

BRB No. 99-0856 BLA

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

Appeal of the Decision and Order - Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

James O. Wells, Jr. (Wells Law Office, P.C.), Rochester, Indiana, for claimant.

Rita Roppolo (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits (98-BLA-1027) of Administrative Law Judge Rudolf L. Jansen awarding benefits 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 found, and the parties stipulated to, ten years and eight months of qualifying coal mine employment as well as the existence of coal workers' pneumoconiosis. Decision and Order at 3; Hearing Transcript at 9; Director's Brief at 2. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the instant survivor's claim is a request for

modification.¹ Decision and Order at 2-5. The administrative law judge noted the proper standard and found that based on the evidence of record, claimant established a mistake in fact pursuant to 20 C.F.R. §725.310 as the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Decision and Order at 3-6. Accordingly, benefits were awarded. On appeal, the Director contends that the evidence of record is insufficient to establish entitlement to benefits. Claimant responds, urging affirmance of the award of benefits.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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading*

¹The miner, Douglas E. Bailey, died on August 13, 1994. Director's Exhibit 16. Claimant, the miner's widow, filed her survivor's claim on March 16, 1995, which was denied on August 13, 1997. Director's Exhibits 1, 32. Claimant subsequently requested modification on December 29, 1997. Director's Exhibit 36.

²The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202 and 718.203 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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). The United States Court of Appeals for the Fourth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death.³ See *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

³This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3.

The United States Court of Appeals for the Fourth Circuit issued *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), holding that the administrative law judge must determine whether a change in conditions or a mistake of fact has been made, even where no specific allegation of either has been made by claimant. Furthermore, in determining whether claimant has established modification pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). The administrative law judge, in the instant case, determined that the evidence of record was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 and therefore sufficient to establish modification.⁴ Decision and Order at 6.

The only evidence linking the miner's death to pneumoconiosis submitted in the original claim was a letter from the miner's treating physician, Dr. Rhinehart, dated December 4, 1995. In that letter, Dr. Rhinehart stated that he was treating the miner for squamous cell carcinoma at the time of death and

[t]here is documented higher incidence of lung cancer in coal miner's who have smoked. Statistically it has been shown that black lung has contributed to the development of lung cancer.

⁴The administrative law judge properly concluded that as the instant case was a survivor's claim, modification could not be established based on a change in conditions. Decision and Order at 3; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Director's Exhibit 19. On modification, claimant submitted a letter dated August 8, 1997 from Dr. Rhinehart together with the doctor's curriculum vitae showing that he is board certified in medical oncology and internal medicine. In that letter Dr. Rhinehart opined that the miner died from squamous cell carcinoma of the lung and that pneumoconiosis was a "significant contributing factor to his lung malignancy in addition to the obvious cause of long standing cigarette smoking." Director's Exhibit 33. The doctor also stated that the mechanism of his death included ... disseminated carcinomatosis and the black lung disease" Director's Exhibit 33.⁵ To rebut Dr. Rhinehart's 1997 letter, the Director submitted

⁵Dr. Rhinehart wrote:

Douglas Bailey was a patient of ours who expired on August 13, 1994. This gentleman died of squamous cell carcinoma of the

lung. He had a long history of working in coal mines and a long history of cigarette smoking. It is my feeling that this patient clearly had evidence of pneumoconiosis or coal miner's lung prior to his death, and that this was a significant contributing factor to his lung malignancy in addition to the obvious cause of long standing cigarette smoking.

The mechanism of his death included not only disseminated carcinomatosis and the black lung disease, but deep vein thrombosis, hypercoagulable state and a pulmonary emboli.

Again, I would emphasize the dual contributing factor of black lung disease and cigarette smoking as both being significant factors in the patient's ultimate lung malignancy and his demise on August 13, 1994.

Department of Labor form Request for Reasoned Medical Opinion in which Dr. Long opined that the miner's death was not due to pneumoconiosis. Director's Exhibit 41.⁶

The Director contends on appeal that the administrative law judge erred in relying upon Dr. Rinehart's opinion to find that pneumoconiosis hastened the miner's death, asserting that Dr. Rinehart's opinion is neither reasoned nor documented. We disagree. In reviewing the administrative law judge's Decision and Order, the Board is charged with determining whether the administrative law judge's findings are rational and supported by substantial evidence. *See O'Keeffe, supra*. In making this determination, "substantial evidence" consists of evidence that is of sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding at issue. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(quoting *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197 (1938)). That which is acceptable to a "reasonable mind," is a decision that rests within the "realm of rationality." *Mays*, 176 F.3d at 757, 21 BLR at 2-591. Thus, an administrative law judge's finding cannot be vacated merely because a different result could have been reached or a different interpretation of the facts could have been adduced. *Id.*

We hold that in the present case, the administrative law judge's determination that Dr. Rinehart's opinion is sufficient to establish that pneumoconiosis hastened the miner's death is, in fact, rational and supported by substantial evidence. The administrative law judge acted within his discretion in treating Dr. Rinehart's conclusion that pneumoconiosis was a significant contributing factor in the miner's demise as adequately reasoned and documented based upon Dr. Rinehart's credentials as a Board-certified medical oncologist and internist and upon his status as the miner's treating physician, who had examined the miner on

⁶Dr. Long stated in relevant part:

In my opinion this relationship (CWP as cause of carcinoma) has not be [*sic*] established. He had a long smoking history which was the most likely cause of the carcinoma. Thus, in my opinion his coal workers' pneumoconiosis did not cause, contribute to or hasten his death.

approximately forty-five occasions. Decision and Order at 5-6; Director's Exhibits 33, 42. The Fourth Circuit has observed that an expert's qualifications are important indicators of the reliability of his opinion. See *Milburn Colliery Company v. Hicks*, 138 F.3d 524, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The Fourth Circuit has also stated that "as a general matter, the opinions of treating and examining physicians deserve special consideration." *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); accord, *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Contrary to the Director's suggestion, the administrative law judge was not required to treat the prior documents authored by Dr. Rinehart, in which he did not identify pneumoconiosis as a cause of death, as evidence contrary to Dr. Rinehart's subsequent opinion. The omission of a reference to pneumoconiosis on the miner's death certificate and in hospital records cannot logically be held to create a conflict with Dr. Rinehart's statement that pneumoconiosis was a significant factor in the miner's death. See *Lafferty v. Cannerton Industries, Inc.*, 12 BLR 1-190 (1989). Nor was the administrative law judge irrational in crediting Dr. Rhinehart's 1997 letter as evidence that pneumoconiosis contributed to the miner's death after rejecting his 1995 letter, because that letter merely asserted the existence of statistical evidence linking pneumoconiosis to cancer. Decision and Order at 5. Moreover, the administrative law judge rationally determined that Dr. Long's opinion, that the miner's death was not due to pneumoconiosis, was entitled to less weight on the grounds that unlike Dr. Rhinehart, Dr. Long is not a Board-certified medical oncologist she did not identify the reports she relied upon in reaching her conclusion, and, as the administrative law judge reasonably determined, she expressed her opinion regarding the cause of the miner's death in terms that "indicate uncertainty." Decision and Order at 6; Director's Exhibit 41; see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). We affirm, therefore, the administrative law judge's finding that Dr. Rinehart's opinion is sufficient to establish that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2), as it is rational and supported by substantial evidence. Hence, we also affirm the administrative law judge's finding that claimant established a mistake of fact in the administrative law judge's prior Decision and Order under Section 725.310 and affirm the award of benefits. See *Jessee, supra*; *Shuff, supra*.

Accordingly, the administrative law judge's Decision and Order - Awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge