

BRB No. 06-0297 BLA

ALICE F. SUMMERLIN)
(Deceased Widow of KENNETH)
SUMMERLIN))
)
Claimant-Petitioner)
)
v.)
) DATE ISSUED: 10/31/2006
JIM WALTER RESOURCES,)
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 of Edward Terhune Miller,
Administrative Law Judge, United States Department of Labor.

Samuel Maples and John R. Jacobs (Thomason, Maples & Allsup, LLC),
Bessemer, Alabama, for claimant.

Thomas J. Skinner, IV (Lloyd, Gray & Whitehead, P.C.), Birmingham,
Alabama, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order (04-BLA-0105) of Administrative Law

¹Claimant is the surviving spouse of the deceased miner who died on May 13, 1995. Director's Exhibit 6. Claimant died on November 12, 2003. See Claimant's Exhibit 3. Kenneth L. Summerlin, the administrator of claimant's estate, is pursuing her

Judge Edward Terhune Miller denying benefits on a 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).² This case involves a survivor's claim filed on June 9, 1995.³ In the initial Decision and Order, Administrative Law Judge Gerald M. Tierney found that the sole issue before him was whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁴ Director's Exhibit 58. Judge Tierney found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* Accordingly, Judge Tierney denied benefits. *Id.*

Claimant subsequently filed a motion for reconsideration, along with additional survivor's claim. *See* Claimant's Exhibit 2.

²The 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The miner filed a claim for benefits on January 20, 1993. Director's Exhibit 1. In a Decision and Order dated June 28, 1995, Administrative Law Judge Sheldon R. Lipson awarded benefits. *Id.* By Decision and Order dated February 16, 1996, the Board vacated Judge Lipson's finding that the evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Summerlin v. Jim Walters Resources, Inc.*, BRB No. 95-1893 BLA (Feb. 16, 1996) (unpublished) (McGranery, J., dissenting). On remand, Judge Lipson reaffirmed his finding that the evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Director's Exhibit 1. Accordingly, Judge Lipson awarded benefits. By Decision and Order dated December 23, 1997, the Board affirmed Judge Lipson's award of benefits. *Summerlin v. Jim Walters Resources, Inc.*, BRB No. 97-0520 BLA (Dec. 23, 1997) (unpublished). Employer subsequently filed an appeal of the Board's Decision and Order with the United States Court of Appeals for the Eleventh Circuit. In a Decision dated December 21, 1998, the Eleventh Circuit affirmed Judge Lipson's award of benefits. *Jim Walters Resources, Inc. v. Summerlin*, No. 98-6050 (11th Cir. Dec. 21, 1998) (unpublished).

⁴Administrative Law Judge Gerald M. Tierney found that the issue of pneumoconiosis and its etiology had already been litigated in the miner's claim. Judge Tierney found that employer was, therefore, collaterally estopped from relitigating these issues in the survivor's claim. Director's Exhibit 58.

medical evidence, namely Dr. Truett's February 10, 2002 report. *See* Director's Exhibit 59-60. In an Order dated April 10, 2002, Judge Tierney found that the newly submitted evidence was insufficient to warrant a change in his decision. Director's Exhibit 61. Judge Tierney, therefore, denied claimant's motion for reconsideration. *Id.*

Claimant subsequently filed a request for modification. Director's Exhibit 62. Administrative Law Judge Edward Terhune Miller (the administrative law judge) found that there was no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). 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.

The Board 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 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 reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Judge Tierney found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the issue properly before the administrative law judge was whether Judge Tierney made a mistake in a determination of fact in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis.

Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁵ *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

⁵Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); see *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).

After consideration of the administrative law judge's Decision and Order, the issue on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of claimant's request for modification. The administrative law judge considered whether the relevant medical evidence (the miner's death certificate and the medical opinions of Drs. Truett, Cohen, Fino and Friedlander) was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). All of the physicians who addressed the issue agreed that the miner's death was attributable to lung cancer. These physicians, however, disagreed as to whether the miner's pneumoconiosis and/or chronic obstructive pulmonary disease also contributed to the miner's death. The miner's death certificate and the opinions of Drs. Truett and Cohen, if credited, are sufficient to support a finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). See Director's Exhibits 31, 60, 62.

Dr. Patil completed the miner's death certificate.⁶ Dr. Patil listed the miner's

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at §718.304 is applicable.

(4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) 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).

⁶In a Discharge Summary dated September 9, 2005, Dr. Patil noted that the miner was hospitalized from May 11, 1995 until his death on May 13, 1995. Director's Exhibit 31. Dr. Patil's final diagnoses were: (1) squamous cell cancer of the lung; (2) pneumonia – left base; (3) COPD (pneumoconiosis); (4) renal failure; (5) pulmonary edema; (6) severe leucopenia, probably secondary to the chemotherapy; and (7) under chemotherapy

immediate cause of death as “squamous [sic] cell carcinoma of the lungs.” Director’s Exhibit 6. Dr. Patil also listed pneumonia, chronic obstructive pulmonary disease and renal failure as causes of death. *Id.* The administrative law judge permissibly found that the miner’s death certificate is insufficient to support a finding that the miner’s death was due to pneumoconiosis because it is not a reasoned medical finding.⁷ Decision and Order at 6; *See generally Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997) (an administrative law judge may require a treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to a miner’s death).

Although Dr. Truett opined that the miner’s pneumoconiosis and chronic obstructive pulmonary disease contributed to his death, the administrative law judge found that Dr. Truett provided only general statements without explaining the basis for his conclusions.⁸ Decision and Order at 5. The administrative law judge, therefore, acted within his discretion in finding that Dr. Truett’s opinion was not sufficiently reasoned.⁹

at present for lung cancer. *Id.*

⁷Dr. Patil provided no explanation for her findings on the miner’s death certificate. *See* Director’s Exhibit 6.

⁸In a report dated February 10, 2002, Dr. Truett stated:

I believe the primary causes of [the miner’s] death were respiratory failure and squamous cell lung cancer, with COPD and pneumoconiosis certainly contributing to the respiratory failure. His pulmonary hypertension and related congestive heart failure, both sequelae of his pneumoconiosis, seem to have also contributed significantly. It is impossible for me to separate the clinical sequelae of COPD and pneumoconiosis. I certainly feel the combination of the two hastened [the miner’s] death, and his pneumoconiosis certainly complicated the treatment of his COPD by decreasing the efficacy of the usual treatments.

I believe [the miner] would have lived longer before succumbing to his lung cancer had he not suffered from COPD and pneumoconiosis. Using Dr. Jack Hassan’s opinion that the chronic pulmonary impairment was at least 10-20% due to pneumoconiosis, it’s fair to say that pneumoconiosis hastened [the miner’s] death. It is not possible for me to even estimate a figure.

Director’s Exhibit 60.

⁹We reject claimant’s contention that the administrative law judge erred in not

See Clark v. Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 5.

The administrative law judge noted that Dr. Cohen based his opinion, that the miner's chronic obstructive pulmonary disease¹⁰ contributed to his death, on a general assessment that the miner's chronic obstructive pulmonary disease damaged his lungs, thereby leaving the miner with less pulmonary reserve to fight the effects of lung cancer, radiation, chemotherapy and pneumonia. Decision and Order at 6. The administrative law judge, however, noted that Dr. Cohen failed to explain how lungs free of pneumoconiosis and chronic obstructive pulmonary disease would have enabled the miner to withstand his pneumonia longer. *Id.* Claimant contends that the administrative law judge thereby imposed an impossible burden of persuasion. We disagree. Drs.

according greater weight to Dr. Truett's opinion based upon his status as claimant's treating physician. Revised Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). However, Section 718.104(d) further provides that:

In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, *provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.*

20 C.F.R. §718.104(d)(5) (emphasis added).

As discussed, *supra*, the administrative law judge properly discredited Dr. Truett's opinion because he found that it was not sufficiently reasoned. For the same reason, we reject claimant's contention that the administrative law judge erred in discrediting Dr. Patil's opinion in the death certificate.

¹⁰The administrative law judge noted that Drs. Cohen, Fino and Friedlander agreed that the miner's chronic obstructive pulmonary disease was due to both coal dust exposure and cigarette smoking. Decision and Order at 5.

Fino¹¹ and Friedlander¹² explained that the miner's death was not attributable to his underlying lung disease, *i.e.*, his pneumoconiosis or chronic obstructive pulmonary disease. Employer's Exhibits 1, 2. The administrative law judge, therefore, properly accorded less weight to Dr. Cohen's opinion because he failed to explain why the miner's diminished pulmonary reserve, in this particular case, reduced his ability to withstand his pneumonia. *See Clark; supra; Lucostic, supra; see also Lango, supra.*

¹¹Dr. Fino opined that:

[The miner] clearly died as a result of squamous cell carcinoma of the lungs. It was indeed true that he had underlying lung disease. However, this man's cancer was going to cause his death, regardless of any pre-existing or underlying pulmonary condition. Unfortunately, the stage of lung cancer in this particular individual was one that showed no hope of survival. This man would have died as and when he did regardless of any pre-existing pulmonary condition.

Employer's Exhibit 2.

¹²Dr. Friedlander explained that:

[The miner] died because he had cancer plugging the airways, profound depletion of the neutrophils from chemotherapy, and tissue wasting as evidenced by the low albumin and early cachexia. In this setting, "pulmonary reserve" (*i.e.*, the ability to move a lot of air in and out of the lungs) doesn't matter. Even if it did, [the miner] obviously had enough lung reserve to oxygenate his blood to 98% when he was given supplemental oxygen. [The miner] had always survived pneumonia in the past; this case was different because it resulted from his having almost no neutrophils (the cells that actually fight bacteria), thanks to his chemotherapy. And his pneumonia rendered him hypoxic because it shunted the blood away from the portions of his lungs that were still breathing. This is how pneumonia kills smokers and non-smokers, miners and non-miners alike. Further, if cancer is obstructing one's large bronchi, then secretions are going to pool distal to the obstruction, inviting infection, even if one has no obstructive lung disease. Pulmonary edema visible on x-ray, whether due to alveolar damage from chemotherapy or to left-sided heart failure, adds a mechanical barrier to oxygen transfer into the blood, making the whole issue of ventilation moot.

Employer's Exhibit 1.

Because it is based upon substantial evidence,¹³ we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).¹⁴ Consequently, we affirm the administrative law judge's finding that there is no mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

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

¹³The administrative law judge credited Dr. Fino's opinion, that the miner's chronic obstructive pulmonary disease did not contribute to his death, over Dr. Cohen's contrary opinion. However, the administrative law judge noted that, even if he had found the opinions to be equally probative, claimant would have failed to carry her burden of proof. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 6.

¹⁴Because there is no evidence of complicated pneumoconiosis in the record, claimant is precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3).