

U.S. Department of Labor

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



BRB No. 18-0270 BLA

ELENORA R. ROBINSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELKAY MINING COMPANY)	DATE ISSUED: 05/08/2019
)	
and)	
)	
PITTSTON COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification Denying Benefits (2015-BLA-5814) of Administrative Law Judge Natalie A. Appetta, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a request for modification of the denial of a survivor's claim.¹

The administrative law judge found the miner had thirty-three years of coal mine employment, with at least fifteen years underground. She further determined, however, that the presumption of death due to pneumoconiosis at Section 411(c)(4) was not invoked because claimant did not establish the miner had a totally disabling respiratory or pulmonary impairment.² 30 U.S.C. §921(c)(4); 20 C.F.R. §§718.204(b), 718.305(b)(1)(iii). She further found the evidence insufficient to establish the miner's death was due to pneumoconiosis and, therefore, insufficient to establish a mistake in a determination of fact and an essential element of entitlement. Accordingly, the

¹ Claimant is the widow of the miner, Ralph C. Robinson, who died on October 26, 2010. Director's Exhibit 9. She filed a claim for survivor's benefits on February 16, 2011. Director's Exhibit 1. Administrative Law Judge Drew A. Swank issued a Decision and Order Denying Benefits on April 17, 2014, finding claimant established the existence of simple clinical pneumoconiosis, but did not establish the miner's death was due to pneumoconiosis. Director's Exhibit 42. On March 27, 2015, claimant timely requested modification and the district director issued a proposed Decision and Order denying claimant's request on June 11, 2015. Director's Exhibits 43, 46. Claimant asked for a hearing and the case was referred to the Office of Administrative Law Judges. Director's Exhibits 47, 55.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Because the record does not reflect that the miner was determined to be eligible to receive benefits at the time of his death, claimant also cannot establish entitlement under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), which provides that a survivor of a miner eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.

administrative law judge denied claimant's request for modification and her claim for survivor's benefits.

On appeal, claimant asserts the administrative law judge erred in finding that she did not establish total disability or death due to pneumoconiosis. Employer/carrier (employer) responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.³

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record on modification, an 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'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The administrative law judge may correct "any mistake . . . including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).

I. Invocation of the Section 411(c)(4) Presumption – Total Disability

Claimant initially contends the administrative law judge's finding that claimant failed to establish total disability "is not rational, supported by substantial evidence or in accordance with applicable law." Claimant's Brief at 2. Aside from this general assertion, however, claimant has not identified any specific error in the administrative law judge's determination and, therefore, she has not properly invoked the Board's review

³ We affirm, as unchallenged on appeal, the administrative law judge's finding of thirty-three years of coal mine employment, at least fifteen of which were underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 8-12.

⁴ Because the miner's coal mine employment was in West Virginia, this case arises within the jurisdiction 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 4.

authority. 20 C.F.R. §§802.211(b) (requirements for an issue to be adequately briefed), 802.301(a) (Board not empowered to conduct *de novo* review of record); *see Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Accordingly, we affirm the administrative law judge's findings that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) and did not invoke the presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(iii), (c).

II. Establishing Entitlement without the Presumption

In a survivor's claim where no statutory presumptions are invoked,⁵ claimant must establish, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes entitlement. *See Trumbo*, 17 BLR at 1-87-88. A miner's death is considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of death, or if pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 184 (4th Cir 2014).

Pursuant to 20 C.F.R. §718.205(b), the administrative law judge considered the death certificate attributing the miner's death to cirrhosis of the liver, and the medical opinions of Drs. Rizkalla, Oesterling, Bush, Spagnolo, and Rosenberg.⁶ Decision and

⁵ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant did not establish complicated pneumoconiosis and, therefore, could not invoke the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. *See Skrack*, 6 BLR at 1-711; Decision and Order at 7. We have, *supra*, affirmed the administrative law judge's determination that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis set forth in 20 CFR §718.305.

⁶ Dr. Rizkalla reviewed the miner's medical records and tissue slides from his autopsy. Claimant's Exhibit 2. He opined that although the miner died from hepatic cirrhosis, coal workers' pneumoconiosis and emphysema "accelerat[ed] the mechanism of his death through the terminal bronchial pneumonia he developed[.]" *Id.* Drs. Oesterling and Bush reviewed the same material as Dr. Rizkalla and concluded that the miner's coal workers' pneumoconiosis was too mild to have played a role in his death. Director's Exhibits 30, 31; Employer's Exhibit 7 at 34, 50-51. Drs. Spagnolo and Rosenberg reviewed medical records and opined the miner died from progressive liver failure that was

Order at 24-25. She discredited Dr. Rizkalla's opinion that pneumoconiosis was a substantially contributing cause of the miner's death because he did not have an accurate understanding of the extent of the miner's liver disease and did not fully explain his conclusions. Decision and Order at 25; Claimant's Exhibits 2, 3. Reviewing the contrary opinions, the administrative law judge discredited Dr. Rosenberg,⁷ but credited the opinions of Drs. Oesterling, Bush, and Spagnolo as reasoned and documented.⁸ Decision and Order at 25; Director's Exhibits 30, 31; Employer's Exhibits 1, 2, 3, 8. She therefore concluded claimant failed to prove that the miner's death was due to pneumoconiosis. Decision and Order at 25.

Claimant argues that remand is required because the administrative law judge erred in citing case law from courts other than the United States Court of Appeals for the Fourth Circuit and in crediting the opinions of Drs. Oesterling and Bush on the issue of death causation. Claimant's Brief at 3. We disagree.

Claimant has not provided any support for her assertion that an administrative law judge is not permitted to reference decisions from other federal circuits, nor has she identified any instances in which the administrative law judge applied legal principles that conflict with the law of the Fourth Circuit. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Sarf*, 10 BLR at 1-120-21. Similarly, because claimant has not challenged the administrative law judge's discrediting of Dr. Rizkalla's opinion – the only evidence supportive of claimant's burden to establish death due to pneumoconiosis – we affirm the administrative law judge's finding that claimant did not satisfy her burden of

unrelated to his minimal coal workers' pneumoconiosis or his coal dust exposure. Employer's Exhibits 1, 2, 8 (at 35). The administrative law judge also considered the opinions of Drs. Franyutti and Klayton but correctly determined they do not address death causation. Decision and Order at 24; Director's Exhibit 11; Claimant's Exhibit 1.

⁷ The administrative law judge determined Dr. Rosenberg's opinion "provides a less thorough explanation of why he attributes the miner's bronchopneumonia to his liver disease rather than [coal workers' pneumoconiosis] or emphysema than Dr. Oesterling, and his opinion is correspondingly less well[-]reasoned." Decision and Order at 25; Employer's Exhibits 2, 8.

⁸ When summarizing her findings as to which physicians she found credible, the administrative law judge mistakenly referenced Dr. Rosenberg's opinion, rather than Dr. Bush's opinion. Decision and Order at 25. The context of the administrative law judge's decision reflects this is a transcription error.

proof.⁹ *See Trumbo*, 17 BLR at 1-87-88; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore further affirm the administrative law judge's determination that claimant did not establish a mistake in a determination of fact or entitlement to benefits. 20 C.F.R §§718.1, 718.205(b), 725.310; *see Collins*, 751 F.3d at 184; *Stanley*, 194 F.3d at 497; *Wojtowicz*, 12 BLR at 1-164.

Accordingly, the Decision and Order on Modification Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

⁹ We decline to address claimant's contentions regarding the administrative law judge's crediting of the opinions of Drs. Oesterling and Bush that pneumoconiosis played no role in the miner's death, as these opinions do not assist her in satisfying her burden of proof. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).