

BRB No. 13-0236 BLA

JANICE BROWN)	
(o/b/o BOBBY G. BROWN, deceased))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PERFORMANCE COAL COMPANY)	
)	
and)	
)	DATE ISSUED: 11/08/2013
A.T. MASSEY)	
)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (10-BLA-5229) of Administrative Law

¹ The miner died on June 10, 2005. Decision and Order at 2. Claimant, the

Judge Richard A. Morgan denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's claim filed on June 21, 2004,² and has previously been before the Board.

In a Decision and Order dated September 21, 2006, Administrative Law Judge Daniel F. Solomon found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and denied benefits. Judge Solomon's denial of benefits was subsequently affirmed by the Board. *J.B. [Brown] v. Performance Coal Co.*, BRB No. 06-0987 BLA (July 25, 2007) (unpub.). Claimant timely requested modification, and the case was assigned to Administrative Law Judge Richard A. Morgan (the administrative law judge).

After crediting the miner with at least twenty-five years of coal mine employment,³ the administrative law judge found that the autopsy and medical opinion evidence established the existence of clinical pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), (4); 718.203(b). The administrative law judge further found that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), but did not establish that the miner's total disability was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's denial of benefits. *Brown v. Performance Coal Co.*, BRB No. 11-0357 BLA (Feb. 16, 2012) (unpub.). Specifically, the Board held that, in finding that the evidence did not establish that the miner's disability was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge mischaracterized the opinion of Dr. Mullins. Thus, the Board vacated the administrative law judge's findings that the medical opinion evidence did not establish that the miner's total disability was due to his

miner's surviving spouse, is pursuing the miner's claim.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim because it was filed before January 1, 2005. The relevant version of all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

³ The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. 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, 1-202 (1989) (en banc).

clinical pneumoconiosis, pursuant to 20 C.F.R. §718.204(c),⁴ and remanded the case to the administrative law judge for further consideration.

On remand, the administrative law judge again concluded that the evidence did not establish that the miner's total disability was due to clinical pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found no change in conditions or mistake of fact to support modification of the denial of benefits. *See* 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's disability was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer/carrier responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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).

To establish entitlement to benefits under the Act, claimant must establish by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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).

⁴ The Board affirmed, as unchallenged, the administrative law judge's findings that claimant established at least twenty-five years of coal mine employment, and the existence of clinical, but not legal, pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The Board further affirmed the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Brown v. Performance Coal Co.*, BRB No. 11-0357 BLA (Feb. 16, 2012) (unpub.), slip op. at 2 n.5.

In addressing, on remand, whether the evidence established that the miner's total disability was due to clinical pneumoconiosis, the administrative law judge considered the opinions of Drs. Mullins, Hippensteel, Spagnolo, and Crisalli. Dr. Mullins opined that seventy-five percent of the miner's totally disabling pulmonary impairment was due to his clinical pneumoconiosis. Director's Exhibit 12 at 4. Dr. Mullins indicated that she based her 2004 opinion on her physical examination findings, the miner's medical and exposure histories, and an x-ray, pulmonary function study, and blood gas study. Conversely, Drs. Hippensteel, Spagnolo, and Crisalli each opined that the miner's clinical pneumoconiosis was too minimal to have contributed in any way to his pulmonary disability. Employer's Exhibits 3, 4 at 12; 5 at 10. These physicians attributed the miner's pulmonary disability to his cigarette smoking-induced emphysema. *Id.* Drs. Hippensteel, Spagnolo, and Crisalli based their conclusions on their review of the medical evidence of record, including the pathology opinions of Drs. Naeye, Tomashefski, and Oesterling.⁵

The administrative law judge permissibly discounted the opinion of Dr. Mullins because she offered no explanation for her conclusion that seventy-five percent of the miner's impairment was due to clinical pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 3. The administrative law judge further permissibly discounted Dr. Mullins' opinion because, unlike Drs. Hippensteel, Spagnolo, and Crisalli, Dr. Mullins did not consider the pathology evidence that showed only minimal evidence of clinical pneumoconiosis in the miner's lungs. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); Decision and Order at 3. Thus, the administrative law judge found that Dr. Mullins' opinion did not meet claimant's burden of proof. In contrast, the administrative law judge found that the opinions of Drs. Hippensteel, Spagnolo, and Crisalli, that the miner's minimal degree of clinical pneumoconiosis did not contribute to his respiratory disability, were well supported by the pathology evidence of record. Decision and Order at 3. The administrative law judge, therefore, determined that the evidence did not

⁵ Drs. Naeye, Tomashefski, and Oesterling each performed an autopsy slide review. Dr. Naeye did not diagnose pneumoconiosis, citing an absence of anthracotic macules, micronodules or characteristic findings of coal workers' pneumoconiosis. Director's Exhibit 41. Dr. Tomashefski diagnosed minimal simple pneumoconiosis, based on the presence of rare small micronodules, but opined that it was "far too minimal" to have caused respiratory symptoms. Director's Exhibit 53. Dr. Oesterling diagnosed mild macular subpleural coal workers' pneumoconiosis and similarly opined that due to the lack of interstitial structural damage, the miner's pneumoconiosis would have produced no "symptomatology." Employer's Exhibit 2 at 2.

establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

Claimant contends that the administrative law judge erred in crediting the opinions of Drs. Hippensteel, Spagnolo, and Crisalli, over that of Dr. Mullins. Citing *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), claimant asserts that, because Drs. Hippensteel, Spagnolo and Crisalli did not initially diagnose the miner with pneumoconiosis, prior to their review of the pathology evidence, their opinions as to whether pneumoconiosis contributed to the miner's respiratory impairment are not credible. Claimant's Brief at 5 (unpaginated). Claimant's argument is misplaced. Contrary to claimant's characterization of the administrative law judge's decision, the administrative law judge did not credit the opinions of employer's physicians over that of Dr. Mullins. Rather, as discussed above, the administrative law judge found that Dr. Mullins' opinion, that seventy-five percent of the miner's disabling impairment was due to clinical pneumoconiosis, was insufficiently explained to carry claimant's burden of proof. Because the administrative law judge provided valid reasons for discounting the opinion of Dr. Mullins, the only opinion supportive of a finding that pneumoconiosis played any role in the miner's disabling pulmonary impairment, we affirm the administrative law judge's finding that claimant failed to establish an essential element of entitlement under 20 C.F.R. Part 718. *Trent*, 11 BLR at 1-27; Decision and Order at 3. Therefore, we affirm the denial of benefits. Consequently, we need not address claimant's arguments regarding the credibility of employer's physicians' opinions.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge