

BRB No. 00-0585 BLA

DORSIA LAKIN)		
(Widow of SAMUEL LAKIN)		
)		
Claimant-Petitioner)		
)		
v.)		
)		
BETTY B COAL)	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 of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Dorsia Lakin, Clintwood, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (99-BLA-00145) of Administrative Law Judge Daniel F. Sutton denying a request for modification in a living miner's claim and benefits in 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,

¹ Claimant married Samuel Lakin, the miner, on July 27, 1979. Director's Exhibit 5. The miner died on June 3, 1997. Director's Exhibit 14A. Claimant filed her application for survivor's benefits on September 19, 1997. Director's Exhibit 1A.

30 U.S.C. §901 *et seq.* (the Act).² In the living miner's claim, the administrative law judge found that the miner's request for modification filed on March 14, 1996 was not timely and declined to consider the issue of modification pursuant to 20 C.F.R. §725.310 (2000). Based on the filing date of September 19, 1997, the administrative law judge adjudicated the survivor's claim pursuant to 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a)(2), 718.203(b), but insufficient to establish that pneumoconiosis caused, substantially contributed to or hastened the miner's death, 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge regarding death due to pneumoconiosis and the denial of modification in the miner's claim. 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.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which both employer and the Director have responded.³ Claimant, who is proceeding without counsel,

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, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ Employer and the Director, in briefs submitted in response to the Board's order, have

has not responded to the Board's order of February 21, 2001. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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. *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).

The miner filed his initial application for benefits on July 25, 1994, which the district denied on October 12, 1994. Director's Exhibits 1, 13. In the denial letter, the district director advised the miner that he could file a request for modification within one year of the denial based on a change in conditions or a mistake in fact. 20 C.F.R. §725.310 (2000); Director's Exhibit 13. By letter dated March 14, 1996, and filed with the district director on March 22, 1996, the miner requested modification and submitted new evidence. Director's Exhibit 18. The district director issued a "Proposed Decision and Order Denying Request for Modification as Untimely" on March 25, 1996. Director's Exhibit 20. Following an informal conference on July 29, 1996, the district director issued a Proposed Decision and Order, Memorandum of Conference on August 30, 1996, concluding that all parties agreed: that the request for modification filed on March 22, 1996 was not timely; that the district director found that good cause for an exception to the one year deadline was not shown; that all parties agreed that the claim filed on July 25, 1994 was closed and further pursuit of that claim would prove fruitless; and that the miner would pursue the new claim he filed on July 29, 1996. Director's Exhibit 30. Pursuant to the miner's request for a hearing in September 1996, the miner's representative was notified that the claim would be forwarded to the Office of Administrative Law Judges for a hearing on the question of the timeliness of the modification request; however, the hearing was not held as the miner died prior to the hearing date of June 25, 1997. Director's Exhibits 32, 37, 40, 45. In light of the miner's death and a request by the miner's representative, the claim was remanded to the district director pursuant to an Order signed by Administrative Law Judge Mollie Neal on August 4, 1997. Director's Exhibits 45, 46.

On remand, and after the development of additional evidence, a conference was held

both asserted that the regulations at issue in the lawsuit do not affect the outcome of this case.

and on June 15, 1998, the district director issued a second Proposed Decision and Order, Memorandum of Conference. The district director held that Stone Mountain agreed to withdraw the miner's second claim, filed on July 29, 1996, after being advised by the district director that there could not be two claims; that the request for modification was not timely; and that the miner's claim for benefits remains denied. Director's Exhibit 47. Claimant requested a hearing which was held on March 31, 1999. Director's Exhibit 49.

A request for modification based on a change in condition or a mistake in a determination of fact may be filed at any time before one year after the denial of a claim. 20 C.F.R. §725.310 (2000). Since the miner's initial claim was denied by the district director on October 12, 1994 and the miner filed his request for modification by letter dated March 14, 1996, some seventeen months after the denial of his claim, the administrative law judge properly found that the request for modification was not timely. *Id.* Furthermore, since no reason has been articulated for the lateness of this request, the administrative law judge permissibly found that no basis for tolling the deadline had been established. *Id.* We, therefore, affirm the decision of the administrative law judge to deny the miner's request for modification as it is supported by substantial evidence and is in accordance with law.

We remand the case for consideration of the miner's second application for benefits filed on July 29, 1996, however. To withdraw an application for benefits, a claimant must file a written request with the appropriate adjudication officer, indicating the reasons for seeking withdrawal of the claim, and the appropriate adjudication officer must determine if withdrawal of the claim is in the best interest of the claimant or his or her estate. 20 C.F.R. §725.306.

In the instant case, the record does not contain a written request from the claimant on behalf of the miner's estate outlining the reasons she sought withdrawal of the miner's claim nor a finding by the appropriate adjudication officer, in this case the district director, that withdrawal was in the best interests of the miner's estate. *Id.* As the procedure for withdrawing a claim was not followed, the miner's second claim for benefits remains viable. *Id.* Thus, on remand the administrative law judge must determine if the newly submitted evidence is sufficient to demonstrate a material change in conditions. 20 C.F.R. §725.309 (2000); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997).

In order to establish entitlement to benefits 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, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death

or that death was caused by complications of pneumoconiosis.⁴ 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 113 S.Ct. 969 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff, supra*.

⁴ Since the miner's last coal mine employment took place in Virginia, 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*).

At Section 718.205(c), claimant bears the burden of proving that pneumoconiosis caused, contributed to or hastened the miner's death. In finding that claimant failed to meet her burden of proof, the administrative law judge improperly found that the record contained no evidence that the miner's death was due to pneumoconiosis or complications caused by pneumoconiosis or that pneumoconiosis contributed to or hastened the miner's death. Contrary to the administrative law judge's conclusion, Dr. Abrenio, the autopsy prosector, not only diagnosed simple coal workers' pneumoconiosis, he also diagnosed multiple pulmonary and cardiac conditions, all of which he stated contributed to the immediate cause of the miner's death.⁵ *See* Director's Exhibit 10A. Thus, we vacate the findings of the

⁵Dr. Abrenio's final diagnosis included simple coal workers' pneumoconiosis, severe pulmonary congestion and edema, marked early bronchopneumonia, mild to moderate centrilobular emphysema, pleural fibrosis, old myocardial infarction, severe atherosclerosis and calcification of right and left coronary arteries, and cardiomegaly. In addition to the

administrative law judge at 20 C.F.R. §718.205(c) and remand this case for the administrative law judge to reconsider and weigh the medical opinion evidence to determine if claimant has met her burden of proof.⁶ 20 C.F.R. §718.205(c); *Shuff, supra; Trumbo,*

conditions listed in his final diagnosis, his microscopic findings also included mild interstitial fibrosis, no progressive massive fibrosis, mild coal workers' pneumoconiosis, early bronchopneumonia, severe pulmonary congestion and edema consistent with congestive heart failure which is secondary to the miner's previous myocardial infarction including that of cardiomegaly with left and right ventricular hypertrophy. Based on these findings, Dr. Abrenio stated that superimposed on the congestive heart failure was early bronchopneumonia and then concluded that "all of these contributed to the immediate cause of death." Director's Exhibit 10A.

⁶ Although the administrative law judge permissibly found that the weight of the x-ray interpretations by Board Certified Radiologists and/or B-readers was negative for the existence of pneumoconiosis, the administrative law judge properly concluded that all the pathologists were unanimous in their opinions that the autopsy evidence showed that the miner suffered from simple coal workers' pneumoconiosis. 20 C.F.R. §718.202(a)(1), (2);

supra.

Trumbo v. Reading Anthracite Co., 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); Director's Exhibits 10A, 11A; Employer's Exhibit 2. Thus, the administrative law judge properly found that claimant met her burden of proving the existence of pneumoconiosis. 20 C.F.R. §718.202(a); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR , (4th Cir. 2000). Likewise, the administrative law judge correctly found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), and that rebuttal of the presumption was not established. *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). We, therefore, affirm these findings as supported by substantial evidence.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge