

BRB No. 05-0527 BLA

CLARSIE M. ANDERSON	)	
(Widow of HOWARD ANDERSON)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 11/22/2005
RIVER HURRICANE COAL COMPANY,	)	
INCORPORATED	)	
	)	
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-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Clarsie M. Anderson, Kimper, Kentucky, *pro se*.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order-Denial of Benefits (04-BLA-0020) of Administrative Law Judge Robert L. Hillyard rendered 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).<sup>1</sup>

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<sup>1</sup> Claimant is Clarsie M. Anderson, the widow of the miner, Howard Anderson. Claimant filed her application for survivor's benefits on March 30, 1998. Director's Exhibit 1. Susie Davis, president of the Kentucky Black Lung Coalminers & Widows

The administrative law judge found that this case involves claimant's request for modification of the denial of her survivor's claim. *See* 20 C.F.R. §725.310 (2000). Previously, Administrative Law Judge Joseph E. Kane found that although the miner's autopsy evidence established the existence of pneumoconiosis, claimant did not prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>2</sup> Upon review of the record on modification, the current administrative law judge found that claimant did not establish that the miner's death was due to pneumoconiosis, and thus did not demonstrate a mistake in a determination of fact pursuant to Section 725.310 (2000). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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. 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).

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order, request modification of a denial of benefits. Modification may be granted if there are changed conditions or if there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310(a) (2000). The sole ground available for granting modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial of benefits. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). When a request for modification is filed, the administrative law judge has the authority "to reconsider all the evidence for any mistake of fact," including whether "the

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Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

<sup>2</sup> Upon review of claimant's appeal, the Board affirmed the denial of benefits. *Anderson v. River Hurricane Coal Co.*, BRB No. 01-0809 BLA (May 23, 2002)(unpub.).

ultimate fact” of entitlement was wrongly decided. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).<sup>3</sup>

To establish entitlement to survivor’s benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors’ claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes 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. 20 C.F.R. §718.205(c)(1)-(c)(4). 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)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.205(c), the administrative law judge found that claimant did not prove that the miner’s death was due to pneumoconiosis. In making this determination, the administrative law judge found no mistake in Judge Kane’s previous findings that the initial evidence linking the miner’s death to pneumoconiosis, specifically, a death certificate completed by a coroner and a medical opinion by Dr. Sundaram, were inadequately documented and reasoned. The administrative law judge additionally considered four new medical opinions submitted on modification addressing the cause of the miner’s death. Dr. Jones, who the administrative law judge noted listed no medical specialty credentials, reviewed the miner’s medical records and pathology reports and opined that the miner’s pneumoconiosis “played a role in his death by reducing myocardial oxygenation.” Director’s Exhibit 53 at 4. Dr. Forehand, who is not a pulmonary specialist,<sup>4</sup> stated that the miner “had a respiratory disability which arose from coal workers’ pneumoconiosis and COPD and which contributed to and hastened his death.” Claimant’s Exhibit 1. By contrast, Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, and Dr. Naeye, who is Board-certified in

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 23.

<sup>4</sup> The administrative law judge noted that Dr. Forehand is Board-certified in Pediatrics, Allergy and Immunology, and is a B-reader. Decision and Order at 5, Claimant’s Exhibit 1.

Pathology, reviewed the miner's medical records and Dr. Jones's report and concluded that pneumoconiosis did not cause, contribute to, or hasten the miner's death from cardiac problems. Employer's Exhibits 1, 3, 6.

The administrative law judge permissibly found that Dr. Jones "did not document what evidence he relied upon to find that pneumoconiosis weakened the miner's pulmonary condition prior to death." Decision and Order at 9; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). The administrative law judge was also within his discretion to find that Dr. Forehand did not adequately explain his opinion that pneumoconiosis hastened the miner's death. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Additionally, the administrative law judge reasonably considered Dr. Jones's and Dr. Forehand's lack of specialized credentials in deciding how much weight to give their opinions. *See Williams*, 338 F.3d at 518, 22 BLR at 2-655.

Substantial evidence supports the administrative law judge's findings, which are in accordance with law. *McFall*, 12 BLR at 1-177. Review of the record discloses no other evidence that pneumoconiosis caused or hastened the miner's death. We therefore affirm the administrative law judge's finding pursuant to Section 718.205(c). Because claimant failed to establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296; *Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge