

BRB No. 07-0312 BLA

G.W.	)	
(Widow of H.W.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 12/31/2007
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 on Modification - Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification - Denying Benefits (05-BLA-0044) of Administrative Law Judge Richard A. Morgan 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). This case has a lengthy procedural history and is before the Board for the sixth time. Claimant filed a survivor's claim on March 5, 1993, which was consolidated with a duplicate claim filed by the miner, prior to his death. Director's Exhibit 83. Administrative Law Judge

Michael P. Lesniak initially awarded benefits in both the miner's claim and the survivor's claim by Decision and Order dated September 11, 1995.<sup>1</sup> Employer appealed, and the Board affirmed Judge Lesniak's denial of benefits in the miner's claim based on his determination that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (1995).<sup>2</sup> [*G.W.*] v. *Island Creek Coal Co*, BRB No. 95-2234 BLA , slip op. at 2 n.2 (Aug. 26, 1996) (unpub.). The Board affirmed the administrative law judge's determination that Dr. Perper offered a documented and reasoned opinion that the miner's death was due to pneumoconiosis.<sup>3</sup> *Id.* at 3-4. However, because the administrative law judge failed to determine the overall credibility of the autopsy findings, and he failed to provide a sufficient rationale for rejecting the opinions of Drs. Kleinerman, Naeye and Fino, that the miner's death was not due to pneumoconiosis, the Board vacated the award of benefits in the survivor's claim and remanded the case for further consideration.<sup>4</sup> *Id.* at 4-6; Director's Exhibit 98.

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<sup>1</sup> The miner, H.W., filed a claim for benefits on April 6, 1973, which was finally denied by the district director on April 4, 1980. Director's Exhibit 28. The miner filed a duplicate claim on February 6, 1984. Director's Exhibit 1. While the miner's claim was pending before the Office of Administrative Law Judges (OALJ), the miner died on December 9, 1992, and his widow, G.W., claimant herein, filed her survivor's claim on March 5, 1993. Director's Exhibit 31. By Order dated June 24, 1994, the OALJ remanded the miner's claim for consolidation with the survivor's claim. Director's Exhibit 30.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> Dr. Perper opined that pneumoconiosis contributed to the miner's death by causing chronic hypoxemia, leading to myocardial infarction, terminal arrhythmia and heart failure. Director's Exhibits 72, 77.

<sup>4</sup> The miner's death certificate, dated December 11, 1992, was signed by Dr. Comas and stated that the immediate cause of the miner's death was cardiopulmonary arrest due to an acute myocardial infarction, and that cirrhosis was another significant condition contributing to the miner's death. Director's Exhibit 45. Dr. Benschoff performed an autopsy on December 10, 1992, and reported that the cause of the miner's death was acute coronary thrombosis with left ventricular myocardial infarction. He noted contributory factors to be early to moderate pneumoconiosis and bilateral hydrothorax. Director's Exhibit 61. However, in a letter dated May 26, 1993, Dr.

On remand, Judge Lesniak determined that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2) (1997). He therefore awarded benefits in a Decision and Order on Remand dated May 27, 1997. Director's Exhibit 99. Pursuant to employer's appeal, the Board vacated Judge Lesniak's award of benefits, on the ground that he erred in failing to consider what effect, if any, Dr. Comas's failure to list pneumoconiosis as a factor in the miner's death, on the death certificate, had on the weight to be assigned his January 14, 1993 opinion, that pneumoconiosis contributed to the miner's death. [*G.W.*] v. *Island Creek Coal Co.*, BRB No. 97-1310 BLA, slip op. at 2 (May 27, 1998) (unpub.). In addition, the Board held that Judge Lesniak erred in discrediting the opinions of Drs. Naeye and Kleinerman. *Id.* at 3. Consequently, the Board vacated the award of benefits and remanded the case for further consideration. Director's Exhibit 104.

In a Decision and Order on Remand dated October 5, 1998, Judge Lesniak again awarded survivor's benefits pursuant to Section 718.205(c)(2) (1998). Employer appealed, and the Board held that Judge Lesniak failed to adequately address whether Dr. Comas provided a reasoned and documented opinion, and that he erred in rejecting the opinions of Drs. Naeye and Kleinerman. [*G.W.*] v. *Island Creek Coal Co.*, BRB No. 99-0184 BLA, slip op. at 3-4 (Nov. 26, 1999) (unpub.). The Board therefore vacated the award of survivor's benefits, and remanded the case for further consideration.

On remand, Judge Lesniak judge again awarded benefits in a Decision and Order on Remand dated April 10, 2001. Employer appealed and the Board held that the administrative law judge erred in relying on Dr. Comas's opinion to support an award of benefits as Dr. Comas's report did not constitute an independent, reasoned opinion that pneumoconiosis hastened the miner's death, [*G.W.*] v. *Island Creek Coal Co.*, BRB No. 00-0764 BLA, slip op. at 3-4 (June 25, 2001) (unpub.); Director's Exhibit 123. The Board also held that the administrative law judge erred in failing to provide a rationale for crediting the opinions of Drs. Benschhoff and Perper over the contrary opinions of Drs. Naeye, Kleinerman and Fino. [*G.W.*], BRB No. 00-0764 BLA, slip op. at 4-5. Consequently, the Board vacated Judge Lesniak's findings pursuant to 20 C.F.R. §718.205(c)(2) (2000) and directed him to provide a rationale for the weight accorded the conflicting medical opinions as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). *Id.* at 5. The Board specifically rejected employer's

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Benschhoff opined that simple pneumoconiosis was not a causal factor in the miner's death. *Id.*

suggestion that reassignment to a different administrative law judge on remand was warranted. *Id.*

On remand for the fourth time, Judge Lesniak issued a Decision and Order denying benefits on April 23, 2002. Director's Exhibit 126. After reconsidering the medical opinions of Drs. Benschhoff and Perper, that pneumoconiosis contributed to the miner's death, as well as the opinions of Drs. Naeye, Kleinerman and Fino, that pneumoconiosis played no role in the miner's death, Judge Lesniak determined that the opinions of Drs. Fino, Naeye and Kleinerman were entitled to controlling weight as their findings were better supported by underlying documentation showing that the miner did not exhibit any pulmonary disability, until immediately prior to his death. Judge Lesniak thus found that the medical opinion evidence failed to establish that the miner's death was due to pneumoconiosis under Section 718.205(c). Accordingly, survivor's benefits were denied. The Board specifically affirmed the administrative law judge's credibility determinations and his denial of benefits on appeal. [*G.W.*] *v. Island Creek Coal Co.*, BRB No. 02-0554 BLA (Feb. 26, 2003) (unpub.). Although claimant filed a petition for review of the Board's decision with the United States Court of Appeals for the Third Circuit, the appeal was later withdrawn, without prejudice, at claimant's request.<sup>5</sup> Director's Exhibit 133.

Claimant next filed a timely request for modification with the district director and submitted additional evidence, including medical records from Dr. Comas and Mercy Hospital and Dr. Perper's report and deposition transcript. Employer submitted letters from Drs. Comas and Benschhoff, medical reports from Drs. Renn and Schaaf and Dr. Fino's deposition transcript. The district director denied claimant's request for modification under 20 C.F.R. §725.310 (2000), and a hearing was held before Judge Morgan (the administrative law judge) pursuant to claimant's request. In his Decision and Order on Modification, the administrative law judge found that there had been no mistake in a determination of fact in the prior denial under 20 C.F.R. §725.310 (2000). Considering the newly submitted evidence, in conjunction with the previously submitted evidence, the administrative law judge further determined that the evidence was insufficient to establish that pneumoconiosis hastened the miner's death. Accordingly, the administrative law judge denied claimant's request for modification and denied survivor's benefits.

On appeal, claimant challenges the administrative law judge's finding at Section 718.205(c). Claimant also contends that the Board previously erred in vacating Judge

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<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner's coal mine employment was in Pennsylvania. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Lesniak's earlier decisions awarding benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits on modification as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address claimant's general assertion that the Board exceeded its scope of review in vacating Judge Lesniak's earlier decisions awarding benefits. Claimant's Brief at 5-6 (unpaginated). Under 33 U.S.C. §921(b)(4) of the Longshore and Harbor Workers' Compensation Act, as incorporated into the Act by 30 U.S.C. §932(a), as well as the Board's rules of practice and procedure, the Board is permitted to remand a case for reconsideration to the hearing level or the district director level. 20 C.F.R. §802.405. The decision of whether to remand is made on a case by case basis. *Couch v. Shamrock Coal Co.*, 2 BLR 1-342, 1-348 (1979). Remand is usually required when a hearing officer fails to resolve a factual issue, and the issue is necessary to a final determination. *Luketich v. Bethlehem Mines Corp.*, 2 BLR 1-393, 1-400 (1979). Moreover, claimant has not advanced any new arguments in support of altering the Board's previous holdings and has not set forth any exception to the law of the case doctrine, *i.e.*, there was no change in the underlying fact situation, no intervening controlling authority demonstrates that the initial decision was erroneous, and the Board's decisions were neither clearly erroneous nor a manifest injustice. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Consequently, we adhere to our prior holdings in this case.

We now turn to the merits of claimant's request for modification. Because this 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). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

The sole ground available for modification of a survivor's claim is a mistake in a determination of fact. *See Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In reviewing the record as a whole on modification, an administrative law judge is authorized “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, 256 (1971).

After consideration of the administrative law judge’s Decision and Order, the arguments of the parties, and the evidence of record, we conclude that the Decision and Order of the administrative law judge denying modification is supported by substantial evidence and contains no reversible error.

Claimant argues on appeal that the administrative law judge failed to give proper weight to Dr. Perper’s “reasoned” opinion that pneumoconiosis was a substantially contributing factor in the miner’s death from heart disease and a myocardial infarction. Claimant’s Brief at 4 (unpaginated). Claimant states that it is “noteworthy” that the Board, in its November 26, 1999 Decision and Order, affirmed Judge Lesniak’s determination that the opinion of Dr. Perper was reasoned. *Id.* Claimant further argues:

In the current decision which denied benefits, the [administrative law judge] found the opinions of Drs. Fino, Naeye, and Kleinerman “are more persuasive than Dr. Perper’s.” Claimant submits that nothing in the opinion of Judge Lesniak, who considered this matter for the fourth time and finally reversed himself, or in the opinion of the [the administrative law judge] in the present proceeding, supports the change in determination that Dr. Perper’s opinion is now entitled to less weight.

*Id.* Claimant maintains that the administrative law judge has not adequately explained why he chose not to credit Dr. Perper’s opinion at Section 718.205(c), as required by the Administrative Procedure Act, (APA) 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a). *Id.* Claimant further contends that the administrative law judge erred by failing to explain why he did not credit Dr. Schaaf’s opinion that the miner had abnormal arterial blood studies, demonstrating that the miner had significant lung impairment prior to his death, contrary to the findings of employer’s experts.

Claimant’s contentions are without merit. The APA requires that every adjudicatory decision be accompanied by a statement of “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . .” 5 U.S.C. §557(c)(3)(A); *see Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997). The administrative law judge specifically explained, in accordance with the APA, why he accorded greater weight to the opinions of Drs. Fino, Naeye and Kleinerman, and found that there was no mistake in fact in the denial of benefits in the survivor’s claim, notwithstanding claimant’s new evidence on

modification. We noted that the conflict in the medical opinions in this case stemmed from whether the miner had a significant respiratory impairment due to coal dust exposure, which may have hastened his death from heart disease and a myocardial infarction. The administrative law judge determined that the opinions of Drs. Fino, Naeye, and Kleinerman, that the miner had no significant respiratory impairment that would have hastened his death, were better supported by the objective evidence, including the pulmonary function studies submitted in the miner's claim, which were "clearly" nonqualifying, Director's Exhibits 7, 14, 24, 30, and the preponderance of the non-qualifying arterial blood gas studies, Director's Exhibits 9, 24, 30, 50.<sup>6</sup> Decision and Order on Modification at 14.

Contrary to claimant's assertion, the administrative law judge permissibly rejected Dr. Schaaf's statement, in his newly submitted medical report dated January 19, 2006, that the miner had shown a "dramatically abnormal response to exercising indicating significant lung function impairment," prior to his death, since it was at odds with Dr. Schaff's earlier opinion "that the PO<sub>2</sub> on the most recent exercise arterial blood gas test, dated January 9, 1985, was only mildly reduced." Director's Exhibit 134.

The administrative law judge further explained why he was not persuaded by Dr. Perper's opinion that the miner's death was hastened by pneumoconiosis:

Dr. Perper's new report and deposition testimony reiterates his prior conclusion that pneumoconiosis and causally associated centrilobular emphysema substantially contributed to and hastened the miner's death (DX 72, 77; CX 1, 5). However, Dr. Perper's opinion is primarily based upon his pathology findings and his conclusion that the miner suffered from significant respiratory problems related to coal mine dust exposure long before the miner's cardiac problems manifested themselves. On the other hand, Drs. Fino (DX 63, 85; EX 4), Naeye (DX 47, 73, 88), and Kleinerman (DX 74, 88) found that the miner did not suffer from any significant coal mine dust-related impairment, as demonstrated by the valid, objective clinical test results prior to his terminal hospital admission and the pathology evidence of very mild or incidental simple pneumoconiosis. Accordingly, they opined that the pneumoconiosis did not cause, substantially contribute to, or hasten the miner's death.

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<sup>6</sup> The administrative law judge noted that, except for the February 29, 1984 exercise blood gas test and the results obtained on December 8, 1992 (*i.e.*, during the miner's terminal hospitalization), the arterial blood gas studies were clearly nonqualifying, which served to support the opinions of employer's experts. Decision and Order on Modification at 14.

Decision and Order on Modification at 14.

In weighing the conflicting opinions, the administrative law judge reasonably found that while Dr. Perper's opinion was reasoned, it was simply outweighed by the more credible opinions of Drs. Kleinerman, Naeye and Fino. He specifically determined their conclusions were "better supported by the underlying objective medical evidence, which establishes that the miner did not suffer from a significant pulmonary impairment until his terminal hospitalization due to heart disease, along with the pathological evidence, which "indicates that the extent of the miner's pneumoconiosis was very mild." Decision and Order on Modification at 14; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Therefore, we reject claimant's assertion that the administrative law judge failed to comply with the APA, and affirm his credibility determinations pursuant to Section 718.205(c). See *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); see *Clark*, 12 BLR at 1-151.

The administrative law judge is empowered to weigh the medical evidence and to draw his or her 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 *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge acted within his discretion in rendering his credibility determinations, we affirm his finding that claimant failed to establish that pneumoconiosis caused, contributed to, or hastened the miner's death pursuant to Section 718.205(c). See *Lukosevicz*, 888 F.2d at 1001, 13 BLR at 2-100; *Trumbo*, 17 BLR 1-75; see also *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g. Greenwich Collieries v. Director, OWCP [Ondecko]*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Consequently, we affirm the administrative law judge's finding that claimant failed to establish a ground for modification pursuant to Section 725.310 (2000), and his denial of benefits.



Accordingly, the Decision and Order on Modification – Denying Benefits of the administrative law judge 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