

BRB No. 99-1161 BLA

MILDRED SKEENS)	
(Widow of RALPH A. SKEENS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
C. S. & S. COAL COMPANY)	DATE ISSUED:
)	
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 Denying Modification of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Mildred Skeens, Grundy, Virginia, *pro se*.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Benefits (98-BLA-0362) of Administrative Law Judge Daniel F. Sutton, on a petition 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 case is

¹ Claimant is Mildred Skeens, surviving spouse of the miner, Ralph Skeens. The miner died on September 1, 1981. Director's Exhibit 11. Claimant filed her application for survivor's benefits with the Department of Labor (DOL) on December 16, 1981. Director's Exhibit 1. The miner's claim filed on June 20, 1973, has been finally denied and is not on appeal before the Board.

before the Board for the fourth time. In the instant case, the administrative law judge found that claimant did not establish that there was 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, the administrative law judge denied benefits in the survivor's claim.

The relevant procedural history of this claim is as follows: Following a hearing, Administrative Law Judge Julius A. Johnson issued a Decision and Order dated December 8, 1987, denying benefits in both the miner's and survivor's claims. Director's Exhibit 58. Following claimant's appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §718.204(c)(2)-(4), but vacated his findings at Sections 718.204(c)(1) and 718.205(b) and remanded the case to the Office of Administrative Law Judges. *Skeens v. C.S. & S. Coal Co.*, BRB Nos. 88-0167 BLA and 88-0167 BLA-A (Sept. 30, 1991)(unpub.). Director's Exhibit 77. On remand, the administrative law judge denied benefits again, finding that the evidence failed to establish total respiratory disability at Section 718.204(c)(1) or that the miner's death was due to pneumoconiosis at Section 718.205(b). Director's Exhibit 79. Following claimant's second appeal, the Board affirmed the administrative law judge's denial of benefits in the miner's claim, but vacated his findings at Section 718.205(b), and remanded the case. *Skeens v. C.S. & S. Coal Co.*, BRB No. 92-2327 BLA (Feb. 24, 1994)(unpub.). Director's Exhibit 93. On remand, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis at Section 718.205(b), and he denied benefits in a Decision and Order dated April 7, 1995. Director's Exhibit 94. Following claimant's third appeal, the Board affirmed the administrative law judge's determination pursuant to Section 718.205(b), and therefore, the denial of benefits in the survivor's claim. *Skeens v. C. S. & S. Coal Co.*, BRB No. 95-1428 BLA (May 30, 1996)(unpub.); Director's Exhibit 106. On April 19, 1997, claimant submitted additional evidence and requested modification on the survivor's claim. Director's Exhibit 107.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). On appeal, claimant generally challenges the denial of modification, and thereby, of benefits. Employer, 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 and that the miner's death was due to pneumoconiosis pursuant to Section 718.205(b) is supported by

substantial evidence, and accordingly, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not respond to the instant appeal.

In a survivor's claim, claimant must establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. For claims filed prior to January 1, 1982, death will be considered due to pneumoconiosis if any of the following criteria are met: (1) where evidence establishes that the miner's death was due to pneumoconiosis; (2) where death was due to multiple causes including pneumoconiosis; (3) where the presumptions set forth in §§718.303, 718.304, or 718.305 are applicable; (4) or where the cause of death is significantly related to or aggravated by pneumoconiosis. 20 C.F.R. §718.205(b). Section 718.305 provides, in relevant part, that where evidence establishes that the miner has 15 or more years of employment in underground mines, and the evidence establishes the existence of a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.305(a).

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 could be based was whether there was a mistake in a determination of fact in the prior denial. Decision and Order at 5, *citing Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge considered the newly submitted opinion by Dr. Baxter, dated September 29, 1971, Director's Exhibit 107, and rationally found that while it addressed whether the miner was totally disabled during his lifetime, it did not establish a link between the miner's pneumoconiosis and his death. Decision and Order at 8; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2- (4th Cir. 2000). Moreover, the administrative law judge rationally concluded that the other reports by Dr. Baxter, including the death certificate, Director's Exhibit 11, did not identify any objective medical support for his statement's that coal workers' pneumoconiosis caused the miner's death, *Id*; *see Sparks, supra*; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Further, the administrative law judge rationally concluded that the remaining newly submitted reports by Drs. Fino, Kleinerman, and Harnsbarger found that pneumoconiosis was not a contributing cause of the miner's death and thus, insufficient to establish a mistake in a determination of fact in the prior denial. Employer's Exhibits 1-3, 5; *see Trumbo, supra*; *Neeley, supra*.² We

² Additionally, Dr. Baxter's 1971 report is insufficient to establish the requirements of Section 718.305, as it merely reiterates his opinion as set forth in his report dated June 23, 1981, Director's Exhibit 16, and we have previously affirmed Administrative Law Judge Johnson's determination that this report is insufficient to establish a totally disabling respiratory or pulmonary impairment, as required by Section 718.305. *See Skeens v. C. S. & S. Coal Co.*, BRB No. 95-1428 BLA (May 30, 1996)(unpub.). Director's Exhibit 106.

affirm, as within the administrative law judge's discretion, his finding that the evidence is insufficient to establish a mistake in a determination of fact pursuant to Section 725.310, in the instant modification request, and thus, the denial of benefits in the instant claim. *See Spark, supra; Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge