

BRB No. 03-0710 BLA

SELEKA B. PICKANA)
(Widow of NICK PICKANA))
)
Claimant-Petitioner)
)
v.)
)
WYOMING POCAHONTAS)
LAND COMPANY)
)
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,))
UNITED STATES DEPARTMENT)
OF LABOR)
)
Party-in-Interest)

DATE ISSUED: 05/27/2004

DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits on Modification of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Seleka B. Pickana, Adena, Ohio, *pro se*.

Erik A. Schramm (Hanlon, Duff, Estadt & McCormick Co., LPA), St. Clairsville, Ohio, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denying Benefits on Modification (2001-BLA-1208) of Administrative Law Judge Robert J. Lesnick on a 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). This case is before the Board for a second time.¹ Based on the date of filing, the administrative law judge

¹The miner was awarded living miner’s benefits in a Decision and Order issued on October 11, 1994 by Administrative Law Judge Michael P. Lesniak. Director’s Exhibit 32.

adjudicated claimant's petition for modification pursuant to 20 C.F.R §725.310 (2000).² The administrative law judge found the medical evidence of record insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) or a mistake of fact pursuant to Section 725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. 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, 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

The miner died on January 22, 1995 and claimant filed an application for survivor's benefits on April 27, 1995. Director's Exhibits 1, 4. Subsequently, the award of miner's benefits was affirmed by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, and is not at issue herein. *See The Youghioghny and Ohio Coal Co. v. Pickana*, No. 95-3868 (6th Cir., July 3, 1997)(unpub.). Administrative Law Judge Thomas M. Burke issued a Decision and Order denying the survivor's claim on April 29, 1997, as claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 16. The denial of benefits was affirmed by the Board on appeal. *Pickana v. Wyoming Pocahontas Land Company*, BRB No. 97-1172 BLA (April 15, 1998)(unpub.); Director's Exhibit 17. The Board also denied claimant's subsequent Motion for Reconsideration. *Pickana v. Wyoming Pocahontas Land Company*, BRB No. 97-1172 BLA (June 5, 1998)(Order on Motion for Reconsideration)(unpub.); Director's Exhibit 18. On January 28, 1999, claimant filed a request for modification, which was denied on September 11, 2000, by Administrative Law Judge Michael P. Lesniak as claimant failed to establish that the miner's death was due to pneumoconiosis or a mistake of fact. Director's Exhibits 19, 37. Claimant filed an appeal with the Board on September 26, 2000, which was subsequently dismissed on January 18, 2001, due to claimant's request for modification. Director's Exhibits 38, 39. The district director denied claimant's modification request on June 27, 2001, and claimant requested a formal hearing on July 20, 2001. Director's Exhibits 45, 46.

²The 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The amended regulation pertaining to requests for modification does not apply in cases, such as this one, in which the claim was pending on January 19, 2001. 20 C.F.R. §725.2.

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).

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, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c)(2000); *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 a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(2); see *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).³

Pursuant to Section 718.205(c) (2000), the administrative law judge accorded little weight to the newly submitted medical report and deposition of Dr. Blatt who found that the miner's death was due solely to coal workers' pneumoconiosis. Decision and Order at 6-8; Claimant's Exhibit 1; Director's Exhibit 46. The administrative law judge rationally determined that this opinion was not well documented and reasoned as Dr. Blatt provided no rationale for his diagnosis; he was unfamiliar with the miner's diagnosis of diabetes; he did not address the effect of the miner's other significant non-respiratory conditions; he had not seen the miner for eight months prior to his death; and he signed the miner's death certificate without viewing the miner's body. Decision and Order at 6-8; see *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Trumbo*, 17 BLR 1-85; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Similarly, the administrative law judge accorded little weight to Dr. Mejia's January 31, 2001 letter stating that the miner's coal workers' pneumoconiosis contributed to his death as this physician failed to identify the objective evidence that supported his diagnosis, and did not acknowledge the miner's numerous non-respiratory conditions. Decision and Order at 6-8; Director's Exhibit 46; *Griffith*, 49 F.3d 184, 19 BLR 2-111; *Trumbo*, 17 BLR 1-85; *Fields*, 10 BLR 1-19. Because it is within the discretion of the administrative law judge as the trier of fact, to determine whether a medical report is adequately documented and reasoned and the administrative has properly exercised his discretion in this case, we affirm the administrative law judge's finding that the newly

³Since the miner's last coal mine employment took place in the State of Ohio, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

submitted medical opinions do not support a finding of death due to pneumoconiosis under Section 718.205(c).

The Decision and Order further indicates that the administrative law judge weighed all of the medical evidence of record, and rationally found that claimant failed to establish a mistake of fact in the prior denials pursuant to Section 725.310 (2000). Decision and Order at 9. We must also affirm, therefore, the administrative law judge's finding that claimant failed to establish the prerequisite for modification of a denied survivor's claim pursuant to Section 725.310 (2000) or entitlement to benefits. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge