BRB No. 04-0504 BLA-A

RUTH FRASURE (Widow of SCOTT FRASURE) Claimant-Petitioner v. HOPE MINING COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders and Brent Bowker (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (03-BLA-5512) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) denying benefits on a miner's claim and 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).[2] The miner's claim involves a request for modification of his June 28, 1993 claim.[3] The administrative law judge credited the miner with at least fourteen years of coal mine employment based on the parties' stipulation and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently,

[1]Claimant is the widow of the miner, Scott Frasure, who died on October 29, 2001. Director's Exhibits 146, 152. The miner's June 28, 1993 claim for benefits was pending at the time of his death. Director's Exhibit 1. Claimant is pursuing the miner's claim. Claimant also filed a survivor's claim on December 18, 2001. Director's Exhibit 146.

[2]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.

[3]The pertinent procedural history in the miner's claim is as follows: The miner filed a claim for benefits on May 29, 1984. Director's Exhibit 55. On September 18, 1984, the Department of Labor denied this claim by reason of abandonment. *Id*. Because the miner did not pursue this claim any further, the denial became final. The miner filed another claim for benefits on June 28, 1993. Director's Exhibit 1. On April 2, 1996, Administrative Law Judge Paul H. Teitler issued a Decision and Order awarding benefits, Director's Exhibit 100, which the Board affirmed in part and vacated in part, and remanded for further consideration of the evidence. *Frasure v. Hope Mining Co.*, BRB No. 96-0947 BLA (May 23, 1997)(unpub.). On November 7, 1997, Judge Teitler issued a Decision and Order on Remand awarding benefits, Director's Exhibit 107, which the Board affirmed in part and vacated in part, and remanded for further consideration of the evidence. *Frasure v. Hope Mining Co.*, BRB No. 98-0417 BLA (Sept. 13, 1999)(unpub.). On April 20, 2000, Judge Teitler issued a Decision and Order on Remand denying benefits. Director's Exhibit 116. Judge Teitler found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). *Id*. The Board affirmed Judge Teitler's denial of benefits. *Frasure v. Hope Mining Co.*, BRB No. 00-0858 BLA (May 24, 2001)(unpub.). On July 2, 2001, the miner filed a request for modification. Director's Exhibit 131.

the administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000),[4] and thus, he found the evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge also found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits in the miner's claim. Turning to the survivor's claim, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge additionally found the evidence insufficient to establish that the miner's death was caused or hastened by pneumoconiosis pursuant to 20 C.F.R §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant challenges the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim. Regarding the miner's claim, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000). Claimant specifically challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Claimant also challenges the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). With regard to the survivor's claim, claimant challenges the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim.[5] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[6]

[4]The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001, and thus do not apply to the instant claim. *See* 20 C.F.R. §725.2.

[5]Claimant filed a brief in reply to employer's response brief, reiterating her prior contentions.

[6]Since the administrative law judge's length of coal mine employment finding of at least fourteen years is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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, we will address claimant's contention on the miner's claim that the administrative law judge erred in finding the newly submitted evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000). The Board has held that in considering whether a claimant has established a change in conditions at 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

Although the administrative law judge indicated that the miner's claim involves a request for modification of a duplicate claim, 2004 Decision and Order at 4-5, 47, 56, it was not necessary for the administrative law judge to consider the newly submitted evidence at 20 C.F.R. §725.309 (2000) because the miner's 1993 claim is not, in fact, a duplicate claim. In its May 23, 1997 decision, the Board concluded that the miner was entitled to have his claim considered as a new claim *on the merits* in accordance with 20 C.F.R. §725.409(b).[7] Thus, the relevant issue before the administrative law judge in this case should have been whether the newly submitted evidence, *i.e.*, the evidence submitted subsequent to Judge Teitler's April 20, 2000 denial of benefits, was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), thereby establishing a change in conditions at 20 C.F.R. §725.310 (2000).[8] Nonetheless, because the administrative law

[7]In its May 23, 1997 Decision and Order, the Board did not affirm Judge Teitler's finding that the evidence was sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Rather, the Board held that Judge Teitler properly considered the 1993 claim on the merits in accordance with 20 C.F.R. §725.409(b) (2000). *Frasure v. Hope Mining Co.*, BRB No. 96-0947 BLA, slip op. at 3 (May 23, 1997)(unpub.). In its September 13, 1999 Decision and Order, however, the Board mischaracterized its 1997 holding by stating that it previously affirmed Judge Teitler's finding that a material change in conditions was established at 20 C.F.R. §725.309 (2000). *Frasure v. Hope Mining Co.*, BRB No. 98-0417 BLA, slip op. at 2 (Sept. 13, 1999)(unpub.).

[8]In the prior decision, Judge Teitler denied benefits because he found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), a finding subsequently affirmed by the Board. *Frasure v. Hope Mining Co.*, BRB No. 00-

judge considered whether the evidence submitted since Judge Teitler's April 20, 2000 denial of benefits was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge's error in considering whether the newly submitted evidence was sufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000) is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the newly submitted opinions of Drs. Broudy, Dahhan, Fino and Sikder. Dr. Sikder opined that the miner suffered from pneumoconiosis while Drs. Broudy, Dahhan and Fino opined that the miner did not suffer from the disease.[9] Based on his determination that the opinions of Drs. Broudy, Dahhan and Fino outweighed Dr. Sikder's opinion, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis.

Claimant asserts that the administrative law judge erred in discounting Dr. Sikder's opinion. Dr. Sikder diagnosed both "clinical" pneumoconiosis and "legal" pneumoconiosis.[10] Director's Exhibit 134. In a report dated November 4, 1998, Dr. Sikder diagnosed coal workers' pneumoconiosis and end stage chronic obstructive pulmonary disease related to tobacco exposure and coal dust exposure.[11] *Id.* In a subsequent deposition dated August 2, 2001, Dr. Sikder again opined that the miner suffered from coal workers' pneumoconiosis and chronic lung disease related to coal dust exposure. Director's Exhibit 134 (Dr. Sikder's August 2, 2001 Deposition at 15, 16). Dr. Sikder further opined that the miner suffered from emphysema related to coal dust exposure and tobacco exposure. *Id.* (Dr. Sikder's August 2, 2001 Deposition at 17).

0858 BLA (May 24, 2001)(unpub.).

[9]The administrative law judge stated that "the numerous hospital records, which simply include the conclusory statement that [the miner] suffered from coal workers' pneumoconiosis, are not persuasive on the issue of the existence of pneumoconiosis." 2004 Decision and Order at 52.

[10]A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

[11]'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R §718.201(a)(2).

The administrative law judge discounted Dr. Sikder's opinion that the miner suffered from "clinical" pneumoconiosis and "legal" pneumoconiosis because Dr. Sikder did not adequately explain the bases for her diagnoses.[12] In addressing Dr. Sikder's "clinical" pneumoconiosis diagnosis, the administrative law judge stated that "[t]he basis for [Dr. Sikder's] opinion that [the miner] suffered from coal workers' pneumoconiosis often appears equivocal and vague." 2004 Decision and Order at 50. The administrative law judge noted that Dr. Sikder indicated that she based her diagnosis of coal workers' pneumoconiosis on a coal mine employment history, a chest x-ray and a pulmonary function study. *Id*. Although the administrative law judge found that Dr. Sikder had an accurate understanding of the miner's coal mine employment history, he determined that coal mine employment history alone is insufficient to establish the existence of pneumoconiosis. *Id*. The administrative law judge further concluded that "[Dr.] Sikder's explanation of the other two factors that led her to deduce the existence of pneumoconiosis, the pulmonary function study and chest x-rays, is not well-reasoned nor is it well-documented."[13] *Id*.

An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indication upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Based upon his consideration of Dr. Sikder's opinion, the administrative law judge rationally determined that Dr. Sikder failed to adequately explain how the underlying objective evidence supported her opinion. *Tackett*, 12 BLR at 1-14; *Oggero*, 7 BLR at 1-865. Further, the administrative law judge permissibly discounted Dr. Sikder's opinion because Dr. Sikder did not identify the x-rays upon which she relied to diagnosis pneumoconiosis.[14] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

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[12]The administrative law judge stated, "[a]lthough [Dr.] Sikder was [the miner's] treating physician at the time she gave her deposition, I find the reasoning and documentation throughout her opinion grossly inadequate." 2004 Decision and Order at 52.

[13]During the August 2, 2001 deposition, Dr. Sikder was asked, "[w]hat other evidence besides his [coal mine employment] history have you looked at in forming that opinion [that the miner suffered from coal workers' pneumoconiosis]." Director's Exhibit 134 (Dr. Sikder's August 2, 2001 Deposition at 15). In response, Dr. Sikder testified that "[h]is pulmonary function is suggestive and his chest X-rays is (sic) also suggestive." *Id.*

[14]In considering whether the underlying x-ray evidence supported Dr. Sikder's opinion, the administrative law judge stated:

Claimant also argues that the administrative law judge erred in discrediting Dr. Sikder's opinion that the miner suffered from pneumoconiosis because it was based, in part, on a pulmonary function study. Section 718.202(a)(4) provides that, notwithstanding a negative x-ray, a physician may find that a miner suffers or suffered from pneumoconiosis based on objective medical evidence such as arterial blood gas studies, electrocardiograms, *pulmonary function studies*, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. §718.202(a)(4). Although the administrative law judge, citing *Burke v. Director, OWCP*, 3 BLR 1-410 (1981), noted that the Board has held that pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis, he addressed Dr. Sikder's conclusions with respect to the pulmonary function study. 2004 Decision and Order at 50. The administrative law judge noted that Dr. Sikder discussed the results of a November 4, 1998 pulmonary function study in the context of whether they revealed an obstructive lung disease, a restrictive lung disease, or both. *Id*. at 50-51. However, the administrative law judge rationally determined that Dr. Sikder failed to adequately explain how the pulmonary function study supported her opinion. *Tackett*, 12 BLR at 1-14; *Oggero*, 7 BLR at 865. Since the administrative law judge considered whether the pulmonary function study that Dr. Sikder's opinion is based on supported her diagnosis of pneumoconiosis, we hold that any error by the administrative law judge in indicating that Dr. Sikder's opinion is not reasoned, because pulmonary function studies are not diagnostic of pneumoconiosis, is harmless. *Larioni*, 6 BLR at 1-1278.

In addressing Dr. Sikder's diagnosis of "legal" pneumoconiosis, the administrative law judge found that Dr. Sikder failed to provide a basis for finding that the miner's chronic obstructive pulmonary disease or emphysema was related to coal dust exposure. Director's Exhibit 134 (Dr. Sikder's August 2, 2001 Deposition at 17-18). The administrative law judge stated:

> [Dr.] Sikder also stated that chronic obstructive pulmonary disease (COPD) is usually due to cigarette smoke but that coal dust can also cause COPD. (DX 134:18). She further stated that [the miner] had COPD. (DX 134:18).
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> Because she failed to set forth the specific x-rays upon which her conclusions were based, I find [Dr.] Sikder's opinion not well-documented. Considering that much of her opinion seems to rely on chest x-ray evidence, the fact that she fails to clearly identify the chest x-rays to which she is referring is especially egregious.

2004 Decision and Order at 51.

> She failed to provide her reasoning for this conclusion. (DX 134:17). At this time, she failed to make any further connections or assertions regarding [the miner's] COPD. (DX 134:18).

2004 Decision and Order at 51.

Claimant asserts that the administrative law judge mischaracterized Dr. Sikder's deposition testimony. Claimant specifically argues that "[the administrative law judge] erred when he stated that Dr. Sikder did not give due consideration to [the miner's] smoking history." Claimant's Brief at 32. In addition, claimant argues that "[the administrative law judge's] statements regarding Dr. Sikder's opinion about whether coal dust caused [the miner's] lung disease are unsupported by substantial evidence." Claimant's Brief at 33. The administrative law judge stated that Dr. Sikder had an accurate understanding of the miner's smoking history. 2004 Decision and Order at 51. However, the administrative law judge found that Dr. Sikder failed to explain the basis for her finding that the miner's lung disease was related to smoking and coal dust exposure. The administrative law judge stated:

> when specifically questioned as to whether coal mine dust exposure caused [the miner's] lung disease, [Dr. Sikder's] reply was not responsive. (DX 134:17). She testified that both smoking and coal dust can cause lung disease and then simply reiterated her position that based on his chest x-ray findings and pulmonary function study, [the miner] "clearly had black lung disease." (DX 134:17). In her opinion, [the miner] had emphysema, which was caused by both coal dust and tobacco. (DX 134:17).

2004 Decision and Order at 51.

In the August 2, 2001 deposition, Dr. Sikder was asked, "[n]ow in making this opinion [that the miner had chronic lung disease due to coal dust exposure], how have you considered [the miner's] history of smoking cigarettes approximately one pack a day for approximately 40 to 50 years, stopping in 1985?" Director's Exhibit 134 (Dr. Sikder's August 2, 2001 Deposition at 17). In response to this question, Dr. Sikder stated:

> Yes, his smoking obviously attributed (sic) to his development of chronic lung disease. As we know that both smoking and coal dust cause lung disease. In this situation, however, based on his chest X-ray findings and his pulmonary function study, I would say he clearly has black lung disease. He also has emphysema, which is, as you know, caused both by cigarette smoking and coal dust exposure. But he has disease due to both causes, coal dust and tobacco.

Id. Since the administrative law judge reasonably found that Dr. Sikder did not adequately explain the basis for her finding that the miner's chronic lung disease was related to coal dust exposure, we reject claimant's assertion that the administrative law judge mischaracterized Dr. Sikder's deposition testimony. Moreover, we hold that the administrative law judge permissibly discounted Dr. Sikder's diagnosis of "legal" pneumoconiosis because it is not reasoned. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294.

Further, we reject claimant's assertion that the administrative law judge erred in failing to accord greater weight to Dr. Sikder's opinion based upon her status as the miner's treating physician. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[15] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* In this case, the administrative law judge found that Dr. Sikder's respective diagnoses of "clinical" and "legal" pneumoconiosis are not sufficiently reasoned. 2004 Decision and Order at 50-52; Director's Exhibit 134. Consequently, the administrative law judge properly found that Dr. Sikder's opinion is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Claimant additionally asserts that the administrative law judge erred in discounting Dr. Sikder's opinion because it is based on a generality. Dr. Sikder answered a hypothetical question in her August 2, 2001 deposition. Specifically, Dr. Sikder was asked, "[e]ven if the weight of the X-ray interpretations is negative for classic medical pneumoconiosis, would that change your opinion that [the miner's] COPD is caused, at least in part, by his coal mine dust exposure?" Director's Exhibit 134 (Dr. Sikder's August 2, 2001 Deposition at 22). In response to this question, Dr. Sikder stated:

> No, it would not, because we constantly are faced with situations where the chest X-ray is negative in a patient with coal dust exposure, and when we do lung biopsies, they come back as positive for coal dust exposure or

[15]Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

> changes for coal dust exposure. So the interpretation of the readings does not change my conclusions.

Id. In considering Dr. Sikder's deposition testimony, the administrative law judge stated:

> While the generality may be true that there are cases where biopsies reveal the existence of pneumoconiosis even when chest x-rays are negative, *no biopsy evidence has been submitted in this case*. The Board has held that a medical opinion based upon generalities, rather than specifically focusing upon the miner's condition, may be rejected. *See Knizer v. Bethlehem Mines Corp.*, 8 B.L.R. 1-5 (1985). By alleging a generality, rather than focusing on the specific evidence that has been submitted in this case, [Dr.] Sikder again fails to provide a useful opinion with regard to the existence of pneumoconiosis in this case.

2004 Decision and Order at 52 (emphasis added).

Although Dr. Sikder indicated that biopsies can reveal abnormalities not revealed by x-rays in her deposition testimony, the administrative law judge reasonably found that Dr. Sikder failed to explain how the evidence in this case supported her diagnoses. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Sikder's opinion because it is based on a generality.

Since the administrative law judge permissibly discounted Dr. Sikder's opinion, the only opinion of record that could support a finding of the existence of pneumoconiosis, because it is not reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294, we hold that any error by the administrative law judge in relying on the contrary opinions of Drs. Broudy, Dahhan and Fino in finding the evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000) is harmless, *Larioni*, 6 BLR at 1-1278. Furthermore, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In view of our affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310 (2000). *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Claimant specifically argues that "[the administrative law judge] did little independent evaluation of the record" and "[the administrative law judge's] decision is not supported by reasoning that satisfactorily explains the basis for his decision." Claimant's Brief at 5, 6.

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." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The Sixth Circuit has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

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 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981).

Claimant asserts that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[16] Claimant specifically argues that the administrative law judge erred in according greater weight to the x-ray readings of Drs. Abromwitz, Binns, Gogineni and Wershba as B readers and Board-certified radiologists since "[e]vidence of these doctors' qualifications is not in the record," and since "[the administrative law judge] gave no explanation about why he attributed these qualifications to [them]." Claimant's Brief at 26. In considering the x-ray evidence, the administrative law judge summarized the x-rays by noting the interpretations and qualifications of the physicians. After considering these factors, the administrative law judge stated:

> Overall, I have determined that two of the x-rays are in equipoise, eight of the x-rays are positive, eight of the x-rays are negative, and two of

[16]The administrative law judge stated, "[w]ith regard to whether there has been a mistake in [a] determination of fact, I must consider all the evidence of record." 2004 Decision and Order at 34.

> the x-rays are unreadable. While I note the extent to which the x-ray evidence appears to be in equipoise, I also observe that a significant number of the x-rays interpreted as positive were done so by physicians who lack both the B-reader qualification and Board certification. Therefore, if not deemed in equipoise, the x-ray evidence seems to prove the absence of pneumoconiosis. Moreover, in this vein, I reiterate that [c]laimant bears the burden of establishing the existence of pneumoconiosis by a preponderance of the evidence and that evidence in equipoise is insufficient to sustain [c]laimant's burden.

2004 Decision and Order at 59.

The Sixth Circuit has held that an administrative law judge must consider the quantity of the evidence in light of the difference in the qualifications of the readers. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). An administrative law judge may accord greater weight to x-ray readings that are provided by physicians who are B readers and/or Board-certified radiologists. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In this case, however, the record does not contain the credentials of Drs. Abromwitz, Binns, Gogineni and Wershba. Director's Exhibits 80, 81, 84. Since the administrative law judge did not explain how he determined that Drs. Abromwitz, Binns, Gogineni and Wershba are B readers and Board-certified radiologists, we hold that the administrative law judge erred in according greater weight to the x-ray readings of Drs. Abromwitz, Binns, Gogineni and Wershba based on their superior qualifications. *Wojtowicz*, 12 BLR at 1-165. Consequently, we further hold that the administrative law judge erred in weighing all of the conflicting x-ray evidence at 20 C.F.R. §718.202(a)(1) with respect to the issue of a mistake in a determination of fact.

Claimant also raises numerous assertions of error by the administrative law judge in relying on the opinions of employer's experts to find that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4), with respect to the issue of a mistake in a determination of fact. The administrative law judge considered the opinions of Drs. Ameji, Anderson, Bangudi, Brandon, Branscomb, Broudy, Bryson, Dahhan, deGuzman, El-Amin, Fino, Lagada, Marshall, Mettu, Myer, O'Neill, Sundaram, Vuskovich, and Wright. Drs. Ameji, Bangudi, Brandon Bryson, deGuzman, El-Amin, Lagada, Marshall, Myer, Sundaram, and Wright opined that claimant suffered from pneumoconiosis, while Drs. Anderson, Branscomb, Broudy, Dahhan, Fino, O'Neill, and Vuskovich opined that claimant did not suffer from pneumoconiosis. Dr. Mettu opined that the miner had symptoms of chronic bronchitis. Director's Exhibit 21. Dr. Mettu further stated that "[t]here could be a complaint of coal dust exposure for his chronic bronchitis and obstructive airway disease." *Id*.

Claimant specifically argues that "[the administrative law judge] gives no other reasons for his determination other than the qualifications of the experts." Claimant's Brief at 6. In weighing the conflicting medical opinions, the administrative law judge considered the qualifications of the physicians. In addition to noting that some physicians are Board-certified in internal medicine and/or Board-certified in pulmonary disease, the administrative law judge also noted that some physicians are A readers, B readers, and/or Board-certified radiologists. The administrative law judge specifically stated:

> In his April 25, 2000 (sic) Decision and Order on Remand Denying Benefits, …Judge Teitler concluded that, on the whole, the physicians who denied the existence of pneumoconiosis in their medical opinions were more well-qualified than those physicians who asserted the existence of pneumoconiosis. This is decidedly true.

2004 Decision and Order at 59 (footnote omitted). The administrative law judge further stated:

> While it is true that more physicians found the existence of pneumoconiosis than denied its existence, this numerical superiority loses its value upon closer inspection of the opinions themselves. Of the eleven physicians who concluded that [c]laimant suffered from pneumoconiosis, one was an A-reader ([Dr.] Bangudi), two were Board-certified in radiology and B-readers ([Drs.] Marshall and Brandon), and one was Board-certified in internal medicine and a B-reader ([Dr.] Myer). Of the eight physicians who concluded that [c]laimant did not suffer from pneumoconiosis, however, one was Board-certified in internal medicine and pulmonary disease ([Dr.] Anderson), one was a B-reader and Board-certified in Internal Medicine ([Dr.] Branscomb), and three were B-readers and Board-certified in internal medicine and pulmonary disease ([Drs.] Broudy, Dahhan, and Fino). In essence, I find no reason to disrupt the findings of [Judge Teitler's] April 25, 2000 (sic) Decision and Order on Remand Denying Benefits.

Id.

An administrative law judge may accord greater weight to the opinions of physicians based on their superior qualifications. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). However, a physician's radiological competence is not a relevant factor in evaluating medical opinion evidence at 20 C.F.R. §718.202(a)(4). *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-

31 (1991)(*en banc*). Thus, we hold that the administrative law judge erred in relying on radiological credentials in weighing the conflicting medical opinion evidence at 20 C.F.R. §718.202(a)(4).

Claimant additionally argues that "[the administrative law judge erroneously] failed to address whether the [e]mployer's experts gave reasoned opinions." Claimant's Brief at 12. Specifically, claimant asserts that the opinions of Drs. Anderson, Branscomb, Broudy, Dahhan, Fino, Mettu, O'Neill, and Vuskovich are not reasoned. The administrative law judge permissibly discredited Dr. Mettu's opinion because it is equivocal. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). In addition, the administrative law judge permissibly discredited Dr. Vuskovich's opinion because it is based on an inaccurate smoking history. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). However, the administrative law judge did not indicate that he found that the opinions of Drs. Anderson, Branscomb, Broudy, Dahhan, Fino, and O'Neill are documented and reasoned. Rather, the administrative law judge focused on the qualifications of the physicians. Before an administrative law judge can rely on a medical opinion, he must first determine whether the medical opinion is documented and reasoned. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1983); *see also Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Fuller*, 6 BLR at 1-1294. Since the administrative law judge did not indicate that he examined the validity of the reasoning of the medical opinions in light of the underlying documentation, we hold that the administrative law judge erred in weighing all of the conflicting medical opinions at 20 C.F.R. §718.202(a)(4) with respect to the issue of a mistake in a determination of fact.

Based on the aforementioned errors by the administrative law judge in finding that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1) and (a)(4) based on all of the medical evidence, we vacate the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310 (2000) and remand the case for further consideration of the evidence.

Next, we address the survivor's claim. Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.[17] *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11

[17]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:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203; *Boyd*, 11 BLR at 1-40-41.

The administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. § 718.205(c)(2).[18] In so finding, the administrative law judge considered Dr. Sikder's August 2, 2001 deposition testimony, medical reports by Drs. Broudy and Fino, and a death certificate with an illegible signature. Drs. Broudy and Fino opined that pneumoconiosis did not cause or hasten the miner's death. Employer's Exhibits 1, 3, 6. The death certificate listed the immediate cause of death as respiratory failure due to COPD. Director's Exhibit 152. However, the death certificate does not indicate that coal dust exposure contributed to the miner's COPD and respiratory failure. *Id*. In considering the medical evidence, the administrative law judge stated:

> Dr. Sikder's deposition, the only medical opinion provided by [c]laimant, was taken approximately three months before [c]laimant died. Therefore, it does not address the issue of hastening. While the medical opinions submitted by [e]mployer were rendered after [c]laimant's death, they too do

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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.
> ...
> (5) 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).

[18]Because there is no medical evidence that pneumoconiosis was the direct cause of the miner's death, we hold that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1). Further, because there is no evidence of complicated pneumoconiosis, we hold that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(3).

> not address the issue of hastening insofar as they are meant to serve as counter-arguments to [Dr.] Sikder's opinion.

2004 Decision and Order at 61. The administrative law judge therefore concluded that "[c]laimant has failed to establish that her spouse's demise was caused by or hastened by pneumoconiosis." *Id*.

Section 718.205(c)(2) provides that death will be considered due to pneumoconiosis where pneumoconiosis was a "substantially contributing cause or factor leading to the miner's death." 20 C.F.R. §718.205(c)(2). Furthermore, Section 718.205(c)(5) provides that pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5). Consistent with Section 718.205(c)(2) and (c)(5), the Sixth Circuit has held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) (2000) where the disease actually hastens death. *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Since none of the medical evidence of record supports a finding that pneumoconiosis hastened the miner's death, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). *See* 20 C.F.R. §718.205(c).

In view of our affirmance of the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), an essential element of entitlement under 20 C.F.R. Part 718 in a survivor's claim, *Trumbo*, 17 BLR at 1-87; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits in the survivor's claim.[19]

[19]In light of our disposition of the case at 20 C.F.R. §718.205(c), we decline to address claimant's contentions with regard to the administrative law judge's findings at 20 C.F.R. §718.202(a) in the survivor's claim. Moreover, in view of our disposition of the case at 20 C.F.R. §718.205(c), we need not address claimant's contention that the administrative law judge admitted medical opinion evidence relevant to the issue of pneumoconiosis that exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414.

Accordingly, the administrative law judge's Decision and Order denying benefits in the miner's claim is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion. However, the administrative law judge's Decision and Order denying benefits in the survivor's claim is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge