

BRB No. 07-0463 BLA

J.R.)	
(o/b/o Estate of R.B., Widow of J.B.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
C R & R TRUCKING COMPANY,)	
INCORPORATED)	DATE ISSUED: 02/21/2008
)	
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 on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

J.R., Kodak, Tennessee, *pro se*.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order on Modification Denying Benefits (2005-BLA-00083) of Administrative Law Judge Jeffrey Tureck (the administrative law judge), rendered 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 administrative law judge determined that

¹ Claimant is the daughter of the miner and his widow, and is pursuing the instant survivor's claim, filed by the miner's widow on August 1, 2000, in her capacity as executrix of her mother's estate.

the survivor's claim was previously denied on February 6, 2003, by Administrative Law Judge Thomas F. Phalen, for failure to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and the denial of benefits was upheld by the Board on appeal. Decision and Order at 2; *R.B. v. CR & R Trucking Co., Inc.*, BRB No. 03-0354 BLA (Feb. 5, 2004)(unpub.). Following claimant's motion for modification on December 4, 2004, and a hearing conducted on March 30, 2006, the administrative law judge found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c). Accordingly, modification was denied pursuant to 20 C.F.R. 725.310 (1999).²

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer has not filed a response, and the Director, Office of Workers' Compensation Programs, has also declined to file a substantive response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence and is in accordance with law.³ *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis arising from coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); see *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).

² The amendments to the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, became effective on January 19, 2001. All citations to the regulations, unless otherwise noted, refer to the amended regulations. However, the amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this, that were pending on January 19, 2001; rather, the version of the regulation as published in the 1999 Code of Federal Regulations is applicable. See 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

³ The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mine industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 2-8.

For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death; if it substantially contributes to or is a factor leading to the miner's death; if death was caused by complications thereof; or if the presumption of complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is considered a substantially contributing cause of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); see *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The modification procedure allows for the review of factual errors in an effort to render justice under the Act by vesting the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); see *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988).

After consideration of the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding that Judge Phalen had properly denied survivor's benefits, the administrative law judge accurately determined that the only evidence in the record before Judge Phalen relevant to the cause of the miner's death was Dr. Fino's July 25, 2001 report stating that the miner's death was unrelated to pneumoconiosis, and the miner's death certificate. Decision and Order at 2; Director's Exhibits 11, 41. While the death certificate attributed the miner's death to a myocardial infarction due to cardiorespiratory arrest and chronic lung disease, the administrative law judge permissibly found that it was of no probative value because it was conclusory, did not mention pneumoconiosis, and there was no indication that the deputy coroner who signed it was a physician or had any knowledge of the miner's condition. Decision and Order at 2; see *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). As claimant submitted no new evidence for consideration, and substantial evidence supports the administrative law judge's finding that the earlier evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge properly concluded that modification was not appropriate. Decision and Order at 3; see *O'Keeffe*, 404 U.S. at 257; *Wojtowicz*, 12 BLR at 1-164. The administrative law judge's findings pursuant to Section 725.310 (1999) are supported by substantial evidence and are affirmed. Consequently, we affirm the administrative law judge's denial of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge