

BRB No. 09-0184 BLA

B.H.)
(Widow of R.H.))
)
Claimant-Petitioner)
)
v.)
)
H & D COAL COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 09/15/2009
)
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 Denying Benefits of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (07-BLA-5992) of
Administrative Law Judge Janice K. Bullard on a request for modification 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 Act). In the initial Decision

and Order issued on November 30, 2004, Administrative Law Judge Joseph E. Kane adjudicated both the miner's and the survivor's claims.¹ With respect to the miner's claim, Judge Kane found pneumoconiosis established at 20 C.F.R. §718.202(a) based on employer's concession and found that pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Judge Kane found, however, that the evidence was insufficient to establish total respiratory disability due to pneumoconiosis at 20 C.F.R. §718.204. Benefits were, accordingly denied in the miner's claim. With respect to the survivor's claim, Judge Kane found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, benefits were denied in the survivor's claim. Director's Exhibit 97. Claimant appealed and the Board affirmed Judge Kane's denial of benefits in both claims. [*B.H.*] v. *H & D Coal Co.*, BRB No. 05-0331 BLA (Oct. 24, 2005) (unpub.); Director's Exhibit 108. Subsequently, on October 19, 2006, claimant filed a petition for modification of the denial in her survivor's claim only.² This request was denied by the district director. Director's Exhibits 109, 118. Claimant filed a second petition for modification of the denial of her survivor's claim, on January 29, 2007, contending that a mistake in a determination of fact was made. The denial of that request by the administrative law judge is now on appeal. Director's Exhibit 119.

Adjudicating claimant's January 29, 2007 request for modification pursuant to 20 C.F.R. §725.310, Administrative Law Judge Janice K. Bullard (the administrative law judge) found that the sole issue before her was whether a mistake in a determination of fact was made by Judge Kane in denying benefits on the survivor's claim.³ The administrative law judge found that the record established that the miner worked in qualifying coal mine employment for thirty-two years, that employer conceded the existence of pneumoconiosis, and that the evidence established that pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The

¹ The miner filed an application for benefits on October 2, 2000. Director's Exhibit 1. The district director awarded benefits on the miner's claim and employer requested a formal hearing. While his claim was pending, however, the miner died on January 28, 2001. Director's Exhibit 12. Claimant, the surviving spouse of the miner, filed her survivor's claim for benefits on April 4, 2001. Director's Exhibit 2. Thereafter, the miner's and the survivor's claims were remanded to the district director for consolidation.

² The denial of the miner's claim has not been challenged.

³ Because this is a request for modification of the denial of a survivor's claim, claimant cannot establish a basis for modification by showing a change in the miner's condition. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

administrative law judge found, however, that the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and failed, therefore, to establish a mistake in a determination of fact, and thereby, a basis for modifying the prior denial of benefits on the survivor's claim. Accordingly, the administrative law judge denied benefits on the survivor's claim and denied claimant's request for modification.

On appeal, claimant argues that the administrative law judge erred in failing to conduct a *de novo* review of all the evidence of record and the issues under consideration. Claimant also contends that the administrative law judge erred in applying an incorrect standard for the adjudication of claimant's modification request pursuant to Section 725.310, because she focused only on whether Judge Kane made a specific mistake in a determination of fact in the prior decision, rather than considering whether the ultimate question of entitlement was correctly decided. Claimant also argues that the administrative law judge erred in finding that the opinion of Dr. Rosenberg outweighed the opinion of Dr. Alam, the miner's treating physician, to find that the miner's death was not due pneumoconiosis pursuant to Section 718.205(c). Employer responds, urging affirmance of the administrative law judge's decision denying modification. The Director, Office Workers' Compensation Programs, is not participating in this appeal.⁴

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.⁵ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered

⁴ We affirm the administrative law judge's finding that claimant established pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b), as that determination is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 6.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes the modification of an award or denial of benefits based, in pertinent part, upon a mistake in a determination of fact. Mistakes of fact may be 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); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

Claimant initially argues that the administrative law judge erred by failing to conduct a *de novo* review of all of the evidence of record. Specifically, claimant contends that the administrative law judge erred in limiting her review of the evidence solely to the new evidence submitted on modification, rather than providing a complete analysis and discussion of both the old and the new evidence, when she found that a mistake in a determination of fact had not been made in the prior decision. Claimant contends that the administrative law judge's statements that: "[t]he evidence assembled in the Director's file and identified as DX 1 through DX 139 is incorporated herein[,]" and that "I adopt the evidence considered by [Administrative Law Judge] Kane in his determination on the Miner's claim, and incorporate it herein[,]" demonstrate that the administrative law judge failed to address and analyze all of the evidence of record herself, as required on modification. Claimant's Petition for Review and Brief at 5, *citing* Decision and Order at 3. Claimant contends, therefore, that the administrative law judge improperly failed to address the previously submitted evidence and impermissibly adopted the prior findings of Judge Kane absent any explanation and, in so doing, abdicated her duty under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), "which requires that an administrative law judge independently evaluate the evidence and provide an explanation for [her] findings of fact and conclusions of law." Claimant's Petition for Review and Brief at 5. We disagree.

Contrary to claimant's assertion, the administrative law judge did not abdicate her duty to consider the previously submitted evidence, as she specifically stated that she considered both the old and the new evidence together and referenced reports contained in the previously submitted evidence, particularly those of Dr. Alam. The administrative

law judge stated, “I have considered Dr. Alam’s opinions [both old and new] together with the evidence that [Administrative Law Judge] Kane considered, and find no mistake in the determination of fact.” Decision and Order at 7. Consequently, as the administrative law judge stated that she reviewed both the old and the new evidence together, and the administrative law judge’s decision reflects her consideration of all of the evidence, we reject claimant’s assertion that the administrative law judge failed to conduct a *de novo* review of this case, as required on modification. See *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14, 1-17 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9, 1-12 (1992). Moreover, we note that claimant has failed to cite to a specific exhibit contained in the previously submitted evidence that would impact the administrative law judge’s finding, or to delineate a specific allegation of error as to how the administrative law judge’s consideration of the previously submitted evidence was erroneous. See *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); Decision and Order at 7; Claimant’s Petition for Review and Brief at 5. Consequently, we reject claimant’s assertion that the administrative law judge did not provide a *de novo* review of all of the evidence of record.

Next, claimant argues that the administrative law judge erred in narrowly focusing on whether a mistake in a determination of fact was made in the prior denial of benefits, instead of simply “rethinking” the case, *i.e.*, determining whether the ultimate question of entitlement was correctly decided. See *Worrell*, 27 F.3d at 230, 18 BLR at 2-296. Claimant contends that the administrative law judge should have accepted the July 28, 2008, “corrected report” of Dr. Alam in which he opined that, even though the miner did not have complicated pneumoconiosis, his death was, nonetheless, hastened by pneumoconiosis. Claimant contends that the administrative law judge erred in failing to address and credit this “corrected report,” on modification, as Judge Kane’s prior denial of benefits was based, in part, on his rejection of Dr. Alam’s October 12, 2006 report, opining that the miner’s death was hastened by pneumoconiosis, because the doctor relied on a finding of complicated pneumoconiosis that was not supported in the record. Claimant contends that because Dr. Alam’s “corrected report,” submitted on modification, still attributes the miner’s death to pneumoconiosis, despite a finding that claimant does not have complicated pneumoconiosis, Dr. Alam’s “corrected report” on the issue of death due to pneumoconiosis should have been credited.

We reject claimant’s argument that the administrative law judge erred in narrowly focusing on whether a specific mistake in fact was made in the prior decision, rather than determining whether the ultimate question of entitlement was correctly decided. The administrative law judge correctly articulated the proper standard for modification at Section 725.310, as she acknowledged that Section 725.310 requires the administrative law judge to reconsider the evidence of record to determine whether a mistake in a

determination of fact was made, even the ultimate fact of entitlement. Decision and Order at 5. Thus, contrary to claimant's argument, the administrative law judge's decision does not demonstrate that she applied an incorrect standard in this modification proceeding. *See Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

Further, we reject claimant's argument that Dr. Alam's "corrected report" was entitled to enhanced, or determinative, weight merely because Dr. Alam now recognizes that the miner did not have complicated pneumoconiosis, but still believes that pneumoconiosis hastened the miner's death. Here, the administrative law judge considered Dr. Alam's "corrected report," finding that the miner did not have complicated pneumoconiosis, but noting that the miner's death was hastened by pneumoconiosis. However, the administrative law judge properly found that its probative value was undermined because the opinion was conclusory, inadequately explained, and not fully reasoned. Decision and Order at 7. Specifically, the administrative law judge noted that Dr. Alam did not fully address the miner's other medical conditions, which were relevant to the cause of death; did not explain how the miner's progressive pneumoconiosis caused a decrease in his oxygenation, despite improvement on bronchodilator treatment; and cited conflicting smoking histories in support of his finding. Decision and Order at 7. Because the determination as to whether a physician's report is sufficiently reasoned and documented is a credibility matter for the administrative law judge, we reject claimant's argument that Dr. Alam's "corrected report" was automatically entitled to dispositive weight. Instead, the administrative law judge properly considered the "corrected report" and explained why it was not credible. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 7.

Claimant argues, however, that the specific reasons given by the administrative law judge for discounting the opinion of Dr. Alam are not rational. Further, claimant contends that Dr. Alam's "corrected report" should have been given determinative weight not only because Dr. Alam was the miner's treating physician, as discussed *supra*, but also because he is Board-certified in Pulmonary Medicine and Critical Care Medicine.

A physician's status as the miner's treating physician is a relevant factor for the administrative law judge to consider in assessing the credibility of the opinion. The opinions of treating physicians are not, however, automatically entitled to greater weight because they are the opinions of treating physicians. Rather, they are only entitled to additional weight based on their power to persuade. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), *citing Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir.

1993). Further, the administrative law judge is not required to accord greater weight to an opinion based on the physician's superior qualifications. *See Clark*, 12 BLR at 1-154.

Although the administrative law judge acknowledged that Dr. Alam was the miner's treating physician and was Board-certified in Pulmonary Medicine, she cited multiple factors that diminished the probative value of Dr. Alam's opinion, and therefore, properly accorded the opinion less weight, despite the fact that Dr. Alam was the miner's treating physician and was highly qualified. *See* 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d at 517-18, 22 BLR at 2-645-55; *Clark*, 12 BLR at 1-154-55. Specifically, the administrative law judge properly found Dr. Alam's opinion, that the miner's death was hastened by pneumoconiosis, "compromised by its conclusory nature." Decision and Order at 7; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 7. Further, the administrative law judge was not persuaded by Dr. Alam's opinion because the doctor's conclusion, that "a long history of underground mining hastened [the miner's] death for at least two or three years," lacked any explanation. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-262 (4th Cir. 2000); *Clark*, 12 BLR at 1-155; Decision and Order at 7; Director's Exhibit 109. Similarly, the administrative law judge properly found that Dr. Alam's failure to discuss how the miner's other serious ailments, namely, coronary artery disease, tuberculosis, and non-coal mine related interstitial disease could have contributed to the miner's death, rendered his opinion on the cause of death unconvincing. *See Williams*, 338 F.3d at 517-18, 22 BLR at 2-654-55. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Further, the administrative law judge properly questioned Dr. Alam's observation that the miner's emphysema was due to both coal dust exposure and cigarette smoking, because Dr. Alam relied on two different smoking histories; *i.e.*, one report stated that the miner ceased smoking "ten to twenty years" prior to his death, while the other stated that the miner ceased smoking "twenty-five to thirty years" prior to death. Decision and Order at 7. Because Dr. Alam relied on two conflicting smoking histories, the administrative law judge permissibly found the reliability of Dr. Alam's opinion further diminished. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985); Decision and Order at 7. Likewise, the administrative law judge determined that Dr. Alam "did not adequately explain" how the miner's emphysema failed to contribute to the decrease in his oxygenation or reconcile his finding of respiratory improvement after the use of bronchodilators with his finding that pneumoconiosis resulted in an oxygenation decrease. *See Trumbo*, 17 BLR at 1-88; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); Decision and Order at 7. Hence, based on these factors, the administrative law judge reasonably found Dr. Alam's death causation opinion was worth little weight. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *King*, 8 BLR at 1-265; *Lucostic*, 8 BLR at 1-47.

Finally, claimant argues that the administrative law judge erred in crediting the contrary opinion of Dr. Rosenberg, that pneumoconiosis neither caused, contributed to,

nor hastened the miner's death, and that death was due to the miner's cardiac condition. Claimant asserts that the administrative law judge erred in crediting Dr. Rosenberg's opinion because the doctor only "reluctantly admitted" that the miner had pneumoconiosis. Claimant asserts that Dr. Rosenberg's reluctance to admit the existence of pneumoconiosis, which was established, renders his opinion tenuous on the death causation issue. Further, claimant contends that the administrative law judge erred in crediting Dr. Rosenberg's opinion without addressing the equivocal nature of the opinion or that it was not supported by objective evidence. We disagree.

The administrative law judge did not err in crediting the opinion of Dr. Rosenberg. After reviewing Dr. Alam's 2006 report, Dr. Rosenberg opined that that the miner's "death clearly was not caused, hastened or accelerated by past coal mine dust exposure." Employer's Exhibit 1. Further, even though Dr. Rosenberg disagreed with Dr. Alam's characterization of the miner's simple pneumoconiosis as "advanced," Dr. Rosenberg nevertheless opined, "at worst [the miner] had a minimal degree of simple [coal workers' pneumoconiosis], without advanced disease changes as inferred Dr. Alam." *Id.* In assessing whether the miner's death was caused by pneumoconiosis, Dr. Rosenberg concluded, "Any simple [coal worker's pneumoconiosis the miner] might have had, would not have caused any significant functional impairment or worsened his PO₂," or aggravated his underlying coronary artery disease. *Id.* Therefore, "his death was not related in any fashion to past coal mine dust exposure and the presence of [coal worker's pneumoconiosis]." *Id.* Because Dr. Rosenberg accepted the presence of simple coal workers' pneumoconiosis, Dr. Rosenberg's opinion does not contradict the administrative law judge's ultimate finding of pneumoconiosis in this case. Hence, we reject claimant's contention that Dr. Rosenberg's opinion should have been rejected, as contrary to the administrative law judge's finding of pneumoconiosis. Further, Dr. Rosenberg's use of conditional words in his opinion does not necessarily nullify the substance of his opinion. *See generally Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999) ("both the meaning of an ambiguous word or phrase and the weight to give the testimony of an uncertain witness are questions for the trier of fact."). The administrative law judge permissibly accorded controlling weight to Dr. Rosenberg's opinion that coronary artery insufficiency caused the miner's demise, as his opinion was supported by other medical opinions and the objective test results of record, and was "consistent with the evidence on the whole." Decision and Order at 7. Consequently, we affirm the administrative law judge's determination that Dr. Rosenberg's opinion was well-reasoned and well-documented, as rational and supported by substantial evidence. *See Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR at 1-155. We affirm, therefore, the administrative law judge's weighing of the evidence and her conclusion that claimant did not establish that pneumoconiosis caused, substantially contributed to, or hastened, the miner's death pursuant to Section 718.205(c). *See Williams*, 338 F.3d at 518, 22 BLR at 2-655.

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to satisfy her burden of establishing that the miner's death was due to pneumoconiosis at Section 718.205(c). See 20 C.F.R. §718.205(c); *Brown*, 996 F.2d at 816, 17 BLR at 2-140; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Because claimant has failed to satisfy her burden of establishing that the miner's death was due to pneumoconiosis, we affirm the administrative law judge's determination that claimant failed to establish a basis for modifying the denial of the survivor's claim.⁶ See 20 C.F.R. §725.310; *Worrell*, 27 F.3d at 230, 18 BLR at 2-296.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge on modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁶ Claimant also contends generally that the administrative law judge failed to consider whether modification would render justice under the Act. Claimant's Brief at 7. As the administrative law judge properly determined that a mistake in a determination of fact was not made after her review of all the evidence, she did not need to reach this issue.