

BRB No. 09-0461 BLA

DIXIE LESLIE)	
(Widow of BILLY LESLIE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
RATLIFF COAL SALES,)	DATE ISSUED: 02/18/2010
INCORPORATED/KENTUCKY)	
EMPLOYERS MUTUAL INSURANCE)	
)	
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 - Denying Survivor's Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Todd P. Kennedy (Jones, Walter, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Survivor's Benefits (2007-BLA-5319) of Administrative Law Judge Kenneth A. Krantz rendered on a request for

modification of the denial of a survivor's claim¹ 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 Administrative Law Judge Thomas F. Phalen, Jr., had previously denied benefits in the survivor's claim on November 7, 2005, for failure to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant initially appealed the decision, but upon claimant's request, the Board dismissed the appeal and remanded the case to the district director for modification proceedings, in conjunction with claimant's petition for modification, filed on November 25, 2005. *Leslie v. Ratliff Coal Sales, Inc.*, BRB No. 06-0225 BLA (Dec. 9, 2005)(unpub. Order); Director's Exhibits 28, 50, 51, 52, 55. Following a hearing, the administrative law judge found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and thus, claimant had failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, modification was denied.

On appeal, claimant challenges the administrative law judge's determination that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), contending that the administrative law judge erred in not according determinative weight to the death certificate and the opinion of Dr. King, the miner's treating physician. Employer responds, urging affirmance of the administrative law judge's denial of modification and benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

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.² 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).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that

¹ Claimant is the widow of the miner, who died on January 31, 2002. Director's Exhibit 10. Claimant filed for survivor's benefits on March 4, 2002. Director's Exhibit 3.

² The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1.

pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see 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). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (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 Company*, 12 BLR 1-162, 1-164 (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, 256 (1971); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

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 law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding that Judge Phalen had properly denied survivor's benefits, the administrative law judge determined that the only evidence of record relevant to the cause of the miner's death was the death certificate signed by Dr. King; letters from Dr. King, submitted as medical opinion evidence from the miner's treating physician; and the miner's treatment records. Decision and Order at 14; Director's Exhibits 10, 11, 44, 45, 66. The administrative law judge correctly noted that the death certificate attributed the miner's death to "progressive massive fibrosis due to coal workers' pneumoconiosis," and accurately summarized Dr. King's opinion, that the immediate cause of the miner's death was the miner's "coal workers' pneumoconiosis with progressive massive fibrosis . . . based upon the history of this individual and his years of medical treatment." Decision and Order at 10-11; Director's Exhibits 10, 44, 45, 66.

The administrative law judge assessed the credibility of Dr. King's opinion, and permissibly found it to be conclusory and unsupported by the record because the physician failed to either explain the basis for his conclusions or provide objective support for his diagnosis of progressive massive fibrosis. Decision and Order at 14; *see Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-55 (1989)(*en banc*); *Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182, 1184 (1984). The administrative law judge further determined

that, while the treatment records indicated that the miner had a totally disabling respiratory disease, they failed to provide support for Dr. King's diagnosis of progressive massive fibrosis or a finding that the miner's death was caused by, contributed to, or hastened by pneumoconiosis. Contrary to claimant's contention, the administrative law judge was not required to accord greater weight to the opinion of Dr. King, based upon his status as a treating physician. Rather, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (6th Cir. 2003); *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Although the administrative law judge did not specifically reference the applicable regulation at 20 C.F.R. §718.104(d), which sets forth the factors for consideration in determining the weight to be accorded to the opinion of a treating physician, he acknowledged the nature and duration of the relationship and treatment provided by Dr. King. Decision and Order at 4, 8-9, 14. In addition, given the lack of reasoning and documentation underlying Dr. King's opinion, the administrative law judge permissibly determined that the death certificate was insufficient, standing alone, to establish that the miner's death was due to pneumoconiosis, as the doctor failed to state a basis for his conclusion that "progressive massive fibrosis" was the immediate cause of the miner's death. *See Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 14; Director's Exhibit 10. Because the administrative law judge permissibly discounted the only medical evidence of record supportive of claimant's burden, we affirm the administrative law judge's findings that claimant failed to establish that the miner's death was due to pneumoconiosis at Section 718.205(c), and that modification of the prior denial was not appropriate pursuant to Section 725.310, as supported by substantial evidence. Decision and Order at 14-15; *see* 20 C.F.R. §725.310; *O'Keefe*, 404 U.S. at 257; *Griffith*, 49 F.3d at 186, 19 BLR at 2-117; *Brown*, 996 F.2d at 817, 17 BLR at 2-140; *Wojtowicz*, 12 BLR at 1-164. Consequently, we affirm the administrative law judge's denial of modification and survivor's benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge-