

BRB No. 99-0849 BLA

MARTHA H. LEHAN)
(Widow of CHARLES B. LEHAN))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order Denying Petition for Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman (Abrahamsen, Moran & Conaboy), Scranton, Pennsylvania, for claimant.

Dorothy L. Page (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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Petition for Modification (98-BLA-1177) of Administrative Law Judge Ainsworth H. Brown denying 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).¹ Originally, in a Decision and

¹ Claimant is the surviving widow of the miner, Charles B .Lehan, who died on December 10, 1991, Director's Exhibit 4. The miner filed a miner's claim on December 3, 1985, and was ultimately awarded benefits in Decision and Order On Remand issued on November 2 1990, by Administrative Law Judge Ralph A. Romano, Director's Exhibit 16.

Order issued on May 28, 1993, the administrative law judge found nine years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, Director's Exhibits 16, 28. The administrative law judge noted that the parties stipulated that the miner had pneumoconiosis arising out of coal mine employment, Director's Exhibit 17. The administrative law judge also noted, however, that the miner's death certificate indicated that the miner's death was due to "acute cardiac and respiratory failure," Director's Exhibit 4, and that hospital records dating from the time of the miner's death indicate that the miner suffered cardiac and pulmonary arrest, Director's Exhibit 6. Considering the two relevant medical opinions of record from Dr. Aquilina, Director's Exhibit 18, and Dr. Levinson, Director's Exhibit 13,² the administrative law judge found that Dr. Aquilina did not explain how he found that the miner's lung condition hastened his death, especially in light of claimant's testimony that the miner suffered a sudden death ("He just fell down and that was it," *see* Director's Exhibit 21 - April 20, 1993, Hearing Transcript at 11). The administrative law judge, therefore, accorded greater weight to Dr. Levinson's opinion that the miner's death was not due to pneumoconiosis as he found it better supported, and in light of Dr.

The miner's claim is not at issue herein. Subsequent to the miner's death, claimant filed a survivor's claim on January 16, 1992, Director's Exhibit 1, which is the subject of the appeal before us.

² Dr. Aquilina had last examined the miner in 1987 and reviewed the evidence, noting that the miner died with acute cardiac and respiratory failure, apparently from a massive myocardial infarction. He diagnosed coal workers' pneumoconiosis and found that the miner's lung disease contributed significantly to and hastened the miner's death. Dr. Levinson reviewed the evidence and found no competent medical evidence to establish that the miner's death was due to pneumoconiosis.

Levinson's superior qualifications.³ Thus, the administrative law judge found that death due pneumoconiosis was not established pursuant to 20 C.F.R. §718.205(c) and, therefore, denied benefits.

³ Dr. Aquilina is a board-certified anesthesiologist, Director's Exhibits 18, 36, while Dr. Levinson is board-certified in internal medicine and pulmonary diseases, Director's Exhibit 13.

Claimant appealed and the Board affirmed the administrative law judge's Decision and Order denying benefits, *Lehan v Director, OWCP*, BRB No. 93-1806 BLA (Jun. 20, 1994)(unpub.). Director's Exhibit 28. Claimant appealed the Board's decision to the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, and the Third Circuit Court reversed the Board's Decision and Order affirming the denial of benefits and remanded the case for further proceedings, *Lehan v Director, OWCP*, No. 94-3428 (3d Circuit; May 16, 1995)(unpub.). Director's Exhibit 32. Although the Third Circuit Court noted that Dr. Aquilina's opinion was somewhat sparse, the Court held that when "viewed together with relevant scholarship in the medical field - of which we now take judicial notice," claimant had satisfied her initial burden of proof that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(d), citing to John Butler & Eugene Braunfeld, *Cor Pulmonale*, in 1 *Harrison's Principles of Internal Medicine* 1085 (Kurt J. Isselbacher et al. eds., 13th ed. 1994 ("detailing one form of heart failure linked to obstructive lung diseases").⁴ Next, the Third Circuit Court noted that the burden shifted to the Director, Office of Workers' Compensation Programs (the Director), to develop evidence that the miner's death was not due to pneumoconiosis pursuant to Section 718.205(d), but found Dr. Levinson's opinion "too terse" to meet the Director's burden of proof, since that the Director must produce "more than a bald-faced refutation" of claimant's evidence. Thus, the Third Circuit Court found that the administrative law judge's finding that death "was not due to" pneumoconiosis unsupported by substantial evidence and, in light of the fact that claimant's evidence "is also fairly meager," remanded the case to the administrative law judge for further development of the factual record.

⁴ The Third Circuit Court explained that by taking notice of this condition, it did not necessarily intend to restrict the subsequent fact-finding before the administrative law judge to the role of this particular condition in the miner's death, but rather merely to take notice of the fact that obstructive lung diseases do contribute to heart failure in some cases.

On remand, claimant submitted the deposition of Dr. Aquilina, Director's Exhibit 36,⁵ and the Director submitted the contrary opinion of Dr. Cander, a board-certified physician in internal medicine, who reviewed the evidence of record, Director's Exhibit 35.⁶ In a

⁵ Dr. Aquilina noted that he had only reviewed the miner's medical records through 1987, when he last examined the miner, Director's Exhibit 36 at 5, 9, 23-24. Dr. Aquilina stated that claimant suffered from coronary artery disease and chronic lung disease, which he stated aggravate each other, Director's Exhibit 36 at 13. Dr. Aquilina stated that he believed that the miner's coal workers' pneumoconiosis contributed to and hastened the miner's death which "might have been the acute cardiac event," based on his analogy to a "patient on the operating room table" suffering a fatal heart attack because of the patient's inability to be ventilated or oxygenated in light of his lung disease, Director's Exhibit 36 at 13-16, 19. Dr. Aquilina based his opinion that claimant suffered from chronic lung disease in part on the miner's blood gas study results, which he noted did not demonstrate disability but nevertheless demonstrated hypoxemia, Director's Exhibit 36 at 24-25.

⁶ Dr. Cander found no evidence that pneumoconiosis hastened or contributed to the miner's death. Although the Third Circuit Court noted that *Harrison's Principles of Internal Medicine* indicates that obstructive lung disease contributes to heart failure, Dr. Cander explained that the medical text only refers to heart failure which is a chronic condition, and not to a heart attack from which the miner suffered in this case, which is due to an acute coronary occlusion. Moreover, Dr. Cander explained that while hypoxemia may cause

Decision and Order Upon Remand From The Benefits Review Board Denying Benefits issued on June 19, 1996, the administrative law judge again found that death due to pneumoconiosis was not established by a preponderance of the evidence pursuant to Section 718.205. Director's Exhibit 40. The administrative law judge found Dr. Aquilina's opinion that pneumoconiosis contributed to the miner's death to be based on generalities and not the miner's specific case. The administrative law judge also found that as Dr. Aquilina had last seen the miner in 1987, Dr. Aquilina was in no better position to judge the cause of the miner's death in 1991 than Dr. Cander, the reviewing physician, whom the administrative law judge credited in light of his superior qualifications and as his opinion was supported by the opinion of the similarly qualified Dr. Levinson.

Claimant appealed, but the Board dismissed claimant's appeal as untimely filed, *see Lehan v. Director, OWCP*, BRB No. 96-1459 BLA (Aug. 15, 1996)(unpub. order) and *Lehan v. Director, OWCP*, BRB No. 96-1459 BLA (May 16, 1997)(unpub. order on recon.). Director's Exhibits 42, 44. Claimant appealed the Board's order to the Third Circuit Court, which summarily affirmed the Board's order, *see Lehan v. Director, OWCP*, No. 97-3324 (3d Circuit, July 29, 1997)(unpub. order). Director's Exhibit 47. Subsequently, claimant filed a request for modification on August 21, 1997, Director's Exhibits 48, 50, at issue herein.

After a hearing on April 13, 1999, the administrative law judge issued his Decision and Order Denying Petition for Modification. The administrative law judge found no mistake in his previous factual determination that death due to pneumoconiosis was not established by a preponderance of the evidence pursuant to Section 718.205, *see* 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find a mistake in determination of fact established. The Director responds, urging that the administrative law judge's Decision and Order Denying Petition for Modification be affirmed.

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).

cardiac disturbances, no significant hypoxemia was demonstrated in the record.

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact.⁷ If a claimant merely alleges that the ultimate fact was wrongly decided, the administrative law judge may, if he chooses, accept this contention and modify the final order accordingly (*i.e.*, "there is no need for a smoking gun factual error, changed conditions or startling new evidence"), *see Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995), *quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26-28 (4th Cir. 1993). In order to establish entitlement on the basis of this survivor's claim, which was filed after January 1, 1982, and in which the miner had not been awarded benefits prior to his death on a claim filed prior to January 1, 1982, *see* 30 U.S.C. §§901, 932(1); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989), claimant must establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988),⁸ which arose out of coal mine employment, *see* 20 C.F.R. §718.203; *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988), and that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.1; 718.205(c); *Neeley, supra*; *cf. Smith, supra*. Moreover, the Third Circuit Court has held that, pursuant to Section 718.205(c)(2),

⁷ The administrative law judge properly noted that because the miner had died in 1991, claimant is limited to establishing a mistake in a determination of fact pursuant to Section 725.310. Decision and Order at 2. *See Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

⁸ The presumptions at Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), as implemented by 20 C.F.R. §718.303, at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, and at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, are inapplicable to this survivor's claim filed after January 1, 1982, *see* 20 C.F.R. §§718.303(c), 718.305(a), (e), 20 C.F.R. §718.306(a); Director's Exhibit 1.

pneumoconiosis substantially contributes to death if it hastens the miner's death, *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

The administrative law judge initially noted that claimant had submitted lay evidence and testimony, Director's Exhibit 53; April 13, 1999, Hearing Transcript, relating to the miner's shortness of breath and respiratory symptoms, and that the coroner who completed the miner's death certificate was not aware of the miner's coal mine employment. However, the administrative law judge noted that in order to establish a basis for modification in this survivor's claim, claimant must establish that his prior finding that death due to pneumoconiosis was not established by "competent medical evidence" pursuant to Section 718.205 was a mistake. The administrative law judge accorded little weight to the opinion of the miner's treating physician Dr. Walnista that, even though the miner died of a massive heart attack, anthracosis "could" have been a contributing factor to the miner's death as he found it to be equivocal, 1999 Decision and Order at 3. The administrative law judge disregarded the opinion of Dr. Levinson because his opinion had previously been rejected by the Third Circuit Court. Decision and Order Denying Petition for Modification at 3. The administrative law judge again accorded little weight to Dr. Aquilina's opinion because he had last seen the miner in 1987. The administrative law judge reasoned that Dr. Aquilina's opinion as to the cause of the miner's death in 1991 was no more credible for this reason than the opinion of Dr. Cander, a reviewing physician. Likewise the administrative law judge again accorded little weight to Dr. Aquilina's opinion that pneumoconiosis contributed to the miner's death because he found it based on Dr. Aquilina's generalized view of what could happen to a typical patient, instead of the specific facts of the miner's case, 1999 Decision and Order at 2, 4. Thus, the administrative law judge credited Dr. Cander's opinion in light of his superior qualifications, 1999 Decision and Order Denying Petition for Modification at 3, and found that no mistake had been made in the previous factual determination that death due to pneumoconiosis was not established by a preponderance of the evidence pursuant to Section 718.205.

Claimant contends that evidence submitted on modification establishes that the administrative law judge made a mistake in a determination of fact in crediting Dr. Cander's opinion. Specifically, claimant contends that Dr. Cander relied on the miner's death certificate which stated that the miner's death was due to "acute" respiratory and coronary failure, whereas claimant contends that the death certificate is unreliable in light of an affidavit submitted on modification from the coroner who completed the death certificate in which the coroner indicated that he was not a physician, had not examined the miner, and was unaware of the miner's coal mine employment and pneumoconiosis.

We reject claimant's contention, however, as neither the administrative law judge nor Dr. Cander relied on the death certificate in determining whether pneumoconiosis contributed to or hastened the miner's death. Dr. Cander specifically stated that the miner's death

certificate did not provide a meaningful diagnosis, and relied instead on the statement of Dr. Walnista, the miner's treating physician, that the miner's death was caused by a massive heart attack, which Dr. Cander stated was caused by an acute coronary occlusion, *see* Director's Exhibit 35.

Claimant also contends that lay evidence submitted on modification establishes that the administrative law judge made a mistake in a determination of fact in relying on claimant's hearing testimony that the miner's death was sudden. We reject claimant's contention, however, as the administrative law judge did not rely on claimant's testimony as a basis for the previous denial of benefits in this case. Moreover, as the administrative law judge noted, in a survivor's claim filed after January 1, 1982, claimant must establish death due to pneumoconiosis by "competent medical evidence," *see* 20 C.F.R. §718.205(c)(1); *cf. Keating, supra.*

Finally, claimant contends that an opinion such as Dr. Walnista's need not be required to be expressed within a reasonable degree of medical certainty, if it is documented and reasoned, and contends that the opinion of Dr. Aquilina is sufficiently reasoned, even if it is based on inconclusive objective tests, as Dr. Aquilina had examined the miner, while Dr. Cander had not. However, contrary to claimant's contention, the administrative law judge rationally rejected Dr. Walnista's opinion, that anthracosis "could" have been a contributing factor in the miner's death, as it was equivocal, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, the administrative law judge permissibly accorded less weight to Dr. Aquilina's opinion on the cause of the miner's death in 1991 since Dr. Aquilina had last seen the miner in 1987. Thus, the administrative law judge permissibly determined his opinion regarding the cause of the miner's death in 1991 was no more credible for that reason than the opinion of Dr. Cander, a reviewing physician. In addition, the administrative law judge, acted within his discretion, in giving less weight to Dr. Aquilina's opinion, that pneumoconiosis contributed to the miner's death, as the administrative law judge found it to be based on generalities rather than specifically focused on the miner's case, *see Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). Thus, the administrative law judge, within his discretion, gave more weight to Dr. Cander's opinion in light of his superior qualifications, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Consequently, we affirm the administrative law judge's finding that claimant failed to establish that a mistake in a determination of fact pursuant to Section 715.310 had been made in the prior finding that death due to pneumoconiosis was not established pursuant to Section 718.205(c).

Accordingly, the Decision and Order Denying Petition for Modification of the administrative law judge's is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge