

BRB No. 06-0216 BLA

THOMAS BALDONI o/b/o	)	
SANTA BALDONI, Deceased Surviving	)	
Spouse of JOHN BALDONI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 07/26/2006
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Thomas Baldoni, Jessup, Pennsylvania, *pro se*.

Rita A. Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Decision and Order Denying Benefits on Modification (05-BLA-0005) of Administrative Law Judge Janice

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<sup>1</sup> Claimant, Thomas Baldoni, is pursuing the appeal of the denial of the survivor's claim of his mother, Santa Baldoni, the widow of a miner. Mrs. Baldoni died before her claim could be fully adjudicated. By Order dated December 8, 2005, the Board stated that it would treat claimant's appeal under the general standard of review pursuant to 20 C.F.R. §802.211(c), 802.220, by considering whether the administrative law judge's

K. Bullard rendered 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). Based on the date of filing, November 30, 2000, the administrative law judge adjudicated this survivor's claim pursuant to 20 C.F.R. Part 718 and found that claimant established six and one-half years of coal mine employment.<sup>2</sup> The

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decision was rational, supported by substantial evidence, and in accord with law, as claimant was not represented by an attorney.

<sup>2</sup> This is a second survivor's claim. The first survivor's claim, filed October 28, 1992 was denied by the district director because the existence of pneumoconiosis and death due to pneumoconiosis were not established. The claim was reconsidered by the district director, following the submission of additional evidence and denied on March 11, 1993 on the same basis. No further action was taken on this first survivor's claim.

The instant claim, which is the survivor's second claim, was first considered by Administrative Law Judge Robert D. Kaplan who denied benefits in a Decision and Order dated July 17, 2002. Judge Kaplan found that because the widow failed to file her second survivor's claim within a year after the denial of her first claim, she was not entitled to modification of her earlier denial, and the second survivor's claim was a duplicate claim. Because the Director, Office of Workers' Compensation Programs, waived the duplicate claim issue, Judge Kaplan proceeded to consider the case on the merits. He found that six and one-half years of coal mine employment were established and denied the claim because the widow failed to establish that the miner had pneumoconiosis. *Baldoni v. Director, OWCP*, 2001-BLA-00880 July 17, 2002. The Board affirmed Judge Kaplan's finding of six and one-half years of coal mine employment, his finding that pneumoconiosis was not established by x-ray, and his finding that the opinions of Drs. Marmo, Gentile, and Biancarelli could not establish the existence of pneumoconiosis as they were neither well-documented nor well-reasoned. The Board, however, found that his consideration of Dr. Gusek's opinion was flawed and therefore vacated Judge Kaplan's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(4) and remanded the case for Dr. Gusek's opinion to be reconsidered and weighed against Dr. Sherman's. Further, the Board held that, if reached, all the evidence relevant to the existence of pneumoconiosis must be weighed together and the administrative law judge must render, if necessary, a finding as to whether the miner's death was due to pneumoconiosis. After reconsideration, Judge Kaplan again denied benefits on December 10, 2003. Director's Exhibit 32. The widow appealed the denial to the Board, submitting a medical report not previously contained in the record, Director's Exhibit 37, but then requested that the case be remanded to the district director for modification proceedings. The Board, therefore, dismissed the appeal and remanded the case to the district director for modification proceedings. The district

administrative law judge found that the evidence of record was insufficient to establish the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202, and failed, therefore, to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, (the Director) responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 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 & Grills Associates, Inc.*, 380 U.S. 359 (1965).

In addressing the length of the miner's coal mine employment, the administrative law judge considered the post-hearing statements submitted by claimant from a fellow coal miner who had worked with the miner, the miner's coal mine employment history form, the miner's Social Security records, the miner's widow's testimony, and the Pennsylvania State Benefit Award, and found that this documentation supported a finding of six and one-half years of coal mine employment. This was rational. *See* Decision and Order Denying Benefits on Modification at 5-6; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In order to establish entitlement to benefits in a survivor's claim filed on or 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. Death is due to pneumoconiosis where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, where death was caused by complications of pneumoconiosis, or where the presumption set forth at 20 C.F.R. §718.304, relating to complicated pneumoconiosis, is applicable. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11

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director denied the request for modification and the case was assigned to Administrative Law Judge Janice K. Bullard.

BLR 1-39 (1988). 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)(2); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).<sup>3</sup>

Turning first to the administrative law judge’s consideration of the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge, considering the qualifications of the x-ray readers, credited the x-rays which were interpreted negative by dually qualified physicians over the positive interpretations by a lesser-qualified physician to find that the x-ray evidence failed to establish the existence of pneumoconiosis. This was proper. Director’s Exhibits 15, 16, 40; Decision and Order Denying Benefits on Modification at 6-8, 14-15; 20 C.F.R. §718.202(a)(1); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Likewise the administrative law judge correctly found that the existence of pneumoconiosis was not established at Section 718.202(a)(2)-(3) as the requirements of Section 718.202(a)(2)-(3) were not met. The record contained no autopsy or biopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, 718.306, were inapplicable to this survivor’s claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Director’s Exhibit 2; Decision and Order Denying Benefits on Modification at 12; 20 C.F.R. §718.202(a)(2), (3). *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to Section 718.202(a) (4), the administrative law judge permissibly found that the opinions of Drs. Gentile and Marmo, diagnosing the presence of pneumoconiosis, unreasoned as they were based on inaccurate smoking and employment histories, were not supported by the objective medical data of record, and were inadequately explained. Claimant’s Exhibit 2; Director’s Exhibits 15, 28, 40; Decision and Order Denying Benefits on Modification at 8-9, 16-17; *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Trumbo*, 17 BLR 1-85; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark*, 12 BLR 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Piniansky v. Director, OWCP*, 7 BLR 1-171 (1984).

Similarly, the administrative law judge found the diagnosis of pneumoconiosis made by Dr. Biancarelli, who treated the miner in the hospital and signed his death certificate, unreasoned as she did not address the miner’s lengthy smoking history, and her diagnosis was inconsistent since she diagnosed chronic obstructive pulmonary disease

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<sup>3</sup> Because the miner last worked in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 28.

and congestive heart failure on the miner's death certificate, but in a follow-up letter failed to note the miner's heart condition. The administrative law judge further noted that five months prior to the miner's death, Dr. Biancarelli found the miner's history of chronic obstructive pulmonary disease "questionable" and noted that the miner's shortness of breath was probably secondary to his "increasing abdominal girth." Decision and Order Denying Benefits on Modification at 17. Thus, the administrative law judge concluded that, in light of these discrepancies, Dr. Biancarelli's opinion was not well-reasoned and entitled to little weight. Claimant's Exhibit 3; Director's Exhibits 16, 40; Decision and Order Denying Benefits on Modification at 9, 13, 16-17; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Trumbo*, 17 BLR 1-85; *Bobick*, 13 BLR 1-52; *Fields*, 10 BLR 1-19; *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984).

The administrative law judge also permissibly gave little weight to the diagnoses of pneumoconiosis by Drs. Dunay and Guzek as Dr. Guzek failed to explain a basis for his opinion, and Dr. Dunay's report was unsupported by the objective evidence of record or the results of her physical examination. Claimant's Exhibits 4, 7; Director's Exhibits 16, 28; Decision and Order Denying Benefits on Modification at 9-10, 12, 17-18; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Trumbo*, 17 BLR 1-85; *Fields*, 10 BLR 1-19. Additionally, considering the opinions of Drs. Gentile, Marmo, and Biancarelli, who were treating physicians, in light of the requirements specified at 20 C.F.R. §718.104(d)(1)-(4), the administrative law judge nonetheless permissibly determined that they would not be accorded determinative weight as they were insufficiently reasoned. Claimant's Exhibits 2, 3; Director's Exhibits 15, 16, 28, 40; Decision and Order Denying Benefits on Modification at 18-19; 20 C.F.R. §718.104(d)(5); *Lango*, 104 F.3d 573, 21 BLR 2-12; *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Gross*, 23 BLR 1-8. The administrative law judge also rationally found that two hospitalization reports and Dr. Soifer's report could not support a finding of pneumoconiosis as they were unreasoned. *Clark*, 12 BLR 1-149, 1-155; Decision and Order Denying Benefits on Modification at 19.

In contrast, the administrative law judge permissibly credited the opinion of Dr. Sherman, who found no evidence of pneumoconiosis as Dr. Sherman reviewed all the evidence of record, and gave a thorough explanation of his findings which were well supported by the objective evidence of record. The administrative law judge further credited Dr. Sherman's opinion because he was a board-certified pulmonologist and the credentials of the other physicians were not in the record. This was rational. Director's Exhibits 19, 46; Decision and Order Denying Benefits on Modification at 10-12, 18-19; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-155; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Dixon*, 8 BLR 1-344. Thus, after weighing all of the relevant evidence together, the administrative law judge rationally concluded that the existence of pneumoconiosis was not established pursuant to

Section 718.202(a)(1)-(4). Decision and Order Denying Benefits on Modification at 19; *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

As we affirm the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, we also affirm her finding that claimant has failed to establish a mistake in a determination of fact in denying this second survivor's claim. We, therefore, affirm the denial of benefits. See 20 C.F.R. §§725.309; 725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995); *Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992) *modifying* 14 BLR 1-156 (1990); *Trent*, 11 BLR 1-26; *Perry*, 9 BLR 1-1.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge