

BRB No. 98-1163 BLA

RITA B. MULLINS)
(Widow of RUFUS G. MULLINS))
)
 Claimant-Petitioner)

v.)

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

DATE ISSUED:

Respondent) DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Rita B. Mullins, Coeburn, Virginia, *pro se*.

Jennifer U. Toth (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, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the widow of the deceased miner, acting without the assistance of counsel,¹ appeals the Decision and Order (97-BLA-1897) of Administrative Law Judge Edward Terhune Miller denying modification and 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 found that claimant established five years and ten months of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.² The administrative law judge concluded that the evidence of record was insufficient to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205 and thus insufficient to establish modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant generally contends that she is entitled to benefits. The Director, Office of Workers' Compensation Programs responds, urging affirmance of the denial of benefits.

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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis or that pneumoconiosis was a

¹Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

²The miner died on July 7, 1994. Director's Exhibit 9. Claimant filed her survivor's claim on July 25, 1994. On August 14, 1996, the Benefits Review Board affirmed the denial of benefits by Administrative Law Judge Jeffery Tureck. Director's Exhibits 1, 33, 42. Claimant filed a modification request on April 21, 1997. Director's Exhibit 47.

substantially contributing cause of death. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis will be considered a substantially contributing cause of death when it actually hastens the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.³ The United States Court of Appeals for the Fourth Circuit issued *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), holding that the administrative law judge must determine whether a mistake of fact has been made even where no specific allegation has been made by claimant. Furthermore, in determining whether claimant has established modification pursuant to Section 725.310 based on a mistake in fact, the administrative law judge must consider the entire record, and has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge, in the instant case, rationally determined that the evidence of record was insufficient to establish both the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis pursuant to Sections 718.202(a) and 718.205, and therefore was insufficient to establish modification.⁴ *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

³We note that the administrative law judge acted within his discretion in crediting the miner with five years and ten months of coal mine employment based on the Social Security and employment records. See *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Niccoli v. Director, OWCP*, 6 BLR 1-910 (1984); Decision and Order at 2. We, therefore, affirm the administrative law judge's length of coal mine employment determination as it is rational and based on a reasonable method of calculation. *Vickery, supra*.

⁴The administrative law judge properly concluded that as the instant case was a survivor's claim, modification could not be established based on a change in conditions. Decision and Order at 7; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The administrative law judge rationally found that the evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1) based on the fact that the preponderance of x-ray readings was negative. Director's Exhibits 10, 12, 15-22, 52; Decision and Order at 8; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*). In addition, the administrative law judge properly found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3) as there is no autopsy or biopsy of record, this claim was filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. 20 C.F.R. §§718.304, 718.305, 718.306; Decision and Order at 8; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Moreover, the administrative law judge also properly considered the entirety of the medical opinion evidence of record and acted within his discretion in concluding that claimant failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4) or that pneumoconiosis caused or contributed to the miner's death pursuant to Section 718.205. Decision and Order at 8-9; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*); *Piccin, supra*. In so finding, the administrative law judge rationally relied on the opinion of Dr. Spagnolo, that the miner did not suffer from pneumoconiosis and that the miner's death was not due to, or hastened by, pneumoconiosis, since the administrative law judge determined that this opinion was persuasive in that the physician reviewed the miner's numerous medical records spanning many years and provided explicit, objectively-based reasons for his conclusions. *Clark, supra*; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Piccin, supra*; Decision and Order at 9; Director's Exhibit 28.

The administrative law judge further permissibly determined that the reports of Drs. Jones and Kanwal, that the miner suffered from pneumoconiosis, and Dr. Joshi, that the miner suffered from pneumoconiosis and that pneumoconiosis contributed to the miner's death, were entitled to diminished weight. The administrative law judge rationally accorded little weight to opinion of Dr. Jones, that the miner suffered from pneumoconiosis, as it was a restatement of an x-ray reading. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); *Piccin, supra*; Decision and Order at 8; Director's Exhibit 10. Additionally, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion by Dr. Kanwal was

equivocal and entitled to diminished weight.⁵ *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); Decision and Order at 9; Director's Exhibit 52. Moreover, the administrative law judge permissibly accorded little weight to the opinion of Dr. Joshi, that the miner suffers from pneumoconiosis and that pneumoconiosis contributed to his death, as the 1995 letter containing this opinion offers no explanation or objective basis for such a conclusion, particularly in light of his hospital discharge summary and the death certificate that the physician completed, which do not mention pneumoconiosis or any disease related to coal dust exposure. *Clark, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Piccin, supra*; Director's Exhibits 9, 12, 30; Decision and Order at 8. The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark, supra*; *Anderson, supra*. Consequently, we affirm the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a) and 718.205 as they are supported by substantial evidence and in accordance with law. *Shuff, supra*; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Trumbo, supra*. Inasmuch as claimant has failed to establish modification pursuant to 20 C.F.R. §725.310, we affirm the denial of benefits. *Jessee, supra*.

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

SO ORDERED.

⁵On modification, the administrative law judge failed to consider Dr. Buchanan's opinion that the miner suffered from a chronic pulmonary disorder, probably of mixed components including coal workers' pneumoconiosis with superimposed asthmatic bronchitis. Director's Exhibit 11. A remand is not required, however, as this opinion is equivocal and the administrative law judge found that the majority of the medical opinion evidence did not diagnose pneumoconiosis or any disease caused by coal dust exposure. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge