

BRB No.00-0124 BLA

BERNICE MOSER )  
(Widow of CARL MOSER) )

Claimant-Petitioner )

v. )

DATE ISSUED:

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Respondent )

)  
DECISION and ORDER

Appeal of the Decision and Order Denying Modification and Denying Survivor's Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Bernice Moser, Fort Carbon, Pennsylvania, *pro se*.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup>, without the assistance of counsel, appeals the Decision and Order Denying Modification and Denying Survivor's Benefits (98-BLA-0788) of Administrative Law Judge Daniel F. Sutton, on a petition for modification of the denial of 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 case is before the Board for the second time.

---

<sup>1</sup>Claimant is Bernice Moser, surviving spouse of the miner, Carl Moser. The miner died on March 30, 1994. Director's Exhibit 57.

The relevant procedural history of this claim is as follows: the miner filed his application for benefits with the Department of Labor (DOL) on February 4, 1993. Director's Exhibit 1. Following an informal denial by DOL, the miner died on March 30, 1994, prior to a hearing. Director's Exhibit 57. Claimant filed a survivor's claim with DOL on June 22, 1994. Director's Exhibit 28. Claimant then requested that both claims be consolidated and transferred to the Office of the Administrative Law Judges for a hearing. Following a hearing, Administrative Law Judge Frank D. Marden issued a Decision and Order denying benefits dated April 17, 1996. Director's Exhibit 50. Claimant appealed, and the Board affirmed the administrative law judge's denial of benefits in both claims. *Moser v. Director, OWCP*, BRB No. 96-1084 BLA (April 25, 1997)(unpub.). Director's Exhibit 56. Claimant then filed a second survivor's claim along with new evidence on December 17, 1997. Director's Exhibit 57. The district director interpreted this as a motion for modification of the survivor's claim and claimant requested that a decision be made on the current record, without the benefit of another hearing. Administrative Law Judge Daniel F. Sutton found that claimant did not establish a mistake in the determination that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, he denied the motion for modification in a Decision and Order dated September 22, 1999. Claimant then filed the instant appeal with the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, claimant generally challenges the denial of modification, and therefore, the denial of benefits. The Director, Office of Workers' Compensation Programs, in response, asserts that the administrative law judge's finding that the evidence fails to establish that there was a mistake in a determination of fact in the prior denial is supported by substantial evidence, and accordingly, urges affirmance of the denial of benefits.

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)- (4), that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) in order to

establish entitlement to survivor's benefits. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death under Section 718.205(c)(2) if it actually hastened the miner's death. *Lukosevicz v. Director, OWCP*, 888 F. 2d 1001, 13 BLR 2-101 (3d Cir. 1989); *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).<sup>2</sup>

---

<sup>2</sup> The administrative law judge did not cite *Lukosevicz v. Director, OWCP*, 888 F. 2d 1001, 13 BLR 2-101 (3d Cir. 1989), which sets forth the appropriate legal standard in the Third Circuit. The administrative law judge, however, utilized the correct standard set forth in *Lango*, to determine whether pneumoconiosis was a substantial contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(a)(2). Decision and Order at 3-4. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

In the instant case, the administrative law judge correctly determined that with respect to a petition for modification of a survivor's claim, the sole ground upon which it can be based is whether there was a mistake in a determination of fact in the prior denial. Decision and Order at 2, *citing Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge considered the newly submitted opinion by Dr. Simelaro, Claimant's Exhibit 1, as well as the other evidence of record relevant to a determination of the cause of the miner's death pursuant to Section 718.205. The administrative law judge rationally found that Administrative Law Judge Marden permissibly gave less weight to the miner's death certificate, prepared by the Deputy Coroner, and Dr. Mather's opinion, both of which reflected the conclusion that pneumoconiosis was a significant contributing condition of the miner's death because they were unreasoned and undocumented. Decision and Order at 5; Director's Exhibits 39, 51; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). He also noted that Judge Marden correctly found that the miner's autopsy report, prepared by Dr. Bindie, did not identify pneumoconiosis as a cause of the miner's death, rather, it merely indicated that pneumoconiosis was present. Director's Exhibit 30; Decision and Order at 5. The administrative law judge then found that Dr. Simelaro determined in his newly submitted opinion that there was a causal link between pneumoconiosis and the miner's heart disease, which caused his death. Claimant's Exhibit 1; *Id.* The administrative law judge, however, rationally accorded greater weight to the contrary opinions of Drs. Naeye and Spagnolo on the basis that they are highly qualified.<sup>3</sup> *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). We affirm, therefore, the administrative law judge's finding that claimant did not establish a mistake of fact in the prior determination that pneumoconiosis was not a cause of the miner's death as it is supported by substantial evidence. *See* 20 C.F.R. §725.310(a); *Trumbo, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley, supra*.

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

SO ORDERED.

---

BETTY JEAN HALL, Chief

---

<sup>3</sup> The administrative law judge correctly found that Dr. Naeye was Board-certified in anatomic and clinical pathology, Decision and Order at 4; Director's Exhibit 31, and that Dr. Spagnolo was Board-certified in internal and pulmonary medicine. Dr. Simelaro's qualifications are not in the record. Decision and Order at 4; Director's Exhibit 34.

Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge