

BRB No. 03-0650 BLA

PAULINE ANDREWS)
(Widow of PAUL ANDREWS))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 06/08/2004
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits (Upon Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Jordan H. Pecile, Hazleton, Pennsylvania, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (Upon Remand by the Benefits Review Board)(01-BLA-0286) of Administrative Law Judge Robert D. Kaplan on a petition for modification of a decision denying 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 The procedural history of the case

¹ 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

is set forth in the Board's December 23, 2002 decision. *Andrews v. Director, OWCP*, BRB No. 03-650 BLA (Dec. 12, 2002)(unpub.). The Board last remanded the case to the administrative law judge to admit Dr. Simelaro's August 17, 1999 report into the record and to consider all evidence for a mistake in fact, including the ultimate fact of entitlement.² On June 13, 2000, the administrative law judge, having admitted the report of Dr. Simelaro, Claimant's Exhibit 1, and the report and curriculum vitae of Dr. Sherman, Director's Exhibits 54, 55, submitted by the Director, Office of Workers' Compensation Programs, (the Director) in response, considered all the medical opinion evidence and found that claimant failed to establish a mistake of fact with respect to the previous denial of her survivor's claim and denied claimant's petition for modification.

On appeal, claimant argues that the administrative law judge erred in his weighing of the medical opinion evidence relevant to whether the miner's death was hastened by pneumoconiosis. The Director responds, urging affirmance of the denial of benefits.³

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

Claimant argues that the administrative law judge erred in not crediting the reasoned opinion of Dr. Simelaro that the miner's pneumoconiosis resulted in a severe respiratory impairment which aggravated his heart condition and thereby hastened his death due to a myocardial infarction, over the opinion of Dr. Sherman that the miner's

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The administrative law judge had excluded Dr. Simelaro's report of August 17, 1999 from the record in considering claimant's request for modification as it was in existence and available at the time of a prior proceeding. The Board held, however, that the modification provision is to be broadly construed and may be based on new evidence, cumulative evidence, or on further reflection of the evidence in the original record. The Board held, therefore, that the administrative law judge could not exclude Dr. Simelaro's report simply because it was available to claimant at the time of a prior proceeding. *Andrews v. Director, OWCP*, BRB No. 03-650 BLA (Dec. 12, 2002)(unpub.).

³ The Director, Office of Workers' Compensation Programs, stated that he had already conceded the existence of pneumoconiosis arising out of coal mine employment. Director's Brief at 9.

death was most likely due to myocardial infarction, not pneumoconiosis. Claimant contends that Dr. Simelaro's opinion was reasoned while Dr. Sherman's was insufficiently explained, unsupported by the record, and equivocal.

Contrary to claimant's contention, the administrative law judge addressed whether Dr. Sherman's opinion was equivocal based on the doctor's use of the words "most likely" to attribute death due to myocardial infarction, not pneumoconiosis. Decision and Order on Remand at 6. The administrative law judge found, however:

[d]espite this language, I disagree with the charge that Dr. Sherman's opinion is equivocal. In reviewing the overall tenor of the report I find that Dr. Sherman's opinion that pneumoconiosis was not a substantial contributor to the miner's death is clear and unhedged rather than tentative, uncertain, guarded, or equivocal.

Decision and Order at 6. This was reasonable because Dr. Sherman, when asked whether there was evidence showing that the miner's death was due to pneumoconiosis, clearly replied, "No, death was due to a cardiac event." Director's Exhibit 54; *Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-234 (3d Cir. 1997); see *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 113 (1989).

The administrative law judge also permissibly credited Dr. Sherman's opinion, that pneumoconiosis did not cause death, over the contrary opinion of Dr. Simelaro, because the administrative law judge found Dr. Sherman's opinion to be better supported by the objective evidence developed during the miner's lifetime, which indicated that the miner's respiratory impairment was not of the severity suspected by Dr. Simelaro. Specifically, the administrative law judge found that Dr. Simelaro relied on a July 18, 1990 pulmonary function study, showing decreased oxygen to the blood and obstruction of the miner's airways due to pneumoconiosis, to support his diagnosis that pneumoconiosis hastened the miner's death. But Dr. Sherman explained: a September 5, 1990 blood gas study indicated normal oxygen levels for a man of the miner's age; a pulmonary function study conducted only four months prior to the one relied on by Dr. Simelaro resulted in values in the normal range; a pulmonary function study conducted September 5, 1990, two months after the July 1990 pulmonary function study relied on by Dr. Simelaro, resulted in higher FEV₁ and FVC than the March 1990 study; and a March 13, 1992 blood gas study revealed oxygenation of 98.1 percent. Thus, the administrative law judge found that Dr. Sherman's opinion called into question the

credibility of Dr. Simelaro's opinion.⁴ This was reasonable. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002)(administrative law judge must assess quality of physician's reasoning); *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 6-7.

Additionally, the administrative law judge accorded greater weight to Dr. Sherman's opinion because he found that it was corroborated by the opinion of Dr. Spagnolo, which he found to be reasoned and documented. *See Clark*, 12 BLR at 149; *Fields*, 10 BLR at 19; Decision and Order at 7.⁵

Because the administrative law judge has discretion to resolve conflicts in the medical evidence, his findings will not be disturbed if supported by substantial evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). We, therefore, affirm the administrative law judge's finding that claimant failed to carry her burden of establishing that the miner's death was due to pneumoconiosis since the medical opinion of Dr. Simelaro was properly found to be outweighed by the contrary opinions of Drs. Sherman and Spagnolo. The administrative law judge's finding that the evidence did not show that the miner's death was due to coal mine employment at 20 C.F.R. §718.205(c) and his determination that claimant failed to establish a mistake in a determination of fact sufficient to warrant modification or entitlement to benefits is, therefore, affirmed, *see Lango*, 104 F.3d at 576, 21 BLR at 2-18.

⁴ The miner died on September 16, 1993. The death certificate lists acute myocardial infarction and hypertensive atherosclerotic coronary artery disease as the causes of death. Director's Exhibit 5.

⁵ Claimant has not challenged the administrative law judge's finding regarding Dr. Spagnolo's opinion, or the administrative law judge's findings regarding the opinions of Drs. Mathur and Karlavage.

Accordingly, the administrative law judge's Decision and Order Denying Benefits (Upon Remand by the Benefits Review Board) is hereby affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge