

BRB No. 11-0619 BLA

KATHLEEN GOFF)	
(Widow of CALVIN GOFF))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN COAL COMPANY,)	DATE ISSUED: 06/25/2012
INCORPORATED)	
)	
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 Request for Modification of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Kathleen Goff, Shelbiana, Kentucky, *pro se*.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Request for Modification and denying benefits (2010-BLA-05039) of

¹ Claimant is the widow of the miner, Calvin Goff, who died on July 1, 2001. Director's Exhibit 5. Based on the filing date of the survivor's claim, the 2010 amendments to the Act are not applicable. The miner's lifetime claims have been denied.

Administrative Law Judge Robert B. Rae on a survivor's claim filed on September 26, 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)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act). Initially, on June 27, 2007, Administrative Law Judge Alice M. Craft denied benefits on the claim, finding the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).² Director's Exhibit 51. Pursuant to claimant's appeal, the Board affirmed Judge Craft's denial of benefits. *K.G. [Goff] v. Eastern Coal Co.*, BRB No. 07-0861 BLA (June 24, 2008)(unpub.). Claimant requested modification of the denial on July 18, 2008. Administrative Law Judge Robert B. Rae (the administrative law judge) found no mistake in fact in the prior decision and that claimant was not, therefore, entitled to modification pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification and again denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of her request for modification and the denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief in response to the 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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.³ 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).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, death will be considered due to

² Administrative Law Judge Alice M. Craft also found that the miner had twenty-one years of coal mine employment, based on the parties' stipulation.

³ Because the miner's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that death was caused by complications of pneumoconiosis, or that 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 miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Modification can be established in a survivor's claim only by establishing that a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310. The United States Court of Appeals for the Sixth Circuit has held that claimant need not allege a specific error in order for an administrative law judge to find modification. The administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

Considering the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge stated:

I have considered the substance of the readings and the qualifications of the physicians conducting the readings and find that the [c]laimant has not met the burden of proof necessary based on the x-ray evidence to show the presence of pneumoconiosis by x-ray readings.

Decision and Order at 5.

The administrative law judge, however, failed to identify the x-ray readings and the physicians he referenced and to discuss the basis for his credibility findings.⁴ Decision and Order at 5. Thus, his findings do not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding that

⁴ Although, at the end of his decision, the administrative law judge referred specifically to x-rays read as positive for pneumoconiosis by Dr. Alexander, and a rehabilitative report concerning Dr. Alexander's positive readings, Decision and Order at 8, 9, he did not discuss how he weighed them against the negative x-ray evidence.

the x-ray evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and remand the case for full consideration and discussion of all of the relevant evidence.

We next turn to the administrative law judge's finding that the medical opinion evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The medical opinion evidence consists of the opinions of Drs. Rosenberg, King and Musgrave. Dr. Rosenberg, who is Board-certified in internal, pulmonary and occupational medicine, reviewed the record and provided a report on November 18, 2005. Dr. Rosenberg concluded that, "it can be stated with a reasonable degree of medical certainty, that [the miner] did not have [coal workers' pneumoconiosis], either ... [clinical] or legal." Employer Exhibit 4. In an addendum dated May 30, 2010, Dr. Rosenberg also concluded, based on his review of the opinions of Drs. King and Musgrave, that the miner did not have pneumoconiosis. Employer's Exhibit 1. Dr. King, in a report dated November 13, 2005, diagnosed coal workers' pneumoconiosis, cardiopulmonary disease, and esophageal cancer. In a subsequent report, dated June 22, 2009, Dr. King also diagnosed coal workers' pneumoconiosis, stating that the diagnosis was supported by the miner's abnormal pulmonary function tests, abnormal CT scans, showing "small non specific mediastinal nodes less than 5 mm in size," and multiple prior abnormal medical examinations. Director's Exhibit 70.

Dr. Musgrave, the oncologist who treated the miner for his esophageal cancer, did not list coal workers' pneumoconiosis as a diagnosis on the miner's death certificate. Pursuant to correspondence dated June 18, 2009, however, Dr. Musgrave stated that the miner had been diagnosed with restrictive airway disease by a Board-certified pulmonologist, and that the miner's CT scans showed "mediastinal nodes less than 5 mm in size consistent with a diagnosis of coal workers' pneumoconiosis." Director's Exhibit 70; Decision and Order at 9.

Based on the above medical opinions, the administrative law judge concluded that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4), stating, "I find there is no medical evidence of any nature sufficient to support a finding of legal or clinical pneumoconiosis." Decision and Order at 9. The administrative law judge failed, however, to sufficiently discuss and analyze the medical opinion evidence in compliance with the requirements of the APA, as set forth above. *See Wojtowicz*, 12 BLR at 1-165. Accordingly, we vacate the administrative law judge's finding that the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and remand the case for reconsideration of the medical opinion evidence.

As there are both positive and negative x-ray interpretations of record, and as both Drs. King and Musgrave diagnosed the existence of pneumoconiosis, the administrative

law judge must discuss the weight, if any, he accords the x-ray interpretations and the medical opinions, and his reasons therefor.⁵ In rendering his decision on remand, the administrative law judge must explain the bases for all of his credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

In conclusion, therefore, we vacate the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) and (4)⁶ and we remand the case for the administrative law judge to reconsider the relevant evidence to determine whether the existence of pneumoconiosis was established thereunder and, therefore, whether the evidence establishes that a mistake in a determination of fact was made in the prior denial of the claim. 20 C.F.R. §725.310; *see Worrell*, 27 F.3d at 230, 18 BLR at 2-296. If the administrative law judge finds that a mistake in a determination of fact was made, the administrative law judge must then consider the claim on the merits. 20 C.F.R. §725.310.

⁵ In addition to considering whether the x-ray or medical opinion evidence establishes the existence of pneumoconiosis, the administrative law judge must also consider whether the CT scan evidence in this record establishes the existence of pneumoconiosis. *See* 20 C.F.R. §718.107.

⁶ The administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (3), as there is no evidence relevant to those subsections. The administrative law judge's subsection 718.202(a)(2) and (3) findings are therefore affirmed.

Accordingly, the administrative law judge's Decision and Order Denying Request for Modification and denying benefits is affirmed in part, vacated in part, and the case is remanded for consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge