

BRB Nos. 09-0378 BLA
and 09-0406 BLA

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| DELANA RAY |) | |
| (o/b/o and Widow of CHARLES B. RAY) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| EASTOVER MINING COMPANY |) | |
| |) | DATE ISSUED: 11/16/2009 |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Orders Denying Modification of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Delana Ray, New Tazewell, Tennessee, *pro se*.¹

W. Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

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

PER CURIAM:

Claimant² appeals, without the assistance of counsel, the Decision and Order Denying Modification (07-BLA-0027) and Decision and Order Denying Modification

¹ Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decisions, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

(07-BLA-0005) of Administrative Law Judge William S. Colwell on claims 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).³ This case involves a miner's duplicate claim filed on July 29, 1998⁴ and a survivor's claim filed on October 24, 2000.

In a Decision and Order dated March 24, 2004, Administrative Law Judge Richard T. Stansell-Gamm adjudicated both claims. In regard to the survivor's claim, Judge Stansell-Gamm found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Director's Exhibit 106. Judge Stansell-Gamm, therefore, found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Stansell-Gamm, denied benefits in the survivor's claim. In regard to the miner's 1998 duplicate claim, Judge Stansell-Gamm found that, because the new evidence submitted since the denial of the miner's 1992 claim did not establish the existence of pneumoconiosis, claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).⁵ *Id.* Judge Stansell-Gamm, therefore, denied benefits in the miner's claim. *Id.*

² Claimant is the surviving spouse of the deceased miner who died on October 5, 2000. Director's Exhibit 12.

³ The 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 (2009). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

⁴ The miner initially filed a claim for benefits on August 28, 1992. Director's Exhibit 93. In a Decision and Order dated November 6, 1996, Administrative Law Judge Paul H. Teitler found that the evidence established total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* However, Judge Teitler found that the evidence did not establish the existence of pneumoconiosis. *Id.* Accordingly, Judge Teitler denied benefits. *Id.* There is no indication that the miner took any further action in regard to his 1992 claim. The miner filed a second claim on July 29, 1998. Director's Exhibit 1.

⁵ Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Fourth Circuit has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the

Claimant appealed, without the assistance of counsel, Judge Stansell-Gamm's decision to the Board. The Board affirmed Judge Stansell-Gamm's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Ray v. Eastover Mining Co.*, BRB No. 04-0624 BLA (Apr. 15, 2005) (unpub.). The Board, therefore, affirmed Judge Stansell-Gamm's findings pursuant to 20 C.F.R. §§718.205(c) and 20 C.F.R. §725.309(d) (2000). *Id.* Accordingly, the Board affirmed Judge Stansell-Gamm's denial of the miner's 1998 duplicate claim and claimant's survivor's claim. *Id.* The Board denied claimant's request for reconsideration as untimely filed. *Ray v. Eastover Mining Co.*, BRB No. 04-0624 BLA (June 30, 2005) (Order) (unpub.).

Claimant timely requested modification in both the miner's claim and the survivor's claim. Director's Exhibit 117. In a Proposed Decision and Order dated September 1, 2006, the district director denied claimant's request for modification in the miner's claim. Director's Exhibit 122. In a separate Proposed Decision and Order dated September 1, 2006, the district director denied claimant's request for modification in the survivor's claim. Director's Exhibit 124. At claimant's request, the miner's claim and the survivor's claim were forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 129. Administrative Law Judge William S. Colwell (the administrative law judge) held a hearing on May 23, 2007. The administrative law judge continued the hearing on August 26, 2008, in order to ensure that the parties understood that he was adjudicating both the miner's claim and the survivor's claim.

The administrative law judge adjudicated the miner's claim and the survivor's claim in separate decisions. In a Decision and Order dated February 2, 2009 (07-BLA-0027), the administrative law judge addressed claimant's request for modification of the miner's 1998 claim. After noting that employer stipulated to twenty years of coal mine employment,⁶ the administrative law judge found that the new evidence did not establish

miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996). Judge Teitler denied the miner's 1992 claim because he found that the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 93. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the new evidence had to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

⁶ The record reflects that the miner's coal mine employment was in Virginia. Hearing Transcript (May 23, 2007) at 11. Accordingly, 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 (1989) (*en banc*).

the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge, therefore, found that the evidence did not establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also found that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied claimant's request for modification in the miner's claim.

In a second Decision and Order dated February 2, 2009 (07-BLA-0005), the administrative law judge addressed claimant's request for modification of the survivor's claim. The administrative law judge found that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge, therefore, denied claimant's request for modification in the survivor's claim.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits.⁷ 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 the issue to be 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 supported by substantial evidence, are rational, and are 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).

The Miner's Claim

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

An administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *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, 18 BLR 2-26 (4th Cir. 1993).

⁷ By Order dated March 12, 2009, the Board consolidated claimant's appeals in BRB No. 09-0378 BLA and BRB No. 09-0406 BLA for purposes of decision only.

An administrative law judge, in considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), should initially address whether the new evidence alone is sufficient to support a material change in conditions. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge would next be required to address whether all of the evidence submitted since the denial of the previous claim is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). If the evidence is sufficient to establish a material change in conditions, the administrative law judge would proceed to the merits of the duplicate claim.

The relevant issue before the administrative law judge was whether the new evidence (*i.e.*, the evidence submitted subsequent to Judge Stansell-Gamm's denial of the miner's 1998 duplicate claim) was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000).⁸

In this case, the administrative law judge initially addressed whether the new evidence, *i.e.*, the evidence submitted since Judge Stansell-Gamm's denial of benefits, established the existence of pneumoconiosis. Because claimant did not submit any additional x-ray, biopsy, or autopsy evidence in support of her request for modification, the administrative law judge correctly found that the new evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2). Decision and Order (M) at 11.⁹ Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).¹⁰ *Id.* at 10-11.

⁸ Although Sections 725.309 and 725.310 have been revised, those revisions apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2(c).

⁹ The administrative law judge's decision in regard to claimant's request for modification in the miner's claim is identified as "Decision and Order (M)," while the administrative law judge's decision in regard to claimant's request for modification in the survivor's claim is identified as "Decision and Order (S)."

¹⁰ 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 and 718.306 presumptions are inapplicable because the miner's and survivor's claims were filed after June 30, 1982. *See* 20 C.F.R. §718.305(e). Finally, because this

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),¹¹ is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In this case, the record contains three new medical opinions from Drs. Fejeran, Rosenberg, and Vuskovich.

In a letter dated April 6, 2006, Dr. Fejeran stated:

[The miner] was a patient at Tazewell Medical Clinic from July 14, 1999 [until] his demise on October 5, 2000. His medical conditions included hypertension, chronic obstructive bronchitis, osteoarthritis, gastroesophageal reflux disease, and metastatic lung cancer. He was followed by Dr. Michael Boggans [sic] for his lung cancer which was deemed to be inoperable. He was treated for comfort measures and hospice homehealth was utilized. Dr. Robert Thomas completed the death certificate on October 23, 2000 with an immediate cause of death being carcinoma of the lung.

It was mentioned in the medical records that [the miner] did work in a coal mine. Dr. Boggans [sic] did point out the anthracotic lung background which is consistent with repeat exposure to coal. He developed terminal lung disease requiring oxygen and also developed cardiopulmonary complications. It is my opinion that black lung disease would have a negative impact on his respiratory status.

Director's Exhibit 117.

Although the administrative law judge noted that Dr. Fejeran referred to Dr. Boggan's finding of anthracotic pigment, the administrative law judge found that this diagnosis did not constitute clinical pneumoconiosis. Decision and Order (M) at 12. The administrative law judge's finding is consistent with the Board's April 15, 2005 Decision and Order, wherein the Board held that Judge Stansell-Gamm "reasonably concluded that although Dr. Boggan diagnosed the presence of anthracosis, he used the term "anthracosis" merely to describe the presence of anthracotic pigmentation in the lungs, a condition not included within the definition of pneumoconiosis at Section 718.201." *Ray*, BRB No. 04-0624 BLA, slip op. at 6. *See* 20 C.F.R. §718.201; *Piney Mountain Coal Co.*

claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

¹¹ "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).

v. Mays, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Moreover, because Dr. Fejeran provided no basis for his diagnosis of “black lung disease,” the administrative law judge permissibly found this diagnosis was not sufficiently reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Finally, because Dr. Fejeran did not attribute any of his other diagnoses to the miner’s coal dust exposure, the administrative law judge properly found that Dr. Fejeran’s opinion does not support a finding of legal pneumoconiosis. Decision and Order (M) at 12. Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that Dr. Fejeran’s opinion does not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge accurately found that the new opinions of Drs. Rosenberg and Vuskovich do not support a finding of pneumoconiosis.¹² Decision and Order (M) at 12; Director’s Exhibit 121; Employer’s Exhibit 1. We, therefore, affirm the administrative law judge’s finding that the new medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because the new evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the new evidence does not support a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Consequently, we affirm the administrative law judge’s finding that the evidence does not establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

Next, based upon a “thorough review” of (1) the previously submitted evidence; (2) Judge Stansell-Gamm’s Decision and Order; and (3) the Board’s April 15, 2005 Decision and Order, 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 (Miner) at 12. Upon review, substantial evidence supports the administrative law judge’s finding.

¹² In a report dated April 16, 2007, Dr. Rosenberg opined that the miner did not suffer from clinical or legal pneumoconiosis. Employer’s Exhibit 1. Dr. Rosenberg opined that the miner suffered from lung cancer and chronic obstructive pulmonary disease caused by cigarette smoking. *Id.*

In a report dated June 16, 2006, Dr. Vuskovich opined that the miner did not suffer from clinical pneumoconiosis or any pulmonary impairment caused by his coal dust exposure. Director’s Exhibit 121. Dr. Vuskovich diagnosed chronic obstructive pulmonary disease caused by cigarette smoking. *Id.* Dr. Vuskovich also opined that the miner’s death from lung cancer was probably related to his cigarette smoking. *Id.*

Consequently, we affirm the administrative law judge's finding that there was not a 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 in the miner's claim.

The Survivor's Claim

Benefits are payable on survivors' claims filed on or after January 1, 1982 only when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

The sole ground available for modification of a survivor's claim is a mistake in a determination of fact. See *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), modified on recon., 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In adjudicating claimant's request for modification in the survivor's claim, the administrative law judge considered the identical evidence that he considered in connection with claimant's request for modification in the miner's claim, namely, the medical opinions of Drs. Fejerman, Rosenberg, and Vuskovich. For the same reasons that he articulated in his adjudication of the miner's claim, the administrative law judge found that this evidence does not establish the existence of pneumoconiosis. Decision and Order (S) at 11. For the same reasons that we articulated in regard to the miner's claim, we affirm the administrative law judge's finding, in the survivor's claim, that the new evidence does not establish the existence of pneumoconiosis. We similarly affirm the administrative law judge's determination that there was not a mistake in a determination of fact in regard to the finding that the previously submitted evidence did not establish the existence of pneumoconiosis. Consequently, we affirm the administrative law judge's determination in the survivor's claim that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §718.310 (2000).

Accordingly, the administrative law judge's Decision and Order Denying Modification in the miner's claim and Decision and Order Denying Modification in the survivor's claim are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge