

BRB No. 04-0723 BLA

MAE ANN SHARPE)
(Widow of WILLIAM A SHARPE))
)
Claimant-Petitioner)
)
v.)
)
WESTMORELAND COAL COMPANY) DATE ISSUED: 06/13/2005
)
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 Denying Benefits Upon Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John A. Bednarz, Jr., Wilkes-Barre, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits Upon Remand (2001-BLA-0398 and 2001-BLA-0399) of Administrative Law Judge Robert D. Kaplan (the administrative law judge) on a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹ Claimant, Mae Ann Sharpe, is the widow of the miner, William A. Sharpe, who died on April 18, 2000. The death certificate lists the miner's cause of death as hypoglycemic shock as well as a ruptured aortic abdominal aneurysm. Director's Exhibit 66.

amended, 30 U.S.C. §901 *et seq.* (the Act). The instant case is before the Board for a second time and has a lengthy procedural history. The miner filed an application for benefits on March 8, 1989. Director's Exhibit 1. On August 26, 1993, Administrative Law Judge Julius Johnson issued a Decision and Order awarding benefits based on his finding that the miner had established the existence of complicated pneumoconiosis and was, therefore, entitled to the irrebuttable presumption that his pneumoconiosis was totally disabling. 30 U.S.C. §921(c)(3), as implemented by, 20 C.F.R. §718.304. Subsequent to an appeal by employer, the Board affirmed the award of benefits on the miner's claim. *Sharpe v. Westmoreland Coal Co.*, BRB No. 93-2511 BLA (Sept. 28, 1994) (unpub.).

After the miner's death on April 18, 2000, claimant filed a survivor's claim on April 26, 2000. Director's Exhibit 66. Employer contested the survivor's claim and also filed a timely request for modification of the award of benefits on the miner's claim. Director's Exhibit 73. On July 23, 2002, the administrative law judge issued a Decision and Order awarding benefits on both the miner's and the survivor's claims. The administrative law judge found that the newly submitted evidence failed to show that a mistake in the determination of fact had been made in the decision awarding benefits on the miner's claim. The administrative law judge further found that, as the prior determination of complicated pneumoconiosis was correct, claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis and was, therefore, entitled to benefits on her survivor's claim. Subsequent to an appeal by employer, however, the Board vacated the administrative law judge's award of benefits on both claims. *Sharpe v. Westmoreland Coal Co.*, BRB No. 02-0810 BLA (Apr. 22, 2003) (unpub.). The Board held that the administrative law judge erred in not engaging in a *de novo* review of all the evidence of record, both old and new, in determining whether Judge Johnson had made a mistake in a determination of fact when he found the existence of complicated pneumoconiosis established. Thus, the Board vacated the administrative law judge's finding that modification was not established on the miner's claim. *Sharpe*, slip op. at 3. Likewise, for the same reasons, the Board vacated the administrative law judge's finding of entitlement on the survivor's claim. *Sharpe*, slip op. at 4. The Board instructed the administrative law judge to reconsider Dr. Wheeler's findings in determining whether the x-ray evidence established the existence of complicated pneumoconiosis, to reconsider Dr. Castle's opinion, to reconsider the CT scan evidence, and to reconsider the deposition testimony evidence relevant to the existence of complicated pneumoconiosis, *Sharpe*, slip op. at 5-7.

On remand, the administrative law judge determined that Judge Johnson's prior determination, that the miner suffered from complicated pneumoconiosis, constituted a mistake in a determination of fact and granted employer's request for modification of the prior award of benefits. Decision and Order on Remand at 4-7. The administrative law judge further found that, while the evidence of record did not establish the existence of

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), the presence of simple pneumoconiosis was established through medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) and based on the miner's coal mine employment history of thirty-nine years, that claimant was entitled to the presumption at 20 C.F.R. §718.203(b) that his pneumoconiosis arose out of coal mine employment. Decision and Order on Remand at 7-17. The administrative law judge found, however, that the evidence failed to establish that the miner suffered from a totally disabling respiratory or pulmonary impairment. Decision and Order on Remand at 17-19. Benefits were, accordingly, denied on the miner's claim. Lastly, the administrative law judge determined that the evidence of record did not demonstrate that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and, therefore, denied benefits on the survivor's claim. Decision and Order on Remand at 19.

On appeal, claimant contends that the administrative law judge erred in determining that the evidence of record established only the existence of simple coal workers' pneumoconiosis and not complicated pneumoconiosis. Claimant also argues that the administrative law judge erred in not finding that the miner was totally disabled. Additionally, claimant contends that the administrative law judge erred in failing to address whether the physicians retained by employer were sufficiently impartial and unbiased. Lastly, claimant contends that the administrative law judge erred in failing to grant her Motion to Present Rebuttal evidence.²

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 the 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in concluding that employer established a mistake in a prior determination of fact, that is, that Judge Johnson had erred in finding the existence of complicated pneumoconiosis. Claimant argues that employer's request for modification in this case is merely an attempt by employer to relitigate clearly settled issues, and results in unfairness to claimant. More specifically, claimant contends that the administrative law judge erred in relying upon the opinion of Dr. Fino to support a finding that the prior finding of complicated

² We affirm, as unchallenged on appeal, the administrative law judge's determination that the evidence of record supported a finding of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis constituted a mistake in the determination of fact. Claimant's Brief at 30-34.

In awarding benefits on the miner's claim, Judge Johnson found that the opinions of Dr. Fino, Director's Exhibits 44, 76; Employer's Exhibits 1, 8, supported a finding of the existence of complicated pneumoconiosis and that the miner was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. On remand, however, the administrative law judge found that Dr. Fino opined only that the miner suffered from the existence of simple pneumoconiosis and did not suffer from tuberculosis or histioplasmosis. Decision and Order on Remand at 7. The administrative law judge thus found that this mischaracterization of Dr. Fino's medical conclusion undermined Judge Johnson's previous finding of the existence of complicated pneumoconiosis. Accordingly, the administrative law judge found that this error constituted a mistake in a prior determination of fact. Decision and Order on Remand at 7.

Contrary to claimant's assertion, the right to modification is available to both claimants and employers. See *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001); *Branham v. Bethenergy Mines, Inc.*, 21 BLR 1-79 (1998) (McGranery, J., dissenting); see also *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In reviewing the administrative law judge's findings, we hold that the administrative law judge rationally concluded that the prior determination, that the miner suffered from the existence of complicated pneumoconiosis, constituted a mistake in the determination of fact pursuant to Section 725.310. See *Jessee*, 5 F.3d 723, 18 BLR 2-26.

In finding that the x-ray evidence of record did not support a finding of complicated pneumoconiosis, the administrative law judge found that the four x-ray interpretations of complicated pneumoconiosis rendered by Drs. Aycoth and Capiello, Director's Exhibits 20, 37, were contradicted by other interpretations of the same film by equally-qualified readers and were also outweighed by the thirteen subsequent x-ray interpretations which did not support a finding of complicated pneumoconiosis. Director's Exhibits 41, 42; Employer's Exhibits 1-4, 8. The administrative law judge thus rationally concluded, based on consideration of all this evidence, that the x-ray evidence of record did not support a finding of complicated pneumoconiosis. See *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*); see also *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); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Further, contrary to the claimant's assertion, the administrative law judge permissibly found that the medical opinion evidence did not support a finding of

complicated pneumoconiosis. He rationally determined that Dr. Fino's opinions were entitled to greatest weight as they were best supported by the underlying documentation of record, Decision and Order at 7, 16. *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. Further, contrary to claimant's assertion, review of the administrative law judge's decision demonstrates that the administrative law judge did specifically consider Dr. Paranthaman's diagnosis of complicated pneumoconiosis, Director's Exhibit 12, but he permissibly found that the opinion was outweighed by the opinions of Dr. Fino, Decision and Order at 16; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. Accordingly, we hold that the administrative law judge complied with the Board's remand instructions to conduct a *de novo* review of all the evidence of record and the administrative law judge permissibly determined that employer has established a mistake in the prior determination that claimant suffered from complicated pneumoconiosis³ See 20 C.F.R. §718.304; *Lester*, 993 F.2d 1143, 17 BLR 2-114; *Melnick*, 16 BLR 1-31.

Claimant also contends that the administrative law judge erred in failing to find that the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge found that the pulmonary function study evidence, Director's Exhibits 10, 40, was non-qualifying.⁴ The administrative law judge also found that while an exercise blood gas study produced qualifying values, the remainder of the studies, exercise and non-exercise, produced non-qualifying values, Director's Exhibits 13, 40. Further, the administrative law judge permissibly determined that only Dr. Paranthaman opined that that the miner suffered from a totally disabling respiratory impairment. In a permissible exercise of his discretion, the administrative law judge concluded that Dr. Paranthaman's opinion was outweighed by the contrary opinions of Drs. Fino, Renn and Castle based on the latter physicians' superior qualifications, Decision and Order on Remand at 19. See *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. We, therefore, reject claimant's assertion and affirm the administrative law judge's determination that the evidence of record fails to support the presence of a totally disabling respiratory impairment. See 20 C.F.R. §718.204(b)(i)-(iv); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

³ We reject claimant's general assertion that the administrative law judge has failed to consider evidence of physicians' bias as claimant has failed to produce specific evidence of such bias. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

⁴ A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in tables at 20 C.F.R. §718.204(b), Appendices B, C, respectively. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b) (2) (i), (ii).

Finally, contrary to claimant's contention, we affirm the administrative law judge's determination that the evidence of record fails to support a finding that the miner's death was due to pneumoconiosis as the record lacks any evidence linking the miner's death due to his pneumoconiosis.⁵ 20 C.F.R. §718.205(c); *Sparks*, 213 F.3d 186, 22 BLR 2-251; *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90.

As the evidence has failed to establish the existence of complicated pneumoconiosis and failed to establish a totally disabling respiratory impairment, a requisite element of entitlement in a miner's claim, *see Trent*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*), and failed to demonstrate that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim, 30 U.S.C. §901; 20 C.F.R. §718.205(a)-(c); *Trumbo*, 17 BLR 1-85 (1993) we affirm the administrative law judge's denial of benefits on both claims.

⁵ On November 8, 2001, a hearing was held in this case. Subsequent to the hearing, claimant filed a "Motion for Rebuttal" seeking admission of additional documents. One such document was an amended death certificate indicating that pneumoconiosis played some role in the miner's death. The administrative law judge denied this motion as there was no basis demonstrated by claimant for a good cause exception to the "20-day rule" found at 20 C.F.R. §725.456. This was proper. *See Troup v. Reading Anthracite Coal Co.*, 21 BLR 1-211 (1999) (administrative law judge is granted broad discretion in resolving procedural disputes and his determinations will be vacated only if he has committed a clear abuse of the discretion given to him.); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428 (1984). We conclude that claimant has failed to demonstrate an abuse of discretion in the instant case.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge