

BRB No. 01-0879 BLA

SHEILA G. MULLINS)
(Widow of KENNETH C. MULLINS))
)
 Claimant-Petitioner)
)
 v.)
)
 WESTMORELAND COAL COMPANY) DATE ISSUED:
)
 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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Sheila G. Mullins, Big Stone Gap, Virginia, *pro se*.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the Decision and Order On Modification Denying Benefits (01-BLA-0351) of Administrative Law Judge Jeffrey Tureck rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² Pursuant to claimant's request for modification, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis in this survivor's claim and failed, therefore, to establish that a mistake in a determination of fact had been made in the prior denial of benefits in this survivor's claim.³ Accordingly, benefits were again denied.

On appeal, claimant generally challenges the findings of the administrative law judge. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.

² 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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ Claimant is the widow of the miner, Kenneth Mullins, who died on October 16, 1995. Director's Exhibits 1, 7. Claimant filed the instant survivor's claim on March 14, 1997. Director's Exhibit 1. After a hearing, Administrative Law Judge Richard T. Stansell-Gamm found that claimant failed to establish the existence of pneumoconiosis and denied benefits on May 28, 1998. Director's Exhibit 65. Claimant appealed, but the Board affirmed the denial of benefits in *Mullins v. Westmoreland Coal Co.*, BRB No. 98-1290 BLA (June 29, 1999)(unpub.). Thereafter, claimant requested modification of the denial on June 20, 2000. Director's Exhibit 74. The denial of that request for modification is the subject of the present appeal.

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'Keeffe 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. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 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 *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (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, considering the new evidence in conjunction with the old evidence, properly found the evidence of record failed to establish the existence of pneumoconiosis, as none of the x-ray, biopsy or CT scan evidence was positive for the presence of the disease, and the medical opinion evidence failed to establish the existence of pneumoconiosis as defined by the Act. 20 C.F.R. §718.201; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 3; Director's Exhibits 1-64, 74, 81, 82. We, therefore, affirm the administrative law judge's finding that the miner did not suffer from pneumoconiosis, an essential element of entitlement, and affirm the denial of benefits. *Trumbo, supra*. Moreover, as claimant failed to establish the existence of pneumoconiosis, the administrative law judge properly found that claimant failed to establish a basis for modification of the prior denial, *i.e.*, a mistake in a determination of fact. See *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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge