

BRB No. 01-0545 BLA

MARCELENE HELTON)	
(Widow of GARLAND D. HELTON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Marcelene Helton, Salyersville, Kentucky, *pro se*.

Barry H. Joyner (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (00-BLA-0302) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a 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).¹ Pursuant to claimant's request for modification, the administrative law judge found that claimant failed to establish that the

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

miner's death was caused by, contributed to, or in any way hastened by pneumoconiosis and that claimant had failed therefore to establish that a mistake in a determination of fact had been made in the prior denial of benefits on this survivor's claim.² Accordingly, benefits were again denied.

On appeal, claimant generally challenges the findings of the administrative law judge. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of 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); *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). In a survivor's claim filed on or after January 1, 1982, death will be considered due to

² Claimant filed the instant survivor's claim on February 16, 1995. Director's Exhibit 1. After a hearing, Administrative Law Judge Thomas F. Phalen found that claimant failed to establish that the miner's death was due to pneumoconiosis and denied benefits on April 30, 1997. Director's Exhibit 29. Claimant appealed, but the Board affirmed the denial of benefits. *Helton v. Director, OWCP*, BRB No. 97-1153 BLA (May 12, 1998)(unpublished). Thereafter, claimant requested modification of the denial on August 3, 1998. Director's Exhibit 38. The denial of that request for modification is the subject of the present appeal.

pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption set forth at Section 718.304, relating to complicated pneumoconiosis, is applicable. See 20 C.F.R. §§718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Pursuant to Section 725.310 (2000), any party may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or there was a mistake in a determination of fact in the earlier decision. *Worrell v. Consolidation Coal Co.*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992). Further, if a claimant avers generally or simply alleges that the administrative law judge improperly found or mistakenly decided the ultimate fact and thus erroneously denied the claim, the administrative law judge has the authority, without more (*i.e.*, there is no need for a smoking gun factual error, changed conditions or startling new evidence), to modify the denial of benefits. See *Worrell, supra*; *Jessee v. Director, OWCP*, 5 F.3d 723, BLR 2-26 (4th Cir. 1993).

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 and contains no reversible error. The administrative law judge properly found the evidence of record failed to establish that pneumoconiosis caused, contributed to or hastened the miner's death. Specifically, the administrative law judge noted that the death certificate listed the causes of death as widely metastatic bladder cancer, hepatic encephalopathy and diabetes. Director's Exhibit 5. Further the administrative law judge noted that while the evidence of record addressed whether the miner had pneumoconiosis, a pulmonary impairment arising out of coal mine employment, or was totally disabled, and discussed the miner's history of bladder cancer and subsequent treatment for bladder cancer, it did not indicate that the miner's death was caused or hastened by pneumoconiosis. Decision and Order at 6-7; see Director's Exhibits 5, 7, 8, 41, 51. We, therefore, affirm the administrative law judge's finding that the miner's death was not due to pneumoconiosis, an essential element of entitlement in a survivor's claim, and affirm the denial of benefits. *Neeley, supra*. Moreover, as claimant failed to establish death due to pneumoconiosis, the administrative law judge properly found that claimant failed to establish a basis for modification of the prior denial, *i.e.*, that a mistake in a determination of fact had been made in the prior denial of the survivor's claim. See *Worrell, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge