

BRB No. 06-0138 BLA

CLARA S. HUGHES	)	
(Widow of JAMES HUGHES)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 07/28/2006
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 Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (05-BLA-00388) of Administrative Law Judge Stephen L. Purcell denying modification and 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). This case has been before the previously and involves a survivor's claim filed on December 1, 1993. This survivor's claim has a lengthy procedural history which is set forth in the Board's prior decision in *Hughes v. Clinchfield Coal Co.*, BRB No. 03-0139 BLA (Oct. 20, 2003)(unpub.); Director's Exhibit 114. Consequently, we will focus on the procedural details relevant to the administrative law judge's decision denying claimant's second modification request.

When the case was most recently before the Board on claimant's first modification request, the Board affirmed Administrative Law Judge Mollie W. Neal's findings that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that there was no mistake of fact in the previous denials. The Board thus affirmed Judge Neal's finding that claimant failed to establish a basis for modification under 20 C.F.R. §725.310 (2000) and affirmed the denial of benefits.

Claimant subsequently filed a second request for modification. Administrative Law Judge Stephen L. Purcell (the administrative law judge) found that the evidence was insufficient to establish that the miner suffered from pneumoconiosis or that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000). On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, requesting, *inter alia*, that the Board reject claimant's contention that the administrative law judge was bound by the prior finding of the existence of pneumoconiosis in the miner's lifetime claim.

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. 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).

---

<sup>1</sup> Claimant is the surviving spouse of the deceased miner, James Hughes, who died on September 30, 1993. Director's Exhibit 6.

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.<sup>2</sup>

Initially, we reject claimant's argument that the administrative law judge "erred in not acknowledging that [the miner] was found to have pneumoconiosis in his claim." Claimant's Brief at 4. The Board has held that employer was not collaterally estopped from relitigating the issue of occupational pneumoconiosis. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*); *Hughes v. Clinchfield Coal Co.*, BRB No. 00-0413 BLA (Feb. 8, 2001) (unpub.); *Hughes*, BRB No. 03-0139 BLA (Oct. 20, 2003)(unpub.). Thus, the administrative law judge properly considered whether the evidence of record was sufficient to establish the existence of pneumoconiosis.

Claimant also argues that the administrative law judge erred in failing to apply the amended regulations to this case, asserting that Dr. Stefanini's diagnoses of chronic obstructive pulmonary disease and chronic interstitial disease meet the definition of pneumoconiosis. See 20 C.F.R. §718.201; Claimant's Brief at 4. Claimant's arguments, however, are misplaced since the administrative law judge noted that he was applying the revised provisions of 20 C.F.R. Part 718. Decision and Order at 1, n. 1. Moreover, as the Director observes, the revised Section 718.201 does not represent a change in the law, but instead merely codifies prior case law. See *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001).

Pursuant to 20 C.F.R. §718.202(a), the administrative law judge initially considered *de novo* the previously submitted evidence of record and found that the existence of pneumoconiosis was not established by a preponderance of the evidence. Decision and Order at 5. Consequently, the administrative law judge found that there was no mistake in a determination of fact in the decisions by Judges Kichuck and Neal such that modification pursuant to 20 C.F.R. §725.310 (2000) would be appropriate. Decision and Order at 4, 10-12.

The administrative law judge also permissibly found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis and/or death due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205. The administrative

---

<sup>2</sup> 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. *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*).

law judge considered the newly submitted medical opinion evidence consisting of the reports and/or deposition testimony of Drs. Perper, Caffrey, Naeye, and Bush, all similarly well-qualified pathologists. Decision and Order at 5-10, 12; Director's Exhibits 116, 119; Employer's Exhibits 1, 3; 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*). The administrative law judge noted that Dr. Perper found the presence of pneumoconiosis and attributed the miner's lung cancer and death thereto, whereas, in contrast, Drs. Caffrey and Naeye did not diagnose pneumoconiosis and opined that neither pneumoconiosis nor the miner's coal mine dust exposure played a role in the miner's death or the miner's underlying lung cancer.<sup>3</sup> Decision and Order at 12. Finding that Dr. Perper's opinion did not outweigh the combined recent opinions of Drs. Caffrey and Naeye, the administrative law judge found that the preponderance of the medical evidence did not establish the presence of pneumoconiosis. Decision and Order at 12.

Claimant contends that the administrative law judge erred in his evaluation of the medical opinion evidence, specifically Dr. Perper's report. Claimant's Brief at 3. The administrative law judge accorded greater weight to the opinions of Drs. Caffrey and Naeye than to the opinion of Dr. Perper upon concluding that:

[T]he opinions of Drs. Caffrey and Naeye are not only supported by their own previously-stated opinions, but also by the well-reasoned, documented opinions of Drs. Tomashefski, Hansbarger, and Branscomb. Furthermore, I find that the opinions of Drs. Caffrey, Naeye, Tomashefski, Hansbarger, and Branscomb are most consistent with the preponderance of the x-ray evidence and biopsy evidence, which are negative for pneumoconiosis. Moreover, their opinions are more consistent with the preponderance of the pathology findings on autopsy which indicate that the miner only had minimal, if any, fibrosis associated with mild anthracotic pigment, insufficient to warrant a diagnosis of pneumoconiosis. Furthermore, the clear preponderance of the credible, autopsy findings reveals that, at most, there are a few, rare birefringent particles of silica. This also undermines Dr. Perper's linkage of the miner's lung cancer (and death) to coal mine dust exposure.

Decision and Order at 12.

---

<sup>3</sup> The administrative law judge also acknowledged that Dr. Bush's recent report included a reference to a "mild degree of coal workers' pneumoconiosis," but found that in the context of his entire report, Dr. Bush did not diagnose pneumoconiosis and that even if he did, "he clearly and unequivocally found that it did not play a role in the miner's lung cancer and/or death." Decision and Order at 12.

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 thus permissibly accorded determinative weight to the opinions of Drs. Caffrey and Naeye based on their well reasoned and documented opinions. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269.

Contrary to claimant's argument, 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 involving a modification request, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and his finding is affirmed. 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 denials 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 v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987).

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 v. Director, OWCP*, 11 BLR 1-26 (1987); *White v. Director, OWCP*, 6 BLR 1-368 (1983). In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), *see Compton*, 211 F.3d 203, 22 BLR 2-162, we also affirm the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). 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), as it is supported by substantial evidence. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

JUDITH S. BOGG  
Administrative Appeals Judge