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BRB No. 11-0553 BLA

CLARIS FITE)	
(Widow of DONALD C. FITE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
U.S. STEEL CORPORATION)	DATE ISSUED: 05/17/2012
)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Robert M. Williams (Maroney, Williams, Weaver & Pancake, PLLC), Charleston, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (2010-BLA-5135) of Administrative Law Judge Thomas M. Burke, rendered on claimant's petition to modify her denied survivor's claim filed pursuant to 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

¹ Claimant is the widow of the miner, Donald C. Fite, who died on May 23, 2003. Director's Exhibit 10.

codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Claimant filed her survivor's claim on July 3, 2003.² On June 11, 2007, Associate Chief Administrative Law Judge Stephen L. Purcell denied benefits, finding that, while claimant established that the miner suffered from simple pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1),(2),(4), 718.203(b), she failed to establish that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant appealed and the denial was affirmed by the Board. *C.L.F. [Fite] v. U.S. Steel Corp.*, BRB No. 07-0843 BLA (June 30, 2008) (unpub.), *recon. denied*, (Feb. 26, 2009) (Order) (unpub.).

Claimant filed a timely request for modification and the case was assigned to Judge Burke (the administrative law judge). Director's Exhibit 52. In his Decision and Order issued on April 14, 2011, the administrative law judge credited the miner with thirty-eight years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge considered the evidence submitted on modification, in conjunction with the evidence previously submitted, and found that there was no mistake in a determination of fact with regard to Judge Purcell's denial of benefits. Thus, the administrative law judge found that claimant failed to establish a basis for modification pursuant to 20 C.F.R. §725.310, and he denied survivor's benefits.

On appeal, claimant argues that the administrative law judge erred by not finding the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

² On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Based on the filing date of this claim, the amendments are not applicable.

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

In order to establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, in a survivor's claim filed on or after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). The miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

In order to establish a basis for modification in a survivor's claim, where the denial of benefits related to the miner's condition and death, the survivor must demonstrate that there was a mistake in a determination of fact in the prior decision. *See* 20 C.F.R. §725.310; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge has the authority to consider all the evidence for any mistake in a determination of fact, including the ultimate fact of entitlement. *See Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

In considering whether claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, the administrative law judge noted that the issue presented to Judge Purcell was whether the autopsy evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304,⁴ as

⁴ The regulation at 20 C.F.R. §718.304 provides, in pertinent part, that:

There is an irrebuttable presumption that...a miner's death was due to pneumoconiosis . . . if such miner. . . suffered from a chronic dust disease of the lung which:

(a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . . ; or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

“claimant provided little or no evidence” that simple pneumoconiosis caused, substantially contributed to, or hastened the miner’s death pursuant to 20 C.F.R. §718.205(c). Decision and Order at 5. He noted that Judge Purcell specifically credited the opinion of Dr. Bush, a reviewing pathologist, over the opinion of Dr. Imbing, the autopsy prosector, as to whether the miner had massive lesions consistent with complicated pneumoconiosis. *Id.* The administrative law judge observed that Dr. Bush was found to have superior qualifications as a pathologist and that he provided a more thorough analysis of the pathology evidence, in conjunction with the miner’s medical record. *Id.*

The administrative law judge weighed the opinions of Drs. Imbing and Bush, in conjunction with the newly submitted reports by Drs. Hammer and Tomashefski, each of whom reviewed the autopsy slides, and a report by Dr. Rasmussen, based on his review of the autopsy report and available medical records. *See* Decision and Order at 5-7; Director’s Exhibit 12; Claimant’s Exhibits 1, 2; Employer’s Exhibits 1, 2. The administrative law judge noted that “all of the pathologists who presented an opinion on the presence of complicated pneumoconiosis were of the opinion that a lesion of 2.0 centimeters on autopsy is necessary for a diagnosis of complicated pneumoconiosis.” Decision and Order at 6. The administrative law judge summarized that, while Drs. Imbing and Hammar identified lesions on the autopsy slides greater than 2.0 centimeters, consistent with complicated pneumoconiosis, Drs. Bush and Tomashefski opined that there were no microscopic lesions to support a diagnosis of complicated pneumoconiosis.⁵ *Id.* at 3-4. He further noted that Dr. Rasmussen diagnosed

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

⁵ Dr. Imbing conducted the autopsy and made gross examination findings of coal dust macules ranging in greatest diameter from 0.3 to 2.3 centimeters, consistent with complicated pneumoconiosis. Director’s Exhibit 12. Dr. Hammer reviewed the autopsy slides and noted nodules in the range of 3 millimeters to 2.2 centimeters. Claimant’s Exhibit 1. Dr. Bush opined, based on his microscopic review of the autopsy slides, that all of the nodules were less than one centimeter in diameter. He also prepared a supplemental report, submitted by employer on modification, in which he disputed Dr. Hammer’s methodology in measuring the nodules for complicated pneumoconiosis.

complicated pneumoconiosis, based solely on his review of Dr. Imbing's autopsy findings. *Id.* at 3.

The administrative law judge concluded that claimant "has not shown that the decision of Judge Purcell should be modified." Decision and Order at 6. He credited the opinions of Drs. Bush and Tomashefski, over the opinions of Drs. Imbing and Hammer, with regard to the size of the lesions, because he found that they "presented[d] a rational explanation for the discrepancies on the size of the lesions," which appeared larger on macroscopic examination than on microscopic examination. *Id.* at 7. He also determined that the findings of Drs. Bush and Tomashefski are "supported by the clinical records in this case which do not describe respiratory signs or symptoms" and the "chest x-ray reports which do not describe a large opacity at least 1 centimeter in diameter." *Id.* Therefore, the administrative law judge concluded that "further reflection [on] the evidence of record pursuant to this petition for modification shows no mistake of fact[,] as it does not show that the miner had complicated pneumoconiosis" pursuant to 20 C.F.R. §718.304. *Id.*

Claimant generally asserts that the administrative law judge erred in finding the autopsy evidence to be insufficient to establish that the miner had complicated pneumoconiosis. Claimant's Brief (unpaginated) [at 2]. Claimant, however, has not identified any specific errors made by the administrative law judge in his analysis of the autopsy evidence. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Furthermore, to the extent that claimant resurrects his argument from his 2007 appeal to the Board, that "[w]here the evidence is conflicting and presents true doubt, the Administrative Law Judge must resolve the issue in the claimant's favor," it is rejected. Claimant's Brief (unpaginated) [at 3]. As the Board explained in our prior decision, the "true doubt" rule is invalid. *Fite*, BRB No. 07-0843 BLA, slip op. at 5; *see Director v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Thus, we affirm, as supported by substantial evidence, the administrative law judge's findings that the miner did not have complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that claimant failed to establish a

Employer's Exhibit 1. Dr. Tomashefski also reviewed the miner's autopsy slides and found no nodules consistent with complicated pneumoconiosis. Employer's Exhibit 2.

basis for modifying the denial of her claim pursuant to 20 C.F.R. §725.310.⁶ *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁶ Claimant does not assert that she is entitled to benefits, based on a finding that the miner's death was due to simple pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (1), (2), (5). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).