

BRB No. 06-0772 BLA

NORMA J. PARSONS	)	
(Widow of BILLY J. PARSONS)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 06/28/2007
	)	
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 of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Norma J. Parsons, Pennington Gap, Virginia, *pro se*.<sup>1</sup>

Douglas A. Smoot (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant<sup>2</sup> appeals, without the assistance of counsel, the Decision and Order (04-BLA-0014 and 04-BLA-0015) of Administrative Law Judge Richard T. Stansell-Gamm

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<sup>1</sup> Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

(the administrative law judge) denying benefits on claims 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).<sup>3</sup> This case involves a miner's duplicate claim filed on July 24, 1996 and a survivor's claim filed on May 3, 1999.

### **Procedural History of the Miner's Claim**

The miner filed a duplicate claim on July 24, 1996.<sup>4</sup> Director's Exhibit 1. In a

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<sup>2</sup> Claimant is the surviving spouse of the deceased miner who died on June 2, 1998. Director's Exhibit 97.

<sup>3</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>4</sup> The miner initially filed a claim with the Social Security Administration (SSA) on October 28, 1971. Director's Exhibit 47. After the SSA denied the claim, it was transferred to the Department of Labor for review. In an Order dated December 7, 1982, the district director awarded benefits contingent upon the miner retiring from coal mine employment within one year of the Order becoming final. Because it was not contested, the Order became a final determination on January 7, 1983. Consequently, in order to have been eligible for benefits, the miner would have had to have terminated his coal mine employment by January 7, 1984. Because the miner continued to work until May of 1985, *see* Director's Exhibits 1, 47, the miner's 1971 claim was denied. *See* 20 C.F.R. §725.503A(b) (2000).

The miner filed a duplicate claim on February 20, 1986. Director's Exhibit 47. In a Decision and Order dated December 13, 1990, Administrative Law Judge Charles W. Campbell found that the miner established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), based on the miner's retirement from coal mine employment. In addressing the merits of the miner's 1986 claim, Judge Campbell found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Judge Campbell also found that the miner was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b)(2000). However, Judge Campbell further found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(c)(2000). Accordingly, Judge Campbell denied benefits.

The miner subsequently filed a request for modification. Director's Exhibit 47. In

Decision and Order dated November 30, 1999, the administrative law judge found that the newly submitted evidence established total disability pursuant to 20 C.F.R. §718.204(c) (2000), thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). In addressing the merits of the miner's 1996 claim, the administrative law judge found that employer was collaterally estopped from challenging the previous determinations that the miner suffered from pneumoconiosis arising out of his coal mine employment. The administrative law judge also found that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(c) (2000) and that the miner's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated November 30, 1999, the Board affirmed the administrative law judge's finding that the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Parsons v. Westmoreland Coal Co.*, BRB No. 99-0274 BLA (Nov. 30, 1999) (unpub.). The Board, however, reversed the administrative law judge's finding that employer was collaterally estopped from relitigating the issues of pneumoconiosis and pneumoconiosis arising out of coal mine employment. *Id.* While the Board affirmed the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(c) (2000), the Board vacated the administrative law judge's finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000) and remanded the case for further consideration.

After learning of the miner's death and that claimant had filed a survivor's claim, the administrative law judge, by Order dated May 21, 2001, remanded the miner's claim to the district director for further development of the record. Director's Exhibit 78. On June 17, 2003, the district director denied benefits on the miner's claim. Director's Exhibit 82. The miner's claim was forwarded to the Office of Administrative Law Judges on October 8, 2003. Director's Exhibit 182.

### **Procedural History of the Survivor's Claim**

Claimant filed a survivor's claim on May 3, 1999. Director's Exhibit 91. In a Decision and Order dated September 26, 2001, Administrative Law Judge Mollie W. Neal found that the autopsy evidence established the existence of pneumoconiosis

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a Decision and Order dated September 30, 1994, Administrative Law Judge Reno E. Bonfanti denied the miner's request for modification. The miner filed an appeal with the Board. However, by Order dated April 24, 1995, the Board dismissed the miner's appeal as abandoned.

The miner filed a third claim on July 24, 1996. Director's Exhibit 1.

pursuant to 20 C.F.R. §718.202(a)(2). Director's Exhibit 164. However, Judge Neal found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* Accordingly, Judge Neal denied benefits. *Id.* By Decision and Order dated June 28, 2002, the Board affirmed Judge Neal's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Parsons v. Westmoreland Coal Co.*, BRB No. 02-0133 BLA (June 28, 2002) (unpub.). The Board, therefore, affirmed Judge Neal's denial of the survivor's claim. *Id.*

Claimant filed a request for modification of her survivor's claim on June 19, 2003. Director's Exhibit 172. On August 11, 2003, the district director denied claimant's request for modification. Director's Exhibit 176. The survivor's claim was forwarded to the Office of Administrative Law Judges on October 8, 2003, where it was assigned to Judge Stansell-Gamm. Director's Exhibit 183.

### **The Administrative Law Judge's Decision and Order dated June 7, 2006**

The administrative law judge adjudicated both the miner's claim and the survivor's claim. In regard to the miner's claim, the administrative law judge noted that employer stipulated that the miner suffered from pneumoconiosis. The administrative law judge also found that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge further found that the miner was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).<sup>5</sup> However, the administrative law judge found that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits in the miner's claim.

In regard to claimant's request for modification of the denial of the survivor's claim, the administrative law judge found that claimant did not 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 survivor's claim.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits in both the miner's claim and the survivor's claim. Employer responds

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<sup>5</sup> The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

in support of the administrative law judge's denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

### **The Miner's Claim**

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

### **Complicated Pneumoconiosis**

In his consideration of whether claimant was entitled to invocation of the irrebuttable presumption set out at 20 C.F.R. §718.304,<sup>6</sup> the administrative law judge initially addressed whether the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a). The record contains one positive x-ray interpretation for the existence of complicated pneumoconiosis. Dr. Mathur, a B reader and Board-certified radiologist, interpreted the miner's February 19, 1997 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 43. However, the administrative law judge noted that "several other similarly well qualified" physicians interpreted this x-ray as negative for the disease.<sup>7</sup> Decision and Order at 9; Director's

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<sup>6</sup> Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

<sup>7</sup> Drs. Wiot, Spitz, Shipley, Scott, Wheeler, Kim, and Cappiello, each dually qualified as a B reader and Board-certified radiologist, interpreted the miner's February 19, 1997 x-ray as negative for complicated pneumoconiosis. Director's Exhibits 27, 31,

Exhibits 26, 27, 31, 35, 37, 39, 46, 54. Consequently, the administrative law judge properly found that Dr. Mathur's x-ray interpretation did not establish the existence of complicated pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 9. The administrative law judge, therefore, properly found that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Because there is no biopsy or autopsy evidence supportive of a finding of complicated pneumoconiosis,<sup>8</sup> claimant is precluded from establishing invocation pursuant to 20 C.F.R. §718.304(b).

The administrative law judge finally considered whether Dr. Wheeler's interpretation of a CT scan taken on October 22, 1996<sup>9</sup> supported a finding of complicated pneumoconiosis.<sup>10</sup> Director's Exhibit 31. Although Dr. Wheeler identified a mass greater than 1.0 cm. on the miner's October 22, 1996 CT scan, there is no evidence that this mass would appear as an opacity greater than one centimeter in diameter on an x-ray.<sup>11</sup> *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); Director's Exhibit 31. The administrative law judge properly found that Dr. Wheeler's interpretation of the miner's October 22, 1996 CT scan "does

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35, 37, 39, 46. In addition, Drs. Dahhan, Pathak, and Morgan, all B readers, interpreted this x-ray as negative for complicated pneumoconiosis. Director's Exhibits 26, 46, 54.

<sup>8</sup> The administrative law judge accurately noted that Drs. Naeye, Kahn, and Caffrey, in interpreting the miner's post-mortem biopsy slides, did not diagnose complicated pneumoconiosis. Decision and Order at 9.

<sup>9</sup> The administrative law judge mistakenly identified Dr. Wheeler's interpretation of the miner's October 22, 1996 CT scan as an interpretation of a September 23, 1996 x-ray. *See* Decision and Order at 8-9; Director's Exhibit 31. However, because Dr. Wheeler's interpretation does not support a finding of complicated pneumoconiosis, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>10</sup> CT scan evidence falls into the "other means" category of establishing complicated pneumoconiosis at 20 C.F.R. §718.304(c). *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

<sup>11</sup> Dr. Wheeler opined that the mass was "most likely" healed tuberculosis. Director's Exhibit 31.

not establish the presence of complicated pneumoconiosis.”<sup>12</sup> Decision and Order at 9. Moreover, none of the other CT scan interpretations of record support a finding of complicated pneumoconiosis. Consequently, claimant is precluded from establishing invocation of the irrebuttable presumption at 20 C.F.R. §718.304(c).

Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff’d sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

### **Total Disability Due to Pneumoconiosis**

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, pursuant to 20 C.F.R. §718.204(b) (2000), a miner must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Revised Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner’s totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a “substantially contributing cause” of the miner’s disability if it:

- (i) Has a material adverse effect on the miner’s respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).<sup>13</sup>

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<sup>12</sup> Although the administrative law judge initially speculated that Dr. Wheeler’s interpretation “might qualify as a Category A radiographic opacity,” Decision and Order at 9, the administrative law judge provided no basis for this statement.

<sup>13</sup> In enacting this revised regulation, the Department of Labor explained:

In considering whether the medical evidence established that the miner's total disability was due to pneumoconiosis,<sup>14</sup> the administrative law judge accorded the greatest weight to the opinions of Drs. Fino, Castle, Morgan, Naeye, Caffrey, Rosenberg, and Hippensteel, that the miner's total disability was not attributable to his pneumoconiosis, because these physicians based their opinions on "extensive" and "comprehensive" reviews of the medical record, including a review of the miner's 1998 pathology slides.<sup>15</sup> Decision and Order at 41-45; Director's Exhibits 99, 128, 135, 154; Employer's Exhibits 1, 4-6. The administrative law judge explained that their awareness

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The Department did not mean to alter the current law through its proposals, however, or to suggest that *any* adverse effect, no matter how limited, was sufficient to establish total disability due to pneumoconiosis. Rather, the Department meant only to codify the numerous decisions of the courts of appeals which, in the process of deciding when a miner is totally disabled due to pneumoconiosis, have also ruled on what evidence is legally sufficient to establish that element of entitlement. In order to clarify this consistent intent, the Department has added the word "material" to §718.204(c)(i) and "materially" to §718.204(c)(ii). In so doing, the Department intends merely to implement the holdings of the courts of appeals. Thus, evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability.

65 Fed. Reg. 79,946 (2000) (emphasis in original).

<sup>14</sup> The administrative law judge properly found that Drs. Fleenor, Miller, Zayed, Smiddy, Patel, Kahn, and Molony did not address the cause of the miner's total disability. Decision and Order at 42.

<sup>15</sup> The miner underwent a post-mortem biopsy of his left and right lungs. In a report dated June 9, 1998, Dr. Patel diagnosed: (1) benign lung disease with perivascular, peribronchial, interstitial and pleural black pigment deposition with fibrosis; (2) focal fibrosis nodule composed of black pigment and fibrosis consistent with healed granuloma; (3) pulmonary emphysema, interstitial fibrosis and black pigment deposition; and (4) focal pulmonary hemorrhage. Director's Exhibit 98.

Dr. Kahn also reviewed the miner's lung tissue slides. In a report dated July 19, 1999, Dr. Kahn diagnosed: (1) pulmonary emphysema; (2) mild coal workers' pneumoconiosis; and (3) moderate pulmonary silicosis. Director's Exhibit 101.



of the post-mortem pathology findings provided them with “additional evidence about the nature and extent of [the miner’s] coal workers’ pneumoconiosis.”<sup>16</sup> Decision and Order at 42. The administrative law judge found that their “well documented and reasoned” opinions provided a “probative consensus” that the miner’s mild coal workers’ pneumoconiosis did not cause or contribute to his pulmonary impairment. *Id.* at 44. Conversely, the administrative law judge accorded less weight to the opinions of Drs. Nash and Taylor, that the miner’s total disability was due to his pneumoconiosis, because these physicians based their opinions on “limited documentation associated with the absence of any consideration of the pathology findings.”<sup>17</sup> Decision and Order at 42-44; Director’s Exhibit 47; Claimant’s Exhibit 1.

In weighing medical reports, an administrative law judge may properly find that a doctor’s opinion based on limited clinical data is entitled to less weight than conflicting reports based upon more comprehensive documentation. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Because he found that their opinions were well reasoned and based upon more comprehensive documentation, the administrative law judge properly accorded greater weight to the opinions of Drs. Fino, Castle, Morgan, Naeye, Caffrey, Rosenberg, and Hippensteel.<sup>18</sup> *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Because it is

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<sup>16</sup> Dr. Dahhan also reviewed the miner’s 1998 pathology reports. However, the administrative law judge permissibly accorded less weight to his opinion, that the miner’s total disability was not due to pneumoconiosis, because he found that it was not sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 43.

<sup>17</sup> The administrative law judge also accorded less weight to the opinions of Drs. Paranthaman, Abrahams, Sargent, and Michos, that claimant’s total disability was not due to pneumoconiosis, because they did not review the miner’s pathology slides. Decision and Order at 42-43.

<sup>18</sup> In weighing the conflicting medical opinion evidence, the administrative law judge considered Dr. Taylor’s status as the miner’s treating physician. Decision and Order at 43; Claimant’s Exhibit 1. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall “be based on the credibility of the physician’s opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.” 20 C.F.R. §718.104(d)(5). In this case, the administrative law judge permissibly accorded Dr. Taylor’s opinion less weight because it was not as well documented as the other medical opinions of record.

supported by substantial evidence, we affirm the administrative law judge's finding that the evidence does not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we affirm the administrative law judge's denial of benefits in the miner's claim. *Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2.

### **The Survivor's Claim**

Because 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).<sup>19</sup> 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

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<sup>19</sup> Section 718.205(c) provides 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
- (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.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (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).

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). The Fourth 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. See *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

In a Decision and Order dated September 26, 2001, Judge Neal found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* By Decision and Order dated June 28, 2002, the Board affirmed Judge Neal's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Parsons* (June 28, 2002), slip op. at 5.

In considering whether there was a mistake in a determination of fact, the administrative law judge stated:

In the record before Judge Neal, Dr. Zayed indicated that the presence of coal workers' pneumoconiosis could cause respiratory arrest which could then lead to fatal ventricular fibrillation. The physician also indicated pneumoconiosis could be a "co-morbid" condition that could contribute to such a condition. In assessing the probative value of Dr. Zayed's opinion, I concur with Judge Neal's observation that Dr. Zayed's causation opinion is not well reasoned. Significantly, Dr. Zayed failed to identify the specific objective medical and pathological evidence that would make his assertions applicable in [the miner's] case. In particular, the treating physician did not address whether, as established by the pathology studies, the presence of mild coal workers' pneumoconiosis in [the miner's] lungs would cause respiratory arrest or represent a "morbid" condition. Additionally, as noted by Dr. Naeye, no evidence exists to indicate that respiratory arrest precipitated [the miner's] fatal ventricular fibrillation. Accordingly, Dr. Zayed's causation opinion has diminished probative value.

Decision and Order at 47-48.

The administrative law judge permissibly accorded less weight to Dr. Zayed's opinion, because the doctor did not explain how the objective evidence supported a

finding that the miner's death was due to pneumoconiosis. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. Decision and Order at 47-48.

In support of her request for modification, claimant submitted Dr. Molony's May 26, 2003 report, wherein the doctor noted that the miner's lung biopsy revealed the existence of pulmonary emphysema and pneumoconiosis. Claimant's Exhibit 1. Dr. Molony opined that the miner "had serious cardiac disease which caused death but lung disease was a contributing factor." *Id.* The administrative law judge, however, permissibly found that Dr. Molony's opinion was not sufficiently reasoned because the doctor failed to identify the objective medical evidence that supported his opinion or provide "any explanation for how he determined [that] the mild coal workers' pneumoconiosis in [the miner's] lungs contributed to his death." Decision and Order at 48; *see Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

By contrast, the administrative law judge permissibly found that the opinions of Drs. Fino, Castle, Morgan, Naeye, Caffrey, Rosenberg, and Hippensteel, that the miner's mild coal workers' pneumoconiosis did not cause or contribute to his death, were well documented and reasoned and outweighed the "less probative" assessments of Drs. Zayed and Molony. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Decision and Order at 48-49. The administrative law judge, therefore, found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>20</sup> Consequently, we affirm the administrative law judge's finding that claimant did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

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<sup>20</sup> As discussed *supra*, the administrative law judge properly found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, claimant is precluded from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.205(c)(3).

Accordingly, the administrative law judge's Decision and Order denying benefits 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