

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 17-0399 BLA

BOBBY D. MANN (deceased) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 TURNER BROTHERS, INCORPORATED )  
 ) DATE ISSUED: 05/22/2018  
 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 Modification of Carrie Bland,  
Administrative Law Judge, United States Department of Labor.

Bobby D. Mann, Wister, Oklahoma.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for  
employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and  
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Decision and Order Denying Modification (2016-BLA-0001) of Administrative Law Judge Carrie Bland on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a duplicate claim filed on November 17, 1986,<sup>2</sup> has a lengthy procedural history.

### Procedural History

In a Decision and Order issued on April 26, 2011,<sup>3</sup> Administrative Law Judge Thomas M. Burke considered claimant's third request for modification of the denial of his 1986 duplicate claim.<sup>4</sup> Director's Exhibit 216. He found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that claimant thus failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).<sup>5</sup> *Id.* He also reviewed the entire record and found that it did not establish the existence of pneumoconiosis and that there thus was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *Id.* Judge Burke therefore denied claimant's

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<sup>1</sup> The miner died on September 15, 2014. Director's Exhibit 238. The miner's widow is pursuing the claim on his behalf.

<sup>2</sup> Claimant filed his first claim on September 23, 1974. Director's Exhibit 31. It was finally denied by the district director on August 14, 1979 because claimant failed to establish any element of entitlement. *Id.* Claimant filed his second claim (a duplicate claim) on April 25, 1983. Director's Exhibit 30. It was also finally denied by the district director on March 14, 1984 because claimant failed to establish any element of entitlement. *Id.*

<sup>3</sup> For a complete procedural history of this case, see *Mann v. Turner Bros., Inc.*, BRB No. 11-0795 BLA, slip op. at 2-4 (Aug. 29, 2012) (unpub.).

<sup>4</sup> In denying claimant's previous request for modification, Administrative Law Judge Thomas M. Burke found that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204, a finding sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 167. However, Judge Burke found that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and denied benefits. *Id.*

<sup>5</sup> Although Section 725.310 has been revised, those revisions apply only to claims filed after January 19, 2001.

motion for modification.<sup>6</sup> *Id.* The Board and the United States Court of Appeals for the Tenth Circuit affirmed. See *Mann v. Turner Bros., Inc.*, BRB No. 11-0795 BLA (Aug. 29, 2012) (unpub.); *Mann v. Turner Bros., Inc.*, BRB No. 11-0795 BLA (Mar. 20, 2013) (Order on Recon.) (unpub.); *Mann v. Turner Bros., Inc.*, No. 13-9553 (10th Cir. Mar. 26, 2014) (unpub.).

Claimant died on September 15, 2014. Claimant's widow timely filed a fourth request for modification on October 21, 2014. Director's Exhibit 233. In a Decision and Order issued on April 10, 2017, Administrative Law Judge Carrie Bland (the administrative law judge) found that the evidence did not establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and she denied the request for modification.

On appeal, claimant generally contends that the administrative law judge erred in denying modification. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are rational and in accordance with applicable law.<sup>7</sup> 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 benefits under Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley*

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<sup>6</sup> Judge Burke subsequently denied two motions for reconsideration filed by claimant. Director's Exhibits 219, 221.

<sup>7</sup> The record indicates that claimant's coal mine employment was in Oklahoma. Director's Exhibit 31. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

*Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310 (2000), authorizes modification of an award or denial of benefits in a miner's claim based on a change in conditions or a mistake in a determination of fact. The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Judge Burke denied claimant's previous modification request because the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Director's Exhibit 216. The administrative law judge therefore considered whether the new evidence, in conjunction with the previously submitted evidence in this claim, established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

### **Existence of Pneumoconiosis**

#### **Section 718.202(a)(1)**

The administrative law judge accurately found that the only new x-ray evidence, an interpretation of an October 23, 2103 x-ray, was negative for pneumoconiosis. Decision and Order at 10; Director's Exhibit 239. She also found that the previously submitted x-ray evidence did not establish the existence of pneumoconiosis, a determination previously made by Judge Burke and affirmed by the Board. Decision and Order at 10; Director's Exhibit 216; *Mann*, BRB No. 11-0795 BLA, slip op. at 7. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence of record does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

#### **Section 718.202(a)(2), (3)**

The Board previously affirmed Judge Burke's finding that the record did not contain any biopsy evidence. *Mann*, BRB No. 11-0795 BLA, slip op. at 7. Claimant has not submitted any biopsy evidence in support of this modification request. Consequently, claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R.

§718.202(a)(2).<sup>8</sup>

Claimant is also not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3).<sup>9</sup> Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is not applicable because the claim was filed before January 1, 2005. 20 C.F.R. §718.305(a). Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

#### **Section 718.202(a)(4)**

The administrative next considered whether the new evidence established the existence of legal or clinical pneumoconiosis<sup>10</sup> pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered a death certificate completed by Dr. Gregory, as well as a subsequent letter authored by the doctor. The death certificate attributes claimant's death to chronic obstructive pulmonary disease and "black lung." Director's Exhibit 238. In a November 13, 2014 letter, Dr. Gregory stated:

[Claimant] was a patient of mine. He worked in the coal mines for over 20 years. I treated him for Black Lung Disease. His Black Lung Disease led to his lung problems and death.

Director's Exhibit 235.

The administrative law judge found that Dr. Gregory did not provide any basis or documentation for her diagnosis of black lung on either the death certificate or in her 2014 letter. Decision and Order at 11. The administrative law judge therefore permissibly found

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<sup>8</sup> An autopsy was not performed on the miner. Decision and Order at 5 n.2.

<sup>9</sup> Judge Burke found that claimant was not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3), a finding that was affirmed by the Board. Director's Exhibit 216; *Mann v. Turner Bros., Inc.*, BRB No. 11-0795 BLA, slip op. at 7 (Aug. 29, 2012) (unpub.)

<sup>10</sup> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

that Dr. Gregory's diagnoses of "black lung" were not sufficiently reasoned. *See N. Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873, 20 BLR 2-335, 2-338-39 (10th Cir. 1996); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 11; Director's Exhibits 235, 238. We therefore affirm the administrative law judge's finding that the new medical evidence<sup>11</sup> does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also found that the previously submitted medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), a determination previously made by Judge Burke and affirmed by the Board. Decision and Order at 12; Director's Exhibit 216; *Mann*, BRB No. 11-0795 BLA, slip op. at 7-9. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence of record does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's findings that the new evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we affirm her finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Based upon a review of the new and previously submitted evidence, the administrative law judge found that there was not a mistake in a determination of fact regarding the previous determination that the evidence did not establish the existence of pneumoconiosis. *See* Decision and Order at 12. Upon review, substantial evidence supports the administrative law judge's determination. Consequently, we affirm the administrative law judge's finding that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). We therefore affirm the administrative law judge's denial of claimant's request for modification.

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<sup>11</sup> Claimant also submitted 2013 hospital records from Eastern Oklahoma Medical Center. Director's Exhibit 239. The administrative law judge accurately noted that these records "do not contain any assessment of pneumoconiosis, or any pulmonary condition due to . . . coal mine dust exposure." Decision and Order at 12. In response to claimant's current request for modification, employer submitted Dr. Tuteur's May 24, 2016 medical report. Based upon a review of the medical evidence, Dr. Tuteur opined that claimant did not have clinical or legal pneumoconiosis. Employer's Exhibit 1 at 4. Thus, the administrative law judge accurately noted that Dr. Tuteur's opinion does not assist claimant in establishing the existence of pneumoconiosis. Decision and Order at 12.

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge