BRB Nos. 95-0478 BLA
and 98-1069 BLA

SHIRLEY SPARKS (Widow of WILLARD SPARKS) Claimant-Respondent v. BILL BRANCH COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 4/30/99____ DECISION and ORDER

Appeals of the Decision and Order of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor, and the Decision and Order of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen, Chartered), Washington, D.C., for employer.

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

PER CURIAM:

In two consolidated appeals, employer appeals the Decision and Order (92-BLA-1581) of Administrative Law Judge Reno E. Bonfanti, and the Decision and Order (97-BLA-1763) of Administrative Law Judge Anne Beytin Torkington awarding 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).[1] In a decision dated February 25, 1994, Judge Bonfanti

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[1]Claimant filed her survivor's claim on November 16, 1990. Director's Exhibit 1. On February 25, 1994, Administrative Law Judge Reno E. Bonfanti issued a Decision and Order awarding benefits. Director's Exhibit 68. In a subsequent Amended Decision and Order, Judge Bonfanti modified the effective date of the award of benefits from November 1990 to August 1, 1990. Director's Exhibit 69. The Board affirmed Judge Bonfanti's award of benefits. *Sparks v. Bill Branch Coal Corp.*, BRB No. 95-0478 BLA (Aug. 30, 1995)(unpub.). On

credited the miner with over thirty years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20

September 29, 1995, employer requested *en banc* reconsideration by the Board of its August 30, 1995 Decision and Order. Director's Exhibit 83. However, on November 29, 1995, employer informed the Board that it filed a request for modification with the district director and, therefore, requested the Board to remand the case to the district director for modification proceedings. Director's Exhibit 87. The Board granted employer's request, and remanded the case to the district director. *Sparks v. Bill Branch Coal Corp.*, BRB No. 95-0478 BLA (Feb. 8, 1996)(unpub.). The Board also informed employer that it would consider the arguments raised in employer's motion for reconsideration of the Board's August 30, 1995 Decision and Order only if employer requests that they be considered. *Id*. After the district director denied the claim on June 20, 1997, Director's Exhibit 95, the case was reassigned to Administrative Law Judge Anne Beytin Torkington who issued a Decision and Order denying employer's request for modification on April 3, 1998. On April 29, 1998, employer filed an appeal of Judge Torkington's award of benefits with the Board. Employer also requested the Board to reinstate its previous request for reconsideration of the Board's August 30, 1995 Decision and Order, and that the appeal and request for reconsideration be consolidated for review. The Board granted employer's requests and reinstated employer's prior request for reconsideration, BRB No. 95-0478 BLA, and consolidated it with employer's most recent appeal, BRB No. 98-1069 BLA. *Sparks v. Bill Branch Coal Corp.*, BRB Nos. 95-0478 BLA and 96-1069 BLA (Order)(May 15, 1998)(unpub.).

C.F.R. Part 718. Judge Bonfanti found the evidence insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. However, Judge Bonfanti found the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Bonfanti awarded benefits, commencing November 1990. In a subsequent decision, Judge Bonfanti granted the motion by claimant[2] to amend the effective date of benefits from November 1990 to August 1, 1990. Employer appealed Judge Bonfanti's award of benefits. In response to employer's appeal, the Board affirmed Judge Bonfanti's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *Sparks v. Bill Branch Coal Corp.*, BRB No. 95-0478 BLA (Aug. 30, 1995)(unpub.). Employer requested modification, and in a decision dated April 3, 1998, Judge Torkington found the evidence insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Nonetheless, Judge Torkington found the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, Judge Torkington found the evidence insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310, and thus, she awarded benefits.

On appeal, employer contends that the Board erred by affirming Judge

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[2]Claimant is the widow of the miner, Willard Sparks, who died on August 6, 1990. Director's Exhibits 1, 9.

Bonfanti's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer also contends that Judge Torkington erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the awards of benefits, and contending that the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 applicable law, they are binding upon this Board and may not be disturbed. 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).

Initially, employer contends that the Board erred in affirming Judge Bonfanti's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). We disagree. Inasmuch as 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).[3] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c);

[3]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

Neeley v. Director, OWCP, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case arises, adopted the standard whereby pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened 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). Whereas Dr. Kahn opined that the miner's death was due to pneumoconiosis, Director's Exhibit 54, Drs. Anderson, Caffrey, Castle, Fino, Hansbarger, Kleinerman and Lane opined that coal workers' pneumoconiosis did not contribute to the miner's death, Director's Exhibits 47, 49, 50-53, 56, 58, 59, 65. The death certificate signed by Dr. Stefanini listed coal workers' pneumoconiosis as a significant condition contributing to the miner's death. Director's Exhibit 9. In an autopsy report, Dr. Stefanini found extensive macronodular coal workers' pneumoconiosis. Director's Exhibits 10, 54. Although Dr. Naeye, in a report dated December 24, 1990, opined that the miner apparently died of complications of severe arteriosclerotic coronary artery

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> (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
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> (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.

20 C.F.R. §718.205(c).

disease, Dr. Naeye also opined that if the miner had arterial oxygen desaturation as a result of his three chronic lung disorders, the miner's pneumoconiosis could have contributed to his presumed fatal cardiac arrhythmia. Director's Exhibits 11, 54.

Employer asserts that the Board erred in affirming Judge Bonfanti's discounting of the opinions of Drs. Anderson, Caffrey, Castle, Fino and Lane since they are pulmonary experts. Contrary to employer's assertion, the Board correctly held that while Judge Bonfanti did not explicitly articulate his reasoning, Judge Bonfanti's discussion of the pathologists' findings indicates that he found these physicians to be better qualified to interpret the autopsy evidence and slides in determining whether pneumoconiosis contributed to or hastened the miner's death. *See Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Szafraniec v. Director, OWCP*, 7 BLR 1-397 (1984). Thus, the Board correctly held that Judge Bonfanti, within a proper exercise of his discretion as trier of fact, accorded greater weight to the opinions of the five pathologists than to the consultative opinions of the five pulmonary specialists.[4] *See Gruller v. Bethenergy Mines, Inc.*, 16 BLR 1-3 (1991); *Simila v. Bethlehem Mines Corp.*, 7 BLR 1-535 (1984); *cf. Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992).

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[4]Judge Bonfanti stated that "[t]he five pathologists are Doctors Stefanini, Naeye, Kahn, Hansbarger, and Kleinerman." 1994 Decision and Order at 3.

Employer also asserts that the Board erred in affirming Judge Bonfanti's determination that Dr. Kahn's opinion is entitled to greater weight than Dr. Hansbarger's contrary opinion since Judge Bonfanti inconsistently considered the medical opinion evidence. Contrary to employer's assertion, the Board correctly held that Judge Bonfanti permissibly found Dr. Kahn's opinion, that the degree of coal workers' pneumoconiosis present on autopsy was a contributing factor in the miner's death, to be more persuasive than Dr. Hansbarger's opinion in light of the severity of the miner's pneumoconiosis[5] and the corroborative opinions of Drs. Stefanini and Naeye.[6] *See Shuff, supra*; *see also Wagner v.*

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[5]The Board correctly held that Judge Bonfanti could properly find Dr. Kahn's opinion to be reasoned because it was based on his evaluation of the autopsy evidence and slides, and was supported by the findings of the autopsy prosector. *See generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, the Board accurately stated that Judge Bonfanti noted the inconsistency between Dr. Hansbarger's opinion that the miner had a severe degree of coal workers' pneumoconiosis and his testimony that the disease did not hasten death because the miner had simple pneumoconiosis. 1994 Decision and Order at 4.

[6]Employer asserts that the Board erred by failing to address the actual conclusions of Dr. Stefanini as reflected in the autopsy report and death certificate. Contrary to employer's assertion, the Board accurately noted that Dr. Stefanini's autopsy findings included extensive macronodular coal workers' pneumoconiosis, and that Dr. Stefanini listed simple coal workers' pneumoconiosis as a significant condition contributing to the miner's death.

Beltrami Enterprises, 16 BLR 1-65 (1990).

In addition, employer, citing *Farmer v. Weinberger*, 519 F.2d 627 (1975), and district court cases cited therein, asserts that the Board erred in stating that employer did not cite any authority which supports its assertion that continued employment is a relevant factor in determining the cause of death at 20 C.F.R. §718.205(c). In *Farmer*, the United States Court of Appeals for the Sixth Circuit rejected the petitioner's assertion that the provision of 20 C.F.R. §410.490(c), which provides that evidence that the miner was doing his usual coal mine work at the time of his death is sufficient to establish rebuttal of the presumption of death due to pneumoconiosis, applies only to the claims of living miners and not to the claims of widows. Inasmuch as the regulations contained in 20 C.F.R. §410.490 are not applicable to the instant survivor's claim, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, we are not persuaded by employer's assertion that the Board erred in holding that employer failed to cite any authority that continued employment is a relevant factor in determining the cause of death at 20 C.F.R. §718.205(c).

Further, we reject employer's assertion that the Board erred by construing Dr. Naeye's original report as supporting Dr. Kahn's opinion since the Board correctly noted that Dr. Naeye found moderately severe to severe simple pneumoconiosis and opined that the cumulative effects of the pneumoconiosis, interstitial fibrosis, and centrilobular emphysema could have caused significant impairments in pulmonary function and could have contributed to the miner's death.

Therefore, we grant employer's request for reconsideration of the 1995 appeal, but deny the relief requested.

Next, employer contends that Judge Torkington erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). We disagree. In Judge Torkington's subsequent decision, Judge Torkington considered the newly submitted medical opinions of Drs. Jones, Naeye and Kleinerman along with the previously submitted evidence of record.[7] Judge Torkington found the opinion of Dr. Stefanini, who did the autopsy and completed the death certificate, to be the most reliable source of evidence with respect to the cause of the miner's death.[8]

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[7]Judge Torkington observed that "employer has submitted two new reports by Dr. Naeye..., both of which change Dr. Naeye's original analysis." 1998 Decision and Order at 4; Employer's Exhibit 1. Judge Torkington also observed that "employer has now submitted...a new report by Dr. Kleinerman in which he states that 'pneumoconiosis did not cause, contribute to or hasten [the miner's] death.'" 1998 Decision and Order at 4; Director's Exhibit 85. Dr. Jones opined that coal workers' pneumoconiosis was a contributing factor to the miner's death. Claimant's Exhibit 1.

[8]Contrary to employer's assertion that Judge Torkington erred by relying on the opinion of Dr. Stefanini since Dr. Stefanini's qualifications are not contained in the record, Judge Torkington correctly observed that Dr. Stefanini "is a pathologist, per his title on the autopsy report." 1998 Decision and Order at

1998 Decision and Order at 5. We reject employer's contention that Judge Torkington erred in according greater weight to the medical opinion of Dr. Stefanini because of Dr. Stefanini's status as the autopsy prosector, inasmuch as an administrative law judge, within her discretion, may rationally accord greater weight to the medical opinion of an autopsy prosector than to the medical opinions of other pathologists, when the autopsy prosector alone has had the benefit of the gross examination at autopsy.[9] *See Gruller, supra*; *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Cantrell v. United States Steel Corp.*, 6 BLR 1-1003 (1984). In reaching his conclusion, Dr. Stefanini relied, at least in part, on a gross examination with microscopic slides.[10] Director's Exhibit 10; 54.

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5 n.3; Director's Exhibits 10, 54. Moreover, we reject employer's assertion that Judge Torkington erred by failing to explain why he accorded greater weight to the opinion of Dr. Stefanini than to the contrary opinions of Drs. Hansbarger, Kleinerman and Naeye, in view of the superior qualifications of Drs. Hansbarger, Kleinerman and Naeye. An administrative law judge is not required to defer to a doctor with superior qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

[9]Judge Torkington observed that Dr. Stefanini "did the autopsy and filled out the death certificate within a few days." 1998 Decision and Order at 7.

[10]Contrary to employer's contention that Judge Torkington erred by mechanically giving Dr. Stefanini a preference as an autopsy prosector without first determining the credibility and weight of all of the pathologists' reports as required in *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992), the

Employer also asserts that Judge Torkington erred by discounting the opinions of Drs. Anderson, Caffrey, Castle, Fino, Hansbarger, Kleinerman, Naeye and Lane because they are reviewing physicians. Judge Torkington observed that "Dr. Stefanini is the only physician who presents an opinion after actually examining the claimant, seeing and analyzing the whole body at the time of death, rather than clinical evidence which is premature by two years, and slides done at autopsy of selected sights of the lungs."[11] 1998 Decision and Order at 5. Further, Judge Torkington observed that "[n]one of the other medical experts actually examined the miner."[12] *Id*. at 5. An administrative law judge,

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fact pattern of the instant case is different from the particular fact pattern in *Urgolites*. In *Urgolites*, the prosector relied solely on microscopic slides rather than on a gross examination to make his findings; therefore, he did not have an advantage over the other reviewing pathologists who also relied on the same slides. However, in the instant case, Dr. Stefanini relied, at least in part, on a gross examination, in addition to the microscopic slides. *See* 1998 Decision and Order at 5; Director's Exhibits 10, 54. Thus, Judge Torkington did not mechanically give a preference to Dr. Stefanini because he was the autopsy prosector.

[11]Judge Torkington stated that "Dr. Stefanini actually examined the miner to do the autopsy, and opined that even absent clinical data, 'there was enough evidence, even within the limitations of this autopsy, to reach valid conclusions.'" 1998 Decision and Order at 8.

[12]Judge Torkington stated that "[t]he contrary opinion of Dr.

within a proper exercise of her discretion as trier of fact, may discount the medical opinion of a physician who never conducted a physical examination of the miner.[13] *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo*

Hansbarger...was based on the slides and autopsy report by Dr. Stefanini." 1998 Decision and Order at 7. Judge Torkington also stated that "Dr. Hansbarger, unlike Dr. Stefanini, did not examine the miner's condition at death first-hand as did Dr. Stefanini." *Id.* Judge Torkington further stated that "Dr. Kleinerman...relied on premature pulmonary function studies and X-rays, and did not have the opportunity to examine the miner at his death to see the full picture of his condition." *Id.* at 9. Similarly, Judge Torkington stated that "Dr. Naeye changed his opinion based on clinical studies done two years before the miner's death, and on the fact that the miner was working up to the time of his death." *Id.* at 5. Additionally, Judge Torkington stated that "Dr. Naeye also opined that the autopsy slides were not necessarily representative of the state of the miner's lungs 'since autopsy prosectors commonly remove tissue for microscopic review from the most advanced lesions they can find.'" *Id.* Moreover, Judge Torkington stated that "Dr. Jones points out in his report, that the pulmonary function study and X-rays were done two years before the miner's death, and that the pneumoconiosis could have progressed considerably in those two years." *Id.* at 5. Further, Judge Torkington stated that Dr. Jones noted that "[o]nly with clinical studies around or near the time of the miner's death, could one reliably state that the pneumoconiosis did not hasten the miner's death." *Id.*

[13]In *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit held that

Mining Co., 12 BLR 1-11 (1988)(*en banc*); *see generally Gruller, supra*; *cf. Urgolites, supra*. Therefore, we reject employer's assertion that Judge Torkington erred by discounting the opinions of Drs. Anderson, Caffrey, Castle, Fino, Hansbarger, Kleinerman, Naeye and Lane because they are reviewing

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the administrative law judge's reliance upon a "head count" of the testifying physicians and invocation of a rule of absolute deference to treating and examining physicians relieved the administrative law judge of his statutory obligation to consider all of the relevant evidence of record. Further, in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), the court held that the administrative law judge erred in completely disregarding the opinions of Drs. Fino and Sobieski, despite the fact that he found them to be "of high quality," simply because they did not examine the claimant. In the instant case, Judge Torkington indicated that her decision is based upon "due consideration of the evidence as a whole, both new and old." 1998 Decision and Order at 3. Judge Torkington also indicated that she found Dr. Stefanini's opinion to be more persuasive than those of the other physicians of record with respect to the cause of the miner's death because Dr. Stefanini was the only physician who actually examined the miner at the time of his death while the other physicians relied on microscopic slides and clinical studies that were performed at least two years before the miner died. Thus, since Judge Torkington did not mechanically accord greater weight to the opinion of Dr. Stefanini because Dr. Stefanini examined the miner, we hold that Judge Torkington's decision is in accordance with *Hicks* and *Akers*.

physicians.[14] Additionally, we reject employer's assertion that Dr. Hansbarger's opinion is better reasoned than Dr. Stefanini's opinion since Judge Torkington properly discounted Dr. Hansbarger's opinion because she found it to be not well reasoned.[15] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en*

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[14]Employer, citing *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), argues that its due process rights were violated because Judge Torkington discredited the opinions of the reviewing physicians. Specifically, employer asserts that the fact that the miner died before its physicians had an opportunity to examine the miner cannot be used against employer. In *Lockhart*, the United States Court of Appeals for the Fourth Circuit held that Lane Hollow Coal Company was denied due process because the Department of Labor's inexcusable delay in notifying it of the claim deprived it of the opportunity to mount a meaningful defense to the proposed deprivation of its property. In the instant case, employer was not deprived of an opportunity to mount a meaningful defense. To the contrary, Judge Torkington considered the opinions of physicians submitted by employer with respect to the cause of the miner's death. Thus, we reject employer's argument that its due process rights were violated by Judge Torkington.

[15]Judge Torkington observed that "Dr. Hansbarger did not explain why he believed simple pneumoconiosis could not hasten an individual's death, other than to indicate that heart disease was the primary cause of the miner's death, a fact which is not in dispute." 1998 Decision and Order at 8. Judge Torkington also observed that "without explanation, it appears to be a statement which is hostile to the Act." *Id*.

banc); *Fields, supra*; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Moreover, we reject employer's assertion that the death certificate signed by Dr. Stefanini is insufficient to establish that the miner's death was due to pneumoconiosis since Dr. Stefanini never expressed a reasoned medical judgment that pneumoconiosis hastened the miner's death or contributed to it in any measurable way in either the autopsy report or the death certificate.[16] Contrary to employer's assertion, Judge Torkington properly found that Dr. Stefanini's autopsy "findings in conjunction with his notation on the death certificate that coal workers' pneumoconiosis was an 'other significant condition contributing to death' is sufficient to show that pneumoconiosis hastened the [miner's] death."[17] 1998 Decision and Order at 7; *see Wagner, supra*.

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[16]We reject employer's assertion that Judge Torkington erred in finding that Dr. Stefanini was not biased. There is no evidence in the record which supports this allegation. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

[17]Employer asserts that Judge Torkington irrationally relied on Dr. Kahn's opinion as supportive of Dr. Stefanini since Judge Torkington did not find Dr. Kahn's opinion to be credible. Judge Torkington stated that "I do note that Dr. Kahn's report does support Dr. Stefanini's opinion on the death certificate that pneumoconiosis was a significant condition contributing to the miner's death." 1998 Decision and Order at 8. However, contrary to employer's assertion, Judge Torkington stated that she did "not rely on Dr. Kahn's report...because he did not consider the role of cardiac disease in the claimant's death." 1998 Decision and

Finally, employer asserts that Judge Torkington erred by failing to consider the fact that the miner continued to work up until the time of his death. As previously noted, employer's assertion that Judge Torkington erred by failing to consider the fact that the miner continued to work up until the time of his death is not persuasive.

Order at 8.

We, therefore, affirm Judge Torkington's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[18] *See Shuff, supra*. Furthermore, we affirm Judge Torkington's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Judge Torkington properly based her conclusion that claimant failed to establish a mistake in a determination of fact "[a]fter due consideration of the evidence as a whole, both new and old." 1998 Decision and Order at 3. Hence, we affirm Judge Torkington's award of benefits.

Accordingly, the awards of benefits in the Decision and Order of Judge Bonfanti and the Decision and Order of Judge Torkington are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[18]In view of our disposition of the case at 20 C.F.R. §718.205(c), we decline to address claimant's contention with regard to 20 C.F.R. §718.304.

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ROY P. SMITH

Administrative Appeals Judge

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MALCOLM D. NELSON, Acting

Administrative Appeals Judge