

BRB No. 10-0568 BLA

MARGIE M. ALLEN)
(Widow of ARVIL ALLEN))
)
 Claimant-Petitioner)
)
 v.)
)
 WELLMORE COAL CORPORATION) DATE ISSUED: 06/21/2011
)
 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 on Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Margie M. Allen, Grundy, Virginia, *pro se*.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of legal counsel, the Decision and Order Denying Benefits on Modification (2009-BLA-5647) of Administrative Law Judge Linda S. Chapman, rendered on a petition for modification of the denial of a survivor's claim filed on June 4, 2001, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)

¹ Claimant is the surviving spouse of the miner, who died on February 17, 2001. Director's Exhibit 11.

(to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² In the initial Decision and Order in this case, Administrative Law Judge Edward Terhune Miller found that claimant failed to establish, by a preponderance of the evidence, the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis.³ 20 C.F.R. §§718.202(a), 718.205(c). Accordingly, Judge Miller denied benefits. Director's Exhibit 51.

Claimant appealed, without the assistance of counsel, and the Board affirmed Judge Miller's determination that the opinions of Drs. Castle and Naeye, that the miner's death was unrelated to pneumoconiosis, were entitled to determinative weight at 20 C.F.R. §718.205(c). *Allen v. Wellmore Coal Corp.*, BRB No. 03-0858 BLA, slip op. at 3-4 (July 29, 2004) (unpub.). The Board, therefore, affirmed Judge Miller's findings that claimant failed to establish that the miner's death was due to pneumoconiosis. *Id.* at 5. Claimant subsequently requested reconsideration of the Board's decision, which the Board summarily denied. *Allen v. Wellmore Coal Corp.*, BRB No. 03-0858 BLA (Oct. 4, 2004) (unpub. Order).

On March 4, 2005, claimant filed her first petition for modification. Adjudicating claimant's request pursuant to 20 C.F.R. §725.310, Administrative Law Judge Jeffrey Tureck found that employer no longer contested the issue of the existence of pneumoconiosis and, therefore, that claimant demonstrated a mistake in a determination of fact. Director's Exhibit 98. Judge Tureck then reviewed all of the evidence of record and determined that claimant failed to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). *Id.* Accordingly, benefits were denied. *Id.*

Pursuant to claimant's appeal, filed without the assistance of counsel, the Board affirmed, as unchallenged, Judge Tureck's findings that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *M.A. [Allen] v. Wellmore Coal Corp.*, BRB No. 07-0813 BLA, slip op. at 3 n.4 (June 20, 2008) (unpub.). The Board, however, rejected claimant's challenge to Judge Tureck's weighing of the conflicting medical opinions of record at 20 C.F.R. §718.205(c)(2). *Id.* at 4-7. The Board, therefore,

² The amendments to the Act became effective on March 23, 2010 and apply to claims filed after January 1, 2005. The amendments are not applicable to the survivor's claim in this case, based upon the filing date of June 4, 2001.

³ The miner filed two claims for benefits during his lifetime, both of which were denied. Director's Exhibit 1.

affirmed Judge Tureck's finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* at 7.

Claimant filed another timely request for modification, but did not submit any new evidence. Judge Chapman (the administrative law judge) determined that, because claimant failed to establish that the miner's death was due to pneumoconiosis, she failed to establish a mistake in a determination of fact in the previous denials. Accordingly, the administrative law judge denied claimant's request for modification and her claim for benefits.

Claimant appeals, challenging the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis and generally contending that the administrative law judge erred in failing to grant modification and award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order denying modification and benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this 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. *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, are supported by substantial evidence, and are in accordance with law.⁴ 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 in this survivor's claim, claimant must prove 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; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered 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 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a

⁴ The record indicates that the miner's last coal mine employment was in Virginia. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 7.

miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

With respect to claimant's request for modification, in a survivor's claim, the sole ground for modification is that a mistake in a determination of fact was made in the prior denial. *Wojtowicz v. Duquesne Light Company*, 12 BLR 1-162, 1-164 (1989). The fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

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 findings are supported by substantial evidence, consistent with applicable law, and contain no error requiring remand. Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the death certificate, prepared by Dr. Briggs, a letter from Dr. Briggs, Dr. Briggs's records of the miner's treatment, and reports from Drs. Segen, Naeye, Perper, Crouch and Castle.

The administrative law judge permissibly found the death certificate to be conclusory, and unsupported by the record, because Dr. Briggs did not explain the basis for his conclusions or provide support for a finding that the miner's death was caused by, contributed to, or hastened by pneumoconiosis.⁵ See *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (4th Cir. 2000); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order at 4-5; Director's Exhibit 11. The administrative law judge also correctly determined that Dr. Segen did not identify pneumoconiosis as a direct, or contributing, cause of the miner's death.⁶ Decision and

⁵ Dr. Briggs, who is Board-certified in osteopathy, identified hepatocellular carcinoma as the immediate cause of death and indicated that hepatic disease and coal workers' pneumoconiosis were conditions that led to the immediate cause of death. Director's Exhibit 11.

⁶ In his autopsy report dated April 18, 2001, Dr. Segen, who is Board-certified in anatomic and clinical pathology and the subspecialty of immunopathology, concluded that the miner had, *inter alia*, terminal liver cancer and clinical liver failure, cardiomegaly, pulmonary hypertension, coal workers' pneumoconiosis, emphysema, and coronary heart disease. Director's Exhibit 12. Dr. Segen indicated that the miner's death was "presumably, related to extensive involvement of the liver by the primary liver cancer, accompanied by multiple metastases." *Id.*

Order at 4; *see* Director's Exhibit 12. The administrative law judge rationally found that the reports of Drs. Naeye and Castle are not probative on the issue of death causation at 20 C.F.R. §718.205(c), as neither of these physicians diagnosed pneumoconiosis, contrary to employer's concession. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 4-5; Director's Exhibit 92.

The administrative law judge rationally found that Dr. Briggs's opinion, that the miner had "severe" coal workers' pneumoconiosis that hindered the treatment of his cancer, was entitled to little weight, as it was contrary to the evidence of record, which established that the miner's pneumoconiosis was mild, and lacked an explanation of what "could have been done differently to treat [the miner] for his liver cancer if he did not have pneumoconiosis."⁷ Decision and Order at 4; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Director's Exhibit 23. The administrative law judge also acted within her discretion in determining that the probative weight of Dr. Briggs's opinion was diminished, as Dr. Briggs did not diagnose pneumoconiosis during the miner's lifetime and he did not explain the change in his diagnosis subsequent to the miner's death. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 188, 22 BLR 2-564, 2-571-72 (4th Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 577, 21 BLR 2-12, 2-20 (3d Cir. 1997); Decision and Order at 4; Director's Exhibit 23.

The administrative law judge also determined correctly that, while Dr. Perper listed ways in which the miner's pulmonary condition *could have* contributed to his death, he did not explain how coal workers' pneumoconiosis *actually* contributed to the miner's death.⁸ Thus, the administrative law judge rationally concluded that Dr. Perper's

⁷ In a short letter dated May 15, 2002, Dr. Briggs acknowledged that the miner died on February 17, 2001 from carcinoma of the liver, but opined that a much more detailed and comprehensive plan of treatment for the miner's carcinoma could have been developed had he not had severe coal workers' pneumoconiosis. Director's Exhibit 23. Dr. Briggs also opined that coal workers' pneumoconiosis was a complicating factor in the treatment of the miner's liver carcinoma and hastened his death. *Id.*

⁸ In his May 9, 2005 report, Dr. Perper, who is Board-certified in anatomic surgical and forensic pathology, reviewed the miner's medical records, the reports by Drs. Castle, Naeye, and Briggs, as well as Dr. Segen's autopsy report and fifteen autopsy slides. Director's Exhibit 71. Dr. Perper opined that his pulmonary pathological findings revealed "significant and substantial coal workers' pneumoconiosis" that was a substantial cause of the miner's death and a hastening factor in his demise but, as the administrative law judge found, Dr. Perper did not definitively explain how pneumoconiosis hastened the miner's death. *Id.*

opinion was insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c). *See Sparks*, 213 F.3d at 192, 22 BLR at 2-262; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); Decision and Order at 4; Director's Exhibit 71.

In contrast, the administrative law judge permissibly determined that Dr. Crouch's opinion, that pneumoconiosis played no role in the miner's death, was worthy of great weight, as she is Board-certified in anatomic pathology, has been a Professor of Pathology and Immunology at the School of Medicine at Washington University since 1983, and specializes in the research and clinical teaching of pulmonary pathology. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Director's Exhibit 92. The administrative law judge, within a rational exercise of her discretion, found persuasive Dr. Crouch's opinion, that the miner's pneumoconiosis was very mild and would not have contributed to his death.⁹ *See Trumbo*, 17 BLR at 1-88-89; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order 6; Director's Exhibits 91, 92, 95.

Because the administrative law judge acted rationally in discounting the medical evidence of record supportive of claimant's burden, and in crediting the contrary evidence, we affirm the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). 20 C.F.R. §718.205(c); *see Shuff*, 967 F.2d at 980, 16 BLR at 2-93; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). We also affirm, therefore, the administrative law judge's conclusion that claimant did not establish a basis for modification of the prior denial pursuant to 20 C.F.R. §725.310. 20 C.F.R. §725.310; *see O'Keeffe*, 404 U.S. at 257; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Wojtowicz*, 12 BLR at 1-164. Consequently, we affirm the administrative law judge's denial of claimant's request for modification and her claim for survivor's benefits.

⁹ Dr. Crouch, who is a Board-certified anatomic pathologist, authored medical reports dated December 19, 2005 and April 20, 2006, and testified at a deposition on May 4, 2006. Director's Exhibits 91, 92, 95. Based upon a review of the autopsy slides, Dr. Crouch diagnosed very mild pneumoconiosis and opined that, because the pneumoconiosis was so mild, it caused little impairment of lung function and would not have contributed to or hastened the miner's death. *Id.* Dr. Crouch further indicated that all of the emphysema that the miner had, whether or not it was related to his coal mine work, did not make a significant contribution to his death. *Id.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge