BRB No. 00-0408 BLA

NORA J. FINK (Widow of THOMAS EARL FINK) Claimant-Respondent v. STERLING SMOKELESS COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners 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 Awarding Survivor's Benefits on Petition for Modification of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington and Lee University, School of Law), Lexington, Virginia, for claimant.

W. William Prochot (Arter & Hadden LLP), Washington, D.C., for employer and carrier.

Michael J. Rutledge and Jeffrey S. Goldberg (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits on Petition for Modification (99-BLA-0403) of Administrative Law Judge Daniel F. Sutton (the administrative law judge) denying benefits in the miner's claim and awarding benefits in the survivor's claim filed by claimant, the miner's widow.[1] Both claims were 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 administrative law judge initially denied employer's motion that it be dismissed as a party to the claim. Considering both the miner's and survivor's claims under 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of occupational pneumoconiosis under 20 C.F.R. §718.202(a)(2000) and 20 C.F.R. §718.203(2000). He further found no mistake in a determination of fact in Administrative Law Judge Robert M. Glennon's finding, in the miner's claim, that the evidence fails to establish that the miner was totally disabled due to a respiratory or pulmonary impairment to which pneumoconiosis was a contributing cause under 20 C.F.R. §718.204(b), (c)(2000). In this regard, the administrative law judge credited medical records implicating the deceased miner's leukemia and back, hip and leg problems as the conditions which limited his ability to work. The administrative law judge thus concluded that the miner's claim was properly denied based on a lack of evidence showing that the miner was totally disabled due to pneumoconiosis. Pursuant to 20 C.F.R. §718.205(b)(2000), the administrative law judge further found, however, that claimant met her burden to establish that pneumoconiosis was a substantially contributing cause of the miner's death under *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), and there was, therefore, a mistake in a determination of fact in the prior denial of the widow's claim. Accordingly, the administrative law judge awarded survivor's benefits, indicating that the miner's claim remained denied.

[1]The miner's death certificate indicates that he died on May 23, 1981 due to cardiopulmonary arrest due to chronic myelogenous leukemia - blast crisis. Director's Exhibit 9.

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, employer contends that modification under 20 C.F.R. §725.310(2000) is unavailable in the survivor's claim as claimant did not allege a mistake of fact, the only available basis for modification of a survivor's claim. Employer argues that claimant alleged a mistake of law which cannot form the basis for modification of a prior denial. Employer further contends that the administrative law judge erroneously denied its motion to dismiss it as a party to the case. On the merits of the survivor's claim, employer contends that the administrative law judge erred in finding that claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(b)(2000). Claimant responds, and seeks affirmance of the decision below. Claimant argues that employer waived any argument on the merits of the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), responds to the procedural issues only. The Director argues that contrary to employer's contention, modification was available to claimant in the survivor's claim and the administrative law judge properly granted modification of the prior denial in that claim. The Director further contends that because employer has not been deprived of its due process rights, the administrative law judge properly denied its motion to be dismissed as a party to the case. Employer has filed a reply brief.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which employer and the Director have responded.[3] Employer and the Director assert that the regulations at issue in the lawsuit do not affect the outcome of the disposition of this case. Employer further asserts, however, that if the Board determines that the administrative law judge properly considered the merits of this survivor's claim under 20 C.F.R. §718.205(c) and affirms the award of benefits, the Board must hold this matter in abeyance pending the resolution of the lawsuit. Based on the briefs submitted by employer and the Director, and our review and resulting decision to remand the case, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

[3]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of the case.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The pertinent procedural history is as follows: The miner filed a claim on April 22, 1981. Director's Exhibit 1. The miner died on May 23, 1981, and claimant filed a survivor's claim on June 11, 1981. Director's Exhibits 2, 9. The district director granted benefits in the survivor's claim and employer controverted the claim. Director's Exhibits 12, 15, 16, 19. The Black Lung Disability Trust Fund began paying interim benefits. Director's Exhibit 20. The case was transferred to the Office of Administrative Law Judges (OALJ) on April 24, 1987. Director's Exhibit 21.

In his June 28, 1989 Decision and Order, Administrative Law Judge Robert M. Glennon denied benefits in the survivor's claim. Judge Glennon credited the miner with seventeen and three-quarter years of coal mine employment, and found that claimant failed to establish that the miner's death was due to, or significantly related to, his pneumoconiosis under 20 C.F.R. §718.205(c)(2000). Director's Exhibit 29. The Director moved for reconsideration based on Judge Glennon's failure to adjudicate the miner's claim. Director's Exhibit 30.

In his November 29, 1989 Supplemental Decision and Order Denying Benefits, Judge Glennon found the existence of occupational pneumoconiosis established under 20 C.F.R. §718.202 (2000) and 20 C.F.R. §718.203(2000), and further found that claimant failed to establish that the miner was disabled due to a respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(2000). Judge Glennon thus denied benefits in both the miner's and survivor's claims. Director's Exhibit 57.

Addressing claimant's appeal in their November 27, 1992 Decision and Order, the Board affirmed Judge Glennon's findings and, consequently, his denial of benefits in the miner's and survivor's claims. Director's Exhibit 48. The Board summarily denied claimant's request for reconsideration. Director's Exhibit 52. By unpublished decision dated July 6, 1995, the United States Court of Appeals for the Fourth Circuit affirmed the Board's Decision and Order. Director's Exhibit 53.

Claimant filed a request for modification on July 24, 1995. Director's Exhibit 54. Therein, without the assistance of counsel, claimant maintained that Judge Glennon, the Benefits Review Board and the Fourth Circuit erred in their decisions. Claimant specifically asserted that under the regulations and because of the fact that she filed her claim prior to January 1, 1982, she did not have to prove that the miner's death was due to pneumoconiosis

but only that he had pneumoconiosis. *Id.* Claimant argued that the miner did have pneumoconiosis and the fact that he was subsequently diagnosed with leukemia had no effect on the fact that he already had pneumoconiosis. *Id.* Claimant thus asserted that it was error that the issue of "death due to pneumoconiosis" was ever considered. *Id.* The district director referred claimant's request to the OALJ without ruling on it. Director's Exhibits 55, 56.

A hearing was held before Administrative Law Judge Samuel J. Smith, whose Order of Remand was filed July 24, 1996. Director's Exhibits 62, 63. Administrative Law Judge Smith found that under 20 C.F.R. §725.212(a)(3)(ii)(2000), claimant, having filed her claim prior to January 1, 1982, could establish her entitlement to benefits by showing either that the miner was totally disabled due to pneumoconiosis at the time of his death or that the miner died due to pneumoconiosis. In this regard, Administrative Law Judge Smith noted that Judge Glennon had not considered the survivor's claim under this regulation. Administrative Law Judge Smith also found that although Judge Glennon found the existence of coal workers' pneumoconiosis and that the miner was not totally disabled by coal workers' pneumoconiosis, Judge Glennon's weighing of the evidence contained errors. Specifically, Administrative Law Judge Smith noted that Judge Glennon did not discuss the miner's last coal mine employment or its exertional requirements pursuant to 20 C.F.R. §718.204(c)(4)(2000), and did not properly discredit Dr. Ahmed's opinion. Administrative Law Judge Smith also determined:

> The ALJ at the time of the hearing on October 19, 1988, did not recognize that the miner's claim was also before him and thus he did not fully develop the record with respect to the Section 718.204(c)(4) issue. Clearly, this constitutes a mistake of fact on the ALJ's part.

Administrative Law Judge Order of Remand at 8. Administrative Law Judge Smith next found another mistake in fact in that Judge Glennon cited to 20 C.F.R. §718.205(b)(2000), while actually applying the regulation at 20 C.F.R. §718.205(c)(2000). Addressing the procedural history, Administrative Law Judge Smith further found that, given the issuance of *Shuff* while the case was pending before the Board, "It appears that the proper procedure for the BRB to follow in this case would have been a remand to the OALJ for further proceedings consistent with *Shuff*." Order of Remand at 9. Administrative Law Judge Smith also found that, (1) the Director only partially discharged his obligation under 20 C.F.R. §725.405(c)(2000) to "obtain whatever medical evidence is necessary and available for the development and evaluation of the claim;" and (2) raising the issue *sua sponte*, that employer did not make a good faith effort to develop evidence while the case was pending before the district director, and, in fact, submitted no evidence while this case was pending transfer to the OALJ from 1981 to 1987. Administrative Law Judge Smith determined that this issue must be addressed on remand. Accordingly, he remanded the case to the district director.

Director's Exhibit 63.

Employer filed a timely motion for reconsideration, Director's Exhibits 65, 66, to which claimant responded with the assistance of counsel, Director's Exhibits 67, 68. Prior to a ruling on the motion, the case was transferred to the district director, who, in turn, returned the case to the OALJ, finding that he was unable to satisfactorily determine the status of the claim or which judicial body retained jurisdiction. Director's Exhibit 71. Thereafter, Administrative Law Judge Lawrence Donnelly[4] summarily denied employer's motion, and remanded the case to the district director on December 22, 1997 to "develop medical and other evidence consistent with the Administrative Law Judge's July 19, 1996 Order of Remand." Director's Exhibit 80.

Evidence was developed before the district director relevant to the cause of the miner's death. The district director denied the miner's and survivor's claims, later denied claimant's motion for reconsideration, and forwarded the claims for hearing on December 28, 1998. Director's Exhibits 89, 92, 93. On June 18, 1998, employer requested that the district director dismiss it as a party to the claim in accordance with *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Director's Exhibit 85. The case was transferred without the district director ruling on the request.

On May 25, 1999, claimant again submitted additional medical evidence. Employer's request for a continuance of the case was denied by Administrative Law Judge Daniel F. Sutton (the administrative law judge) on June 15, 1999. ALJ Exhibit 9. A hearing was held before the administrative law judge on June 22, 1999. The administrative law judge's Decision and Order Awarding Survivor's Benefits On Petition for Modification, which is the subject of the instant appeal, was filed on December 8, 1999.

On appeal, citing *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), employer contends that modification in a survivor's claim is only available to correct a mistake in a determination of fact in the prior denial. In this regard, employer asserts that the administrative law judge abused his discretion in granting modification of the prior denial of the survivor's claim inasmuch as claimant's request for modification was based on a mistake of law, namely Judge Glennon's crediting of pathologists at Section 718.205(b)(2000) without reference to the standard articulated by the Fourth Circuit in *Shuff* regarding the cause of a miner's death. Employer argues that claimant thereby asserted a change in law,

[4]The case was reassigned from Administrative Law Judge Samuel J. Smith to Administrative Law Judge Donnelly. *See* Director's Exhibit 74.

which is not an appropriate basis for modification.

Employer's contentions lack merit. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), deemed "irrelevant" employer's assertion that a legal, rather than a factual, error was at issue on modification under Section 725.310(2000). *See Jessee v. Director, OWCP*, 5 F.3d 723, 725,726, 18 BLR 2-26, 29, 30 (4th Cir. 1993). Further, the Fourth Circuit in *Jessee* indicated that a request for modification is sufficient if a claimant avers generally that the administrative law judge improperly found the ultimate fact, in this case the finding of death due to pneumoconiosis under 20 C.F.R. §718.205(2000), and thus erroneously denied the claim. *Jessee v. Director, OWCP*, 5 F.3d at 725-726, 18 BLR at 2-28. Claimant did allege error in Judge Glennon's denial of her claim and in the decisions of the Board and Fourth Circuit affirming that denial. Further, the administrative law judge properly adjudicated claimant's request for modification of the prior denial of her claim pursuant to the law in effect at the time his decision was rendered. *See Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985). We thus reject employer's arguments challenging the validity of claimant's request for modification.

Employer's arguments challenging the administrative law judge's decision to review claimant's survivor's claim under *Shuff*, however, have merit. Claimant filed her claim on June 11, 1981. Director's Exhibit 2. Hence her claim is properly considered under 20 C.F.R. §718.205(b) and not under 20 C.F.R. §718.205(c). Furthermore, *Shuff* involved the issue of a claimant's burden under Section 718.205(c)(2000). Thus, while it was the administrative law judge's duty to apply the law in effect at the time he rendered his decision on claimant's request for modification, he erred in applying *Shuff* to this claim filed prior to January 1, 1982.

Employer next argues that the administrative law judge's finding of modification in the survivor's claim "improperly ignores the higher tribunals' decisions and mandates." Employer's Brief at 15. Specifically, employer argues that inasmuch as *Shuff* was issued in June 1992, and both the Board, in November 1992, and the Fourth Circuit, in July 1995, affirmed Judge Glennon's decision after the change in law effectuated by the court's 1992 issuance of *Shuff*, the administrative law judge was not free to ignore the decisions of these higher courts.

Employer's arguments lack merit. Modification under Section 725.310(2000) is available, *inter alia*, after the "denial of a claim" and the regulation does not limit modification to cases which have not undergone appellate review. 20 C.F.R. §725.310(2000).[5]

[5]The amendments to the regulation at 20 C.F.R. §725.310(2000) do not apply to

Employer next asserts that even if the denial could be modified, the administrative law judge abused his discretion in failing to weigh the propriety of claimant's request. Employer argues that the fact that the administrative law judge did not initially determine whether granting modification would render justice under the Act, *i.e.* whether the appropriateness of modification of the prior denial outweighed the need for finality in this case, was an abuse of the administrative law judge's discretion. Employer argues, "This is especially true in a case like this where evidence is stale and the case has been going on for almost twenty years." Employer's Reply Brief at 6.

We hold that the administrative law judge's decision to grant modification cannot stand because the rationale provided by the administrative law judge in granting claimant's request for modification was erroneous. The administrative law judge found:

> Here the Claimant alleges that there were mistakes [in] the prior determinations that Mr. Fink was not totally disabled due to pneumoconiosis and that his death was not due to pneumoconiosis which, is [sic] established, would warrant modification of the prior denials.

Decision and Order at 7. The administrative law judge then recognized that none of the medical opinions considered by Judge Glennon in the prior denial considered the "critical question of whether Mr. Fink's pneumoconiosis served to hasten his death in any way" while the "newly-submitted medical opinions all address the correct standard." Decision and Order at 21, 22. To the extent that the administrative law judge relied on the decision in *Shuff* as a basis to grant modification, he erred. As discussed above, *Shuff* is inapplicable to the instant claim as *Shuff* addressed a claimant's burden to establish death due to pneumoconiosis under Section 718.205(c)(2000), and the instant claim involves claimant's burden to establish death due to pneumoconiosis under Section 718.205(b) (2000).

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claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80, 057.

Further, in considering the modification issue, the factfinder must determine whether reopening the case would render justice under the Act. *See Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254 (1971). In the instant case, the record reveals that the administrative law judge did not make a finding that to modify the prior denial would render justice under the Act. Given the administrative law judge's errors in granting modification, we vacate the administrative law judge's finding at Section 725.310(2000) and remand the case to the administrative law judge for further consideration of the modification issue. The administrative law judge has the authority to reconsider all of the evidence for any mistake of fact or change in conditions, but the exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will render justice under the Act. *Stevens Shipbuilding Co. v. Kinlaw*, No. 99-1954, 2000 WL 1804524 (4th Cir. Dec. 8, 2000), *affirming Kinlaw v. Stevens Shipping and Terminal Co.*, 30 BRBS 68 (1999). On remand, the administrative law judge must make specific findings in this regard.[6]

Employer contends that its due process rights were infringed upon by the Director's delay in processing the claims. Employer asserts that because it took over five years for the district director to transfer the claim for hearing, claimant was ultimately able to avail herself of a change in law, namely the issuance of *Shuff* which, employer asserts, eased claimant's burden in proving her entitlement to survivor's benefits. Employer further argues that the prejudice it suffered is that employer must defend a claim that is almost twenty years old, the evidence is limited, and employer cannot obtain additional proof although the administrative law judge has determined that the proof available to employer is not persuasive. Employer also specifically asserts that the mere fact that this case has been pending for several years has prejudiced employer's case. In this regard, employer argues that, "The claimant's persistence, the length of the claim and the possibility of overpayment proceedings if claimant lost again contributed to this award, even if Judge Sutton did not say so explicitly."

[6]Employer's suggestion that claimant's request for modification should not have been entertained by the administrative law judge because the need for finality in this case was greater is unavailing. It is within the discretion of the administrative law judge whether or not to grant modification. 20 C.F.R. §725.310; *Stevens Shipbuilding Co. v. Kinlaw*, No. 99-1954, 2000 WL 1804524 (4th Cir. Dec. 8, 2000), *affirming Kinlaw v. Stevens Shipping and Terminal Co.*, 30 BRBS 68 (1999).

Employer's Brief at 20. Employer continues that the administrative law judge showed "a concern" about overpayment proceedings by footnoting the issue, and asserts that the administrative law judge's award of benefits is the "cumulation of the bending or ignoring the rules in favor of the claimant and must not be countenanced." *Id*. at 21. Employer argues, therefore, that the procedural facts precluded it from mounting a meaningful defense, and requires its dismissal under *Lockhart*. Employer thus assigns error to the administrative law judge's determination that employer's right to defend against the claim was not infringed upon inasmuch as employer was timely notified of the claim and was able to mount a defense.

Employer's contentions lack merit. In *Lockhart*, the court held that a district director's inexcusable delay of seventeen years in providing notice of a claim to the employer did not afford the employer a reasonable time to appear and interpose a meaningful defense, and therefore, employer's right to due process was violated. *See Lockhart, supra*. In the instant case, the record supports the administrative law judge's determination that employer was duly notified of the claim and was afforded the opportunity to defend against it. The administrative law judge specifically distinguished *Lockhart* and found that employer "has in no manner been deprived of an opportunity to develop evidence or to fully defend against the claims at all stages of the administrative proceedings including the current modification proceeding. [*Compare Lane Hollow Coal Co. v. Director, OWCP,* [*Lockhart*] 137 F.3d 799, 807, 21 BLR 2-302, 318](notice of the claim was received too late to provide a fair opportunity to mount a meaningful defense)." Decision and Order at 17. Employer's assertions about how the district director's delay in forwarding the case for hearing or about how the protracted procedural history in this case prejudiced its case while benefitting claimant's case, do not change the fact, as properly determined by the administrative law judge, that employer has not been deprived of a fair opportunity to mount a meaningful defense. *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

Employer's assertion that the administrative law judge's award of survivor's benefits in the instant case was based, in part, on the administrative law judge's "concern" that claimant would otherwise face overpayment proceedings is similarly without merit. The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence inasmuch as this is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107, 108 (1992). A review of the record reveals no evidence of bias on the administrative law judge's part and the fact that the administrative law judge noted that claimant had previously been notified of a potential overpayment under the Act does not amount to evidence of his partiality. Inasmuch as employer raises no argument of merit challenging the administrative law judge's denial of employer's motion that it be dismissed as a party to the claim, we affirm the administrative law judge's denial of employer's motion.

Employer further contends, on the merits of the claim, that the administrative law judge's analysis of the evidence at Section 718.205(b)(2000) is irrational and unsupported by the record. The evidence of record relevant to the cause of the miner's death consists of the following: Pathologist Dr. Sugg performed the autopsy, with Dr. Sturgill as the consulting pathologist. These doctors diagnosed myelocytic leukemia involving bone marrow, spleen and liver. Simple coal workers' pneumoconiosis was listed as an accessory diagnosis. On gross examination, Dr. Sugg noted, "There is marked anthracosis of each lung." The autopsy further indicated under "Final Note":

> The autopsy was limited to sampling of organs, and there was gross and microscopic evidence of infiltration of liver, spleen, and bone marrow. Bone marrow examination revealed widespread necrosis of the leukemia. Of interest was the finding of marked anthracosis and focal fibrosis, consistent with Simple Coal Workers' Pneumoconiosis.

Director's Exhibit 10 at 6. In a letter dated September 23, 1988, Dr. Sugg opined that the miner's death was "due entirely to myelocytic leukemia with its resultant complications of bleeding and sepsis (bacterial infection of the blood stream.) I do not believe that the presence of mild Coal Worker's (sic) Pneumoconiosis contributed to his death in any way." Director's Exhibit 27. By letter dated September 16, 1988, Dr. Sturgill opined that the miner, "had a mild degree of simple coal workers' pneumoconiosis but his main problem was leukemia. It is my opinion that the extent and severity of the decedent's coal workers' pneumoconiosis would not have contributed in any significant way to his death." Director's Exhibit 26.

Drs. Laquer, Naeye and Ahmed reviewed the autopsy slides as well as other evidence. Dr. Laquer indicated that he confirmed the findings arrived at by Drs. Sugg and Sturgill on autopsy. He also found:

> My examination of the lungs indicates numerous very small nodules of simple pneumoconiosis composed of dust laden macrophages and reticulin mostly in the vicinity of terminal bronchi but also in the vicinity of small vessels. There is diffused emphysema of the lung tissue, some interstitial fibrosis and very mild diffused dust distribution. These findings indicate the presence of coal workers' pneumoconiosis in a very mild, simple form which certainly would have no bearing on the outcome of the case in question. There is no relation with hematological disease and the findings related to the deceased (sic) occupation.

Director's Exhibit 25.

In his 1987 opinion, Dr. Naeye found the presence of mild, simple coal workers' pneumoconiosis and opined:

> Assuming that the lung sections I have received for review are representative of the lungs as a whole the pneumoconiosis is too mild to have caused any impairment in lung function that would have prevented this man from doing any job in the coal mining industry. The pneumoconiosis is also too mild to have contributed in any way to his death. Death was apparently due to myelocytic leukemia. Occupational exposure to coal and coal mine dust does not predispose to the development of myelocytic leukemia.

Director's Exhibit 23.

In his 1988 report, Dr. Ahmed found that the miner's leukemia was the precipitating cause of his death, and opined that his occupational pneumoconiosis was severe enough to have been a contributing factor in his demise. Director's Exhibit 22.

The above described evidence was considered by Judge Glennon. Additional evidence was generated in connection with claimant's subsequent request for modification. The administrative law judge noted:

> Clearly, as claimant points out, none of these opinions that were in the record before Judge Glennon considered the critical question of whether Mr. Fink's pneumoconiosis served to hasten his death in any way. This omission is not at all surprising as the "hastening" standard was first articulated by the Third Circuit in 1989, after all of these reports were prepared. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, [13 BLR 2-100] (3d Cir. 1989). However, the newly-submitted medical opinions all address the correct standard.

Decision and Order at 21-22. These newly-submitted medical opinions to which the administrative law judge refers consist of the following:

In a 1997 reviewing opinion, Dr. Naeye found that the miner's coal workers' pneumoconiosis was "far too mild to have produced any disability or hastened this man's death which was due to a chronic myelinogenous leukemia that evolved into a blast crisis." Director's Exhibit 87. Dr. Naeye testified on deposition that the miner's pulmonary or respiratory condition did not contribute in any way to his death. Employer's Exhibit 2 at 14-15.

In a 1999 reviewing opinion, Dr. Kleinerman opined that the amount of simple coal workers' pneumoconiosis present in the miner's lung was very small and could not cause

respiratory impairment of sufficient severity to have contributed to death. He added that the extent of the miner's coal workers' pneumoconiosis could not cause or contribute to respiratory impairment and was not a contributing factor in the miner's death. Employer's Exhibit 1.

Dr. Jones also reviewed the autopsy slides, as well as other evidence. He found that the miner's coal workers' pneumoconiosis and its associated chronic obstructive lung disease significantly weakened the miner's pulmonary capacity and reserve and,

> decreased his ability to with stand (sic) the complications of chronic myelogenic leukemia. The autopsy diagnosis clearly indicates that the presence of black lung disease hastened the death and was a substantially contributing factor to the respiratory failure (noted as Cardio*pulmonary* Arrest on death certificate) which ultimately led to Mr. Fink's demise. [footnote omitted]. If the patient had not suffered from black lung disease, to a reasonable degree of medical certainty, he would have been better able to survive the hypoxia that resulted from bleeding and sepsis and have sufficient pulmonary reserve to sustain life. Mr. Fink's physical performance indicates that he had significant respiratory problems. The findings indicate that there was sufficient respiratory impairment to make coal workers' pneumoconiosis a significant aggravating and hastening factor related to his death.

Claimant's Exhibit 1.

In considering the conflicting later reviewing opinions of Drs. Naeye, Kleinerman and Jones,[7] the administrative law judge found that Dr. Jones' opinion was better reasoned and

[7]The administrative law judge also indicated that claimant conceded "that the evidence establishes that the precipitating cause of Mr. Fink's death was a blast crisis that arose as a result of his leukemia." Decision and Order at 20. He found that there was, therefore, no argument that the miner died due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(1) or (b)(2). The administrative law judge also referred to the fact that the presumptions provided at 20 C.F.R. §§718.303 and 718.305 are inapplicable in the instant claim filed after January 1, 1982. *See* 20 C.F.R. §718.205(b)(3), (b)(4)(2000).

better supported by the most reliable and objective evidence of record. Specifically, the administrative law judge found:

> In this regard, I note that Dr. Sugg, the autopsy prosector, found "marked" anthracosis and focal fibrosis present in Mr. Fink's lungs, and he described this finding as being "[o]f interest." DX 10 at 5. Dr. Sugg's autopsy finding of marked anthracosis and focal fibrosis is substantially at odds with the assessment of Drs. Naeye and Kleinerman that the degree of pneumoconiosis was minimal, and it is appropriate to give greater weight on such questions to the autopsy prosector over pathologists who have only reviewed autopsy slides. [citations omitted] Giving greater weight to the findings of the autopsy prosector is particularly appropriate in this case where the reviewing pathologists only examined a very limited number (four) of autopsy slides.
>
> Thus, I conclude that Drs. Naeye and Kleinerman underestimated the extent and severity of Mr. Fink's pneumoconiosis, and I consequently accord diminished weight to their opinions on the relationship between pneumoconiosis and the cause of Mr. Fink's death. I also find that the persuasiveness of Dr. Kleinerman's opinion is eroded by his mistaken belief that the 1975 chest x-ray was classified as 0/1 which is below the regulatory threshold for radiographic evidence of pneumoconiosis. Since I find that Dr. Jones's [sic] opinion is well-reasoned and that it best comports with the objective autopsy findings, I find that a preponderance of the credible and probative evidence of record, when considered in its entirety, establishes that pneumoconiosis hastened and, therefore, significantly aggravated Mr. Fink's death. In making this finding, I have specifically considered the 1988 opinions which Drs. Sugg and Sturgill provided to Sterling Smokeless. Although both pathologists stated that they did not believe that pneumoconiosis contributed to Mr. Fink's death, there is no explanation as to how they arrived at their beliefs and, more importantly, there is no indication that they considered the appropriate question of whether pneumoconiosis hastened death in any way. Accordingly, I find that their 1988 opinions do not outweigh or even contradict the opinion rendered by Dr. Jones.

Decision and Order at 22-23. The administrative law judge thus concluded that claimant had met her burden to establish that pneumoconiosis was a substantially contributing cause of the miner's death.

Employer argues, (1) it was improper for the administrative law judge to rely on Dr. Sugg's finding of "marked" anthracosis on autopsy as supporting Dr. Jones's conclusion that the miner's simple pneumoconiosis was severe enough to have hastened his death, while

rejecting Dr. Sugg's ultimate conclusion that the miner's pneumoconiosis did not contribute to his death, because Dr. Sugg did not address whether the miner's pneumoconiosis hastened death; (2) the administrative law judge substituted his opinion for that of the medical experts in concluding that Dr. Sugg's finding of "marked" anthracosis on gross examination indicated severe pneumoconiosis, inasmuch as Dr. Sugg explicitly found otherwise, namely that the miner's simple coal workers' pneumoconiosis was "mild;" and (3) the administrative law judge discredited the reports of Drs. Naeye and Kleinerman because they only reviewed four tissue slides, while he credited Dr. Jones' report which was similarly based on four slides. Employer thus argues that the administrative law judge acted inconsistently in weighing the evidence. Employer also advances several reasons in support of its position that Dr. Jones' opinion is not credible. In response, claimant argues that employer waived arguments on the merits by not raising them before the administrative law judge. In reply to claimant's contention, employer asserts that it is alleging legal errors in the administrative law judge's decision, and the appeal herein is the first opportunity employer has had to raise those issues.

Employer's arguments regarding the administrative law judge's analysis and weighing of the evidence relevant to the cause of the miner's death have merit.[8] Insofar as the administrative law judge found that Dr. Sugg's finding of "marked" anthracosis on gross examination was supportive of Dr. Jones' opinion that the miner's pneumoconiosis hastened his death and was a substantial contributing cause thereto, he erred. The record shows that Dr. Sugg unequivocally found that the miner's pneumoconiosis was "mild" and that its presence did not contribute to the miner's death in any way. Director's Exhibit 27. The fact that Dr. Sugg indicated, in the "Final Note" section of the autopsy report, "Of interest was the finding of marked anthracosis and focal fibrosis, consistent with Simple Coal Workers' Pneumoconiosis," Director's Exhibit 10, apparently had no practical effect on the pathologist's ultimate conclusion, and the administrative law judge's suggestion otherwise is not supported by any medical evidence. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

[8]Contrary to claimant's assertion, employer duly raised the issue of death due to pneumoconiosis while the case was pending before the administrative law judge. Hearing Transcript at 44-46; Director's Exhibit 93.

Similarly, the administrative law judge erred when he concluded, "Dr. Sugg's autopsy finding of marked anthracosis and focal fibrosis is substantially at odds with the assessment of Drs. Naeye and Kleinerman that the degree of pneumoconiosis was minimal, and it is appropriate to give greater weight on such questions to the autopsy prosector over pathologists who have only reviewed autopsy slides." Decision and Order at 22. Inasmuch as Dr. Sugg, the autopsy prosector, with Dr. Sturgill as the consulting pathologist, and Drs. Naeye and Kleinerman each diagnosed simple pneumoconiosis which each physician opined did not contribute to the miner's death, Director's Exhibits 10, 26, 27; Employer's Exhibits 1, 2, their respective findings are not "at odds" as determined by the administrative law judge.[9] Furthermore, the administrative law judge's according of greater weight to Dr. Sugg's opinion, based on his status as the autopsy prosector, as supporting the administrative law judge's award of survivor's benefits is irrational, given Dr. Sugg's pertinent findings. *See* discussion, *supra*. Moreover, as employer correctly argues, it was inconsistent for the administrative law judge to accord less weight generally to the reviewing pathologists' reports because they "only examined a very limited number (four) of autopsy slides," Decision and Order at 22, while not recognizing that Dr. Jones, similarly a reviewing pathologist to whose opinion the administrative law judge accorded determinative weight, reviewed four autopsy slides, Claimant's Exhibit 1.

[9]The administrative law judge also accorded less weight to Dr. Kleinerman's opinion because he mistakenly believed "that the [January 24,]1975 chest x-ray was classified as 0/1 which is below the regulatory threshold for radiographic evidence of pneumoconiosis." Decision and Order at 23. The administrative law judge had noted that the x-ray was actually read as 1/1 q positive for pneumoconiosis. Decision and Order at 14 n.13. Inasmuch as Dr. Kleinerman apparently found the existence of simple coal workers' pneumoconiosis based on the autopsy evidence, as did the administrative law judge, this flaw in Dr. Kleinerman's report and the administrative law judge's discrediting of the report on this basis, is not germane to the issues *sub judice*.

Based on the foregoing errors by the administrative law judge, as raised by employer, we vacate the administrative law judge's finding at Section 718.205(b)(2000) and remand the case for further consideration of the relevant evidence. On remand, the administrative law judge must determine whether claimant has met her burden to establish death due to pneumoconiosis pursuant to Section 718.205(b)(5); specifically, claimant must establish that the miner's cause of death is significantly related to or aggravated by pneumoconiosis. 20 C.F.R. §718.205(b)(5).

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration not inconsistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge