks*, 213 F.3d 186, 22 BLR 2-251; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269.

Contrary to claimant's assertions, the administrative law judge did address whether the miner had legal pneumoconiosis as defined in Section 718.201. Decision and Order at 30. Moreover, claimant's mere assertion of bias and hostility to the Act in reference to the opinions of Drs. Castle, Crouch, and Tomashefski, without a specific allegation of error on the administrative law judge's part in his consideration of them,

provides no basis for review of the administrative law judge's reasons for crediting the opinions of these physicians. *Sarf v. Director*, OWCP, 10 BLR 1-119 (1987).

We hold, therefore, that the administrative law judge provided valid reasons for concluding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) in the survivor's claim, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that employer established rebuttal of the Section 718.305 presumption in the miner's claim, and that claimant was not entitled to invocation of the irrebuttable presumption of Section 718.304 in either claim. Additionally, the administrative law judge properly reviewed the entire record and reasonably concluded that there was no mistake in a determination of fact in the prior denial of the miner's claim pursuant to Section 725.310 (2000). The administrative law judge is empowered to weigh the medical evidence and to draw his or her own inferences therefrom, *see Maypray*, 7 BLR 1-683, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson*, 12 BLR at 1-113. Consequently, we affirm the administrative law judge's finding that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000) in the miner's claim, as it is supported by substantial evidence. *See Jessee*, 5 F.3d at 725, 18 BLR at 2-28. Since claimant's petition for modification in the miner's claim was properly denied, we affirm the denial of benefits in the miner's claim.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element of entitlement. *See Trent*, 11 BLR at 1-27; *White v. Director, OWCP*, 6 BLR 1-368 (1983). Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, precludes an award of benefits on the survivor's claim under 20 C.F.R. Part 718. *Trumbo*, 17 BLR 1-85; *Trent*, 11 BLR at 1-27. Consequently, we affirm the administrative law judge's denial of benefits in the survivor's claim as it is supported by substantial evidence. Therefore, we need not address employer's challenge, on cross-appeal, to the administrative law judge's evidentiary rulings. *See Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order - Rejection of Claims is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge