

BRB No. 02-0400-BLA

FAYE B. VANCE)
(Widow of JOSEPH VANCE))
)
 Claimant-Petitioner)
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 v.) DATE ISSUED:
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 APACHE COAL COMPANY)
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 Employer-Respondent)
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 and)
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)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
)
 Party-in-Interest) DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Faye B. Vance, Mavisdale, Virginia, *pro se*.

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

Jeffrey S. Goldberg (Eugene Scalia, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, without the assistance of legal counsel, appeals the Decision and Order Denying Benefits (00-BLA-00086) of Administrative Law Judge Edward Terhune Miller denying benefits on a request for modification 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). Claimant's initial claim was filed on December 27, 1993. Director's Exhibit 1. Administrative Law Judge Nicodemo De Gregorio credited the miner with more than twenty years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). However, the administrative law judge found the evidence did not establish the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits. The Board affirmed the administrative law judge's decision. *Vance v. Apache Coal Company*, BRB No. 96-0977 BLA (Apr. 25, 1997); Director's Exhibit 62. The United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. *Vance v. Apache Coal Company*, 155 F.3d 564 (1998); Director's Exhibit 65.

In 1999, claimant filed a timely request for modification. Director's Exhibit 66. She did not submit any additional evidence or identify any mistake of fact; she generally asserted disagreement with the previous denial of benefits. Employer submitted two additional pieces of evidence, and the parties agreed that the case should be decided on the record. On January 30, 2002, the administrative law judge issued a decision and order denying benefits. The administrative law judge found no mistake in fact in Administrative Law Judge De Gregorio's determination that claimant had failed to establish the miner's death was due to pneumoconiosis within the meaning of Section 718.205(c). Accordingly, the administrative law judge denied benefits. Claimant has appealed that decision to the Board, asserting generally that she disagrees with the denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order is supported by substantial evidence. See *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board's scope of review is defined by statute. We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C.

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The miner had previously filed a claim for benefits, which was denied by administrative law judge Rosenzweig in 1991. Director's Exhibit 70-55. That denial was affirmed on appeal by this Board. *Vance v. Apache Coal Company*, 92-0260 BLA (1993). Director's Exhibit 70-62.

§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).

To establish entitlement to survivor’s benefits, claimant must establish that the miner had pneumoconiosis, the miner’s pneumoconiosis arose out of coal mine employment, and the miner’s death was due to pneumoconiosis. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-8 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor’s claims filed on or after January 1, 1982, the miner’s death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner’s death, was a substantially contributing cause or factor leading to the miner’s death, death was caused by complications of pneumoconiosis or the presumption relating to complicated pneumoconiosis set forth at Section 718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner’s death. 20 C.F.R. §718.205(c)(5); *Shuff v. Ceder Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Pursuant to Section 725.310 (2000), claimant may, within a year of a final order, request modification of the order. Modification may be granted if there are changed circumstances or if there was a mistake in a determination of fact in the earlier decision. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In a survivor’s claim, only a mistake in fact can provide a basis for modification. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1980). It is claimant’s burden to establish a mistake in fact. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

After consideration of the administrative law judge’s Decision and Order, claimant’s appeal, and the record evidence, we conclude the Decision and Order is supported by substantial evidence and contains no reversible error. Substantial evidence supports the administrative law judge’s finding that there was no mistake in fact in the previous determination that the miner’s death was not due to pneumoconiosis. Specifically, substantial evidence supports the administrative law judge’s finding that significant, unexplained, inconsistencies between the prosector’s autopsy report and another report, he issued one year later undermined the credibility of the latter report. *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff’d* 865 F.2d 916 (7th Cir. 1989); *Hopton v. United States Steel Corp.*, 7 BLR 1012 (1984). Similarly, the administrative law judge’s finding that Dr. Cowan’s opinion was unreasoned because it did not express an opinion, but simply relied on the prosector’s discredited opinion, is supported by substantial evidence. See *Minton v. Director, OWCP*, 6 BLR 1-670 (1983) (adjudicator may reject medical opinion as unreasoned for lack of adequate documentation). We also find no error in the administrative law judge’s determination that Dr. Kahn’s opinion was equivocal, and was not reasoned or based on the objective medical evidence. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988) (equivocal opinion may be discredited);

Kendrick v. Kentland-Elkhorn Coal Corp., 5 BLR 1-730 (1983) (administrative law judge may give less weight to medical report that is brief, conclusory, and devoid of supporting evidence). Substantial evidence supports the administrative law judge's finding that the opinions of those three physicians were outweighed by the reasoned, contrary opinions of several board-certified pathologists and board-certified pulmonary specialists. See *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985) (administrative law judge may credit reports that are determined to be better supported).

Consequently, we affirm the administrative law judge's finding that claimant failed to prove a mistake in fact in the prior decision with regard to whether the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). 20 C.F.R. §718.310; see *Wojtowicz, supra*; *Greenwich Collieries, supra*.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge