

BRB No. 05-0232 BLA

MARTHA H. LEHAN)
(Widow of CHARLES B. LEHAN))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 10/07/2005
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

James J. Conaboy (Abrahamsen, Moran & Conaboy, P.C.), Scranton, Pennsylvania, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-0077) of Administrative Law Judge Robert D. Kaplan denying benefits 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). The administrative law judge noted that this case involves a modification request of a previously denied survivor's claim, and, based

on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.¹ Decision and Order at 2-4. Pursuant to the parties' stipulation, the administrative law judge credited the miner with ten years of coal mine employment and found the existence of pneumoconiosis arising out of coal mine employment established. Decision and Order at 2; Hearing Transcript at 7, 11. Considering the prior and newly submitted evidence of record, the administrative law judge concluded that it did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and thus did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Decision and Order at 4-7. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in weighing the evidence of record pursuant to Section 718.205. The Director, Office of Workers'

¹ The miner, Charles B. Lehan, filed a claim for benefits on December 3, 1985 and pursuant to an award was receiving benefits at the time of his death on December 10, 1991. Director's Exhibits 4, 16. Claimant filed her claim for survivor's benefits on January 16, 1992, which was denied by Administrative Law Judge Ainsworth H. Brown on May 28, 1993. Director's Exhibits 1, 22. Claimant appealed and the Board affirmed the denial of benefits on June 20, 1994. Director's Exhibits 23, 28. Claimant petitioned the United States Court of Appeals for the Third Circuit, which reversed the Board's decision and remanded the case for the development of additional evidence. Director's Exhibits 30, 31, 32. On remand, Judge Brown denied benefits. Director's Exhibit 40. Claimant appealed, and the Board dismissed her appeal as untimely. Director's Exhibits 41, 42. The Board denied claimant's motion for reconsideration. Director's Exhibits 43, 44. Claimant again petitioned the United States Court of Appeals for the Third Circuit, which affirmed the dismissal on July 29, 1997. Director's Exhibits 45, 47. Claimant filed a second application for benefits on June 17, 1997, which was treated as a request for modification. Director's Exhibits 48, 49. Judge Brown denied modification on April 29, 1999. Director's Exhibit 61. Claimant appealed, and both the Board and then the Third Circuit court affirmed the denial of benefits. Director's Exhibits 62, 64, 66, 70-76. Claimant filed a third claim for benefits on August 10, 2001, which was treated as a request for modification. Director's Exhibits 78, 79. Administrative Law Judge Janice K. Bullard denied benefits on May 29, 2003. Director's Exhibit 84. Claimant appealed to the Board, but subsequently withdrew her appeal. Director's Exhibits 85, 86, 93. Claimant filed the current request for modification on September 30, 2003. Director's Exhibit 90. The district director denied benefits and claimant requested a hearing. Director's Exhibits 93-95.

Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.²

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 survivor's 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).³ 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 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 of the evidence for any mistake of fact, including whether the ultimate fact of entitlement was wrongly decided. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995).

² The administrative law judge's length of coal mine employment determination and his findings pursuant to 20 C.F.R. §§718.202, 718.203, and 718.304 are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 16.

Pursuant to Section 718.205(c), after finding that the formerly submitted evidence did not demonstrate a mistake in a determination of fact, the administrative law judge reviewed the medical opinions of Drs. Levinson and Sherman submitted in the current modification request. Dr. Levinson noted that earlier in the claim proceedings, he opined that the miner died due to a sudden cardiac arrest that was unrelated to pneumoconiosis.⁴ Claimant's Exhibit 1. Dr. Levinson indicated, however, that upon review of additional evidence it now appeared that the miner experienced progressive respiratory problems in the days leading up to his death, and there was no objective evidence that he died of an "acute cardiac event." Claimant's Exhibit 1 at 3. Considering that the miner was totally disabled due to pneumoconiosis, Dr. Levinson concluded that "coal workers' pneumoconiosis" was "at least a substantial contributing factor" to the miner's death. *Id.* By contrast, Dr. Sherman concluded that the miner died of "an acute coronary arrest," which was "evident by the witnessed sudden loss of consciousness with collapse and the ventricular fibrillation found on cardiogram." Director's Exhibit 98 at 4. In reaching this conclusion, Dr. Sherman referred to the December 10, 1991 emergency room treatment record noting that the miner "was found in the field in cardiac arrest," and "did not respond to therapy and died in the emergency department."⁵ *Id.* Noting further that the miner's pulmonary function testing indicated a mild impairment, Dr. Sherman opined that the miner's severe and worsening dyspnea was "more likely caused by his cardiac disease than his lung disease." Director's Exhibit 98 at 5. Dr. Sherman therefore concluded that there was "no evidence to suggest that pneumoconiosis caused or hastened [the miner's] death from cardiac arrest." *Id.* The administrative law judge found that Dr. Sherman's opinion was reasoned and well-documented, but that Dr. Levinson's opinion was not reasoned or well-documented.

Claimant contends that the administrative law judge did not properly consider Dr. Levinson's opinion that coal workers' pneumoconiosis was "a substantial contributing factor" to the miner's death. Claimant's Exhibit 1; Claimant's Brief at 4-6. However, for the most part, claimant merely recites Dr. Levinson's opinion and requests that the "Board consider the report of Dr. Levinson and award benefits on the present record." Claimant's Brief at 4. The Board, however, may not analyze the credibility of medical opinions or substitute its inferences for those of the administrative law judge. *Mays v. Piney Mountain Coal Co.*, 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting), *aff'd*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Additionally, although claimant alleges that the administrative law judge improperly discounted Dr. Levinson's opinion because Dr. Levinson failed to discount or explain his previous finding that

⁴ Dr. Levinson referred to his report of August 13, 1992. Director's Exhibit 13.

⁵ As summarized by Dr. Sherman, this record also indicated that "[v]entricular fibrillation was noted on cardiogram" in the emergency room. Director's Exhibit 98 at 4.

pneumoconiosis did not hasten the miner's death, an opinion which claimant states was based on inaccurate coal mine employment information supplied by the Department of Labor, review of the administrative law judge's Decision and Order does not reflect that he discounted Dr. Levinson's opinion for this reason. Instead, as the Director points out on appeal, the administrative law judge found that Dr. Levinson's report was not well-reasoned or documented, for several reasons.

Specifically, the administrative law judge permissibly found that Dr. Levinson's opinion was not well documented because Dr. Levinson did not consider the emergency room records from the day of the miner's death. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). Substantial evidence supports this finding. Review of Dr. Levinson's report reveals no indication that Dr. Levinson reviewed the hospital emergency room records completed on the day the miner died. Claimant's Exhibit 1. The administrative law judge was within his discretion to find that, by contrast, Dr. Sherman reviewed these records and integrated them into a reasoned explanation of how the miner collapsed and died of a sudden cardiac arrest. *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Additionally, the administrative law judge noted that Dr. Levinson relied on the fact that the miner was found totally disabled due to pneumoconiosis and experienced breathing problems in the few days before his death, whereas the administrative law judge found that Dr. Sherman analyzed the miner's pulmonary function studies and reasonably explained that the severe, worsening dyspnea the miner experienced in the days before his death was related to his cardiac disease, not his lung disease. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1985)(*en banc*). Further, the administrative law judge was not persuaded by Dr. Levinson's decision to discount the opinion of the miner's treating physician, Dr. Walnista, that the miner died of a massive heart attack. The administrative law judge reasonably observed that Dr. Levinson stated that Dr. Walnista was not attending the miner at the time of his death, yet failed to discount his own opinion as to the cause of death even though he had not seen the miner since 1987, four years before the miner's death.⁶ *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155.

Based on the foregoing, we hold that the administrative law judge permissibly weighed the medical opinions and found that Dr. Sherman's opinion was the better reasoned and documented of the two. Substantial evidence supports his finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). The finding is therefore affirmed.

⁶ The administrative law judge noted that Dr. Walnista had at least seen the miner on October 29, 1991, less than three months before the miner's death. Decision and Order at 7.

Because claimant has failed to establish that the miner's death was due to pneumoconiosis, a requisite element of entitlement in a survivor's claim pursuant to 20 C.F.R. Part 718, we affirm the administrative law judge's decision to deny modification of the prior denial of benefits. 20 C.F.R. §§718.205(c); 725.310 (2000); *Keating*, 71 F.3d at 1123, 20 BLR at 2-61-63.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge