BRB No. 03-0644 BLA

CLARA GEHRIG (Widow of CAROL GEHRIG) Claimant-Petitioner v. ZEIGLER COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/29/2004 DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Clara Gehrig, Long Beach, Mississippi, *pro se*.

Mary Rich Maloy (Jackson Kelly PLLC) Charleston, West Virginia, for employer.

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

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

PER CURIAM:

Claimant,[1] representing herself, appeals the Decision and Order (02-BLA-0377 and 02-BLA-5274) of Administrative Law Judge Larry W. Price 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).[2] This case involves both a miner's request for modification of a 1998 duplicate claim and a 2001 survivor's claim.

The miner filed a duplicate claim on June 5, 1998.[3] By Decision and Order dated August 25, 2000, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Director's Exhibit 62. The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* The administrative law judge further found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* Consequently, the administrative law judge found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, the administrative law judge denied benefits. *Id.*

[1] Claimant is the surviving spouse of the deceased miner who died on May 1, 2001. Director's Exhibit 73.

[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 miner filed an earlier claim. The administrative law judge, however, noted that the file regarding the miner's first claim had been lost and was unavailable. Director's Exhibit 62. The administrative law judge further noted that the district director, in a Proposed Decision and Order dated April 16, 1999, indicated that the miner's earlier claim had been finally denied on August 2, 1982. *See* Director's Exhibit 26. In that proposed decision, the district director stated that the miner's prior claim was denied because none of the entitlement criteria had been met. *Id.*

The miner died on May 1, 2001. Director's Exhibit 73. On May 2, 2001, the miner's counsel filed a request for modification of the denied miner's claim. Claimant filed a survivor's claim on May 25, 2001.[4] Director's Exhibit 70.

In regard to the request for modification in the miner's claim, the administrative law judge found that the evidence was insufficient to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied the request for modification in that claim. The administrative law judge further found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also denied benefits in the survivor's claim. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to claimant's *pro se* appeal. Assuming that the administrative law judge's evaluation of the evidence on the existence of pneumoconiosis with respect to the miner's claim was correct, the Director asserts that any error committed by the administrative law judge in his evaluation of the survivor's claim is harmless.

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).

Modification may be based upon a finding of a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[5] 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); *see also Old Ben Coal Co. v. Director, OWCP* [*Hilliard*],

[4] In a Proposed Decision and Order dated March 20, 2002, the district director noted that because claimant filed her survivor's claim within one year of the denial of the miner's claim, the survivor's claim was also deemed to be a request for modification of the miner's claim pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 66.

[5]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001, and thus do not apply to this case.

292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has recognized that once a request for modification is filed, no matter the grounds stated, if any, the fact-finder has the authority, if not the duty, to reconsider all of the evidence for any mistake of fact or change in conditions. *Id.*

In this case, the administrative law judge stated:

> Claimant has not alleged that any mistake of fact is present in my previous decision and order. I have reviewed the decision and all of the evidence which was before me for consideration. I found no mistake in a determination of fact in the prior decision and order denying benefits.

2003 Decision and Order at 13.

Because claimant is representing herself on appeal, we will address whether the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) is based upon substantial evidence.

In his initial Decision and Order dated August 25, 2000, the administrative law judge found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Director's Exhibit 62. The previously submitted x-ray evidence includes numerous interpretations that are considered positive for pneumoconiosis under the ILO-U/C classification system. However, because these physicians also included comments on their x-ray reports that indicated that the changes were not coal workers' pneumoconiosis, the administrative law judge treated these x-ray interpretations as negative in his weighing of the x-ray evidence under 20 C.F.R. §718.202(a)(1) (2000). *See* Director's Exhibit 62.

In *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999), the Board held that comments of "no coal workers' pneumoconiosis" made by a physician who has read an x-ray as positive for pneumoconiosis under the ILO-U/C classification system should be considered at 20 C.F.R. §718.203, not Section 718.202(a)(1). In this case, Drs. Sargent, Perme, Shipley, Spitz and Meyer rendered positive interpretations of the miner's December 1, 1998 x-ray.[6] Director's Exhibits 16, 23, 29. Although each included

[6] Dr. Wiot rendered a negative interpretation of the miner's December 1, 1998 x-ray. Director's Exhibit 24.

comments regarding the source of the pneumoconiosis,[7] these findings do not undermine the credibility of their respective ILO classifications.

Drs. Perme and Meyer also rendered positive interpretations of the miner's March 18, 1999 x-ray.[8] Director's Exhibits 25, 31, 32, 59. Although each included comments regarding the source of the pneumoconiosis,[9] these findings also do not undermine the credibility of their ILO classifications.

Moreover, the administrative law judge erred in considering the CT scan evidence at 20 C.F.R. §718.202(a)(1). CT scans are not to be considered at Section 718.202(a)(1), but must be evaluated under Section 718.202(a)(4), together with any evidence or testimony which bears on the reliability and utility of CT scans. *See generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en* banc). In light of the above-referenced errors, we hold that the administrative law judge, in his previous 2000 Decision and Order, erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000).[10]

[7] Dr. Sargent noted that the small irregular opacities were "not CWP." Director's Exhibit 16. Dr. Perme commented that there was "no radiographic evidence of coal worker's pneumoconiosis." Director's Exhibit 23. Dr. Shipley noted that there were "no findings consistent with coal worker's pneumoconiosis." Director's Exhibit 29. Dr. Spitz commented that the findings were "not typical of coal worker's pneumoconiosis." *Id.* Dr. Meyer indicated that the findings were "not a radiographic manifestation of coal worker's pneumoconiosis." Director's Exhibit 31.

[8] Drs. Spitz, Wiot, Shipley and Fino rendered negative interpretations of the miner's March 18, 1999 x-ray. Director's Exhibits 31, 33, 49.

[9] Dr. Perme commented that there was "no evidence of coal workers' pneumoconiosis." Director's Exhibit 31. Dr. Meyer noted that the findings were "not those of coal worker's pneumoconiosis." Director's Exhibit 32.

[10] Upon review of the administrative law judge's initial 2000 Decision and Order, we find no error in regard to the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) (2000).

We now turn our attention to the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c) (2000) [11] that were rendered in his initial 2000 Decision and Order. We find no error in regard to the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000).

In his previous consideration of whether the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), the administrative law judge found, *inter alia*¸ that Drs. Fino and Tuteur opined that the miner did not suffer from a totally disabling pulmonary or respiratory impairment. Director's Exhibit 62. Contrary to the administrative law judge's characterization, Dr. Fino did not opine that the miner did not have a totally disabling respiratory or pulmonary impairment.[12] Dr. Fino only opined that the miner did not have any disability "related to coal mine dust inhalation." Director's Exhibit 49.

The administrative law judge also erred in finding that Dr. Tuteur opined that the miner did not have a totally disabling respiratory or pulmonary impairment. Although Dr. Tuteur opined that none of the miner's disability was related to, caused by, or significantly aggravated by his exposure to coal mine dust, *see* Director's Exhibit 54 at 30, the etiology of the miner's respiratory disability is not relevant at 20 C.F.R. §718.204(c) (2000). Because Dr. Tuteur opined that the miner suffered from a disabling pulmonary or respiratory impairment, see Director's Exhibit 54 at 29-30, his opinion supports a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). *See* 20 C.F.R. §718.204(b)(2)(iv).

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[11] 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).

[12] In a report dated May 5, 2000, Dr. Fino opined that:

> I do not find coal workers' pneumoconiosis to be present. I do think [the miner] has a mild interstitial pulmonary fibrosis, which is idiopathic in nature, and shows no relationship to coal mine dust inhalation. I believe that he does have significant heart disease, which has caused congestive heart failure. I believe that there is no disability related to coal mine dust inhalation.

Director's Exhibit 49.

Thus, upon review of the administrative law judge's previous 2000 Decision and Order, we hold that the administrative law judge erred in his consideration of the evidence pursuant to 20 C.F.R. §§718.202(a)(1) (2000) and 718.204(c)(4) (2000). Consequently, we vacate the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and remand the case to the administrative law judge for further consideration.

Modification may also be based upon a change in conditions. The Board has held that in considering whether a claimant has established a change in conditions pursuant to 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). In the prior decision, the administrative law judge, based upon his review of all of the evidence in the record, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Director's Exhibit 62. The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b).

The record contains newly submitted x-ray evidence. Dr. Segarra submitted an "X-ray and CT Review" dated December 3, 2000. Dr. Segarra initially reviewed an x-ray taken on January 20, 1999. Director's Exhibit 63. Dr. Segarra interpreted the x-ray as having a profusion of 2/2.[13] *Id.*

[13] Dr. Segarra also reviewed a series of films from October 15, 1999 to October 20, 1999. Director's Exhibit 63. Dr. Segarra noted that these films revealed "an element of pulmonary edema and congestive heart failure superimposed upon the chronic interstitial lung disease." *Id.* Dr. Segarra also interpreted a CT scan taken on October 15, 2000 as revealing, *inter alia*, "extensive interstitial fibrosis with elements of emphysema throughout all lung zones." *Id.*

Dr. Segarra further stated that:

> This is a complicated chest x-ray and chest CT, with elements of mixed-dust pneumoconiosis (Coal Worker's Pneumoconiosis/Black Lung, and silicosis), congestive heart failure and emphysema/chronic obstructive pulmonary disease (COPD). There may also be a component of asbestosis,

In his 2003 Decision and Order, the administrative law judge stated:

> I note….that Dr. Segarra's opinion itself gives little evidence to support his conclusion that the miner's x-rays were positive for coal workers' pneumoconiosis. Dr. Segarra notes in his report that there were no parenchymal infiltrates, nodules or masses present and there is only a small amount of pleural thickening. His most significant chest x-ray findings all related to the miner's congestive heart failure condition. Finally, the diagnosis of mixed-dust pneumoconiosis, coupled with Dr. Segarra's comment that the miner did not appear to have a simple case of pneumoconiosis, is vague and confusing. In addition, several other B readers who had previously reviewed other chest x-rays taken over the course of 1999 in connection with the previous claim all found that the x-rays were negative for coal workers' pneumoconiosis. Although I accord somewhat less weight to Dr. Tuteur and Dr. Repsher, as noted above, the fact that both men, one of whom is a certified B reader and both of whom are pulmonary specialists, found no radiographic evidence of pneumoconiosis, coupled with the numerous negative chest x-ray interpretations taken during the same period of time as the supposedly positive, albeit vague, x-rays read by Dr. Segarra, indicates to me that the films taken by Dr. Segarra were also negative for pneumoconiosis.

2003 Decision and Order at 14-15.

The administrative law judge erred in his consideration of Dr. Segarra's positive interpretation of the miner's January 20, 1999 x-ray. Dr. Segarra interpreted the miner's January 20, 1999 x-ray as having a profusion of 2/2, a finding considered positive for the existence of pneumoconiosis. *See* 20 C.F.R. §718.102(b). The fact that Dr. Segarra indicated that there were "no parenchymal infiltrates, nodules or masses present" does

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> although the enclosed history does not specify previous exposure to asbestos-containing substances. Further clinical correlation is suggested. This does <u>not</u> appear to be a simple case of Coal Worker's Pneumoconiosis/Black Lung.

Director's Exhibit 63.

Dr. Segarra, diagnosed: (1) Mixed-dust pneumoconiosis (Coal Worker's Pneumoconiosis/Black Lung and silicosis); (2) Pulmonary emphysema/chronic obstructive pulmonary disease (COPD); (3) Chronic congestive heart failure; and (4) Probable asbestos-related lung disease. Director's Exhibit 63.

not undermine his finding that there were opacities present sufficient to justify a profusion of 2/2. The administrative law judge also failed to explain what was "vague and confusing" regarding Dr. Segarra's comment that the miner did not appear to have a simple case of pneumoconiosis. Moreover, because neither Dr. Tuteur nor Dr. Repsher interpreted the miner's January 20, 1999 x-ray, the administrative law judge failed to explain how their comments undermined Dr. Segarra's positive interpretation of the miner's January 20, 1999 x-ray. The administrative law judge also erred in relying upon the fact that all of the x-ray interpretations that he previous considered were negative for pneumoconiosis. As discussed *supra*, the record contains numerous x-ray interpretations that are positive for pneumoconiosis. Consequently, we vacate the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

The record also contains newly submitted autopsy evidence. The administrative law judge noted that three pathologists, Drs. Tucker, Kahn and Naeye, reviewed the miner's autopsy slides. While Drs. Tucker and Kahn found that the miner suffered from pneumoconiosis, Dr. Naeye opined that the miner did not suffer from the disease. The administrative law judge credited Dr. Naeye's opinion that the miner did not suffer from pneumoconiosis over the contrary opinions of Drs. Tucker and Kahn based upon Dr. Naeye's "credentials and upon the fact that [Dr. Naeye] examined numerous lung tissue slides and analyzed them in great detail before making his conclusions." 2003 Decision and Order at 17.

The administrative law judge, in summarizing the autopsy evidence, noted that Dr. Naeye is a board-certified pathologist who served on a committee that published the official standards of coal workers' pneumoconiosis in 1979. 2003 Decision and Order at 17. Based upon his qualifications, the administrative law judge found that Dr. Naeye's opinion was entitled to additional probative weight. *Id.* The administrative law judge, however, in summarizing the autopsy evidence, also found that Dr. Tucker's opinion was well reasoned and well documented. *Id.* at 16. The administrative law judge found that Dr. Tucker's opinion "was entitled to probative weight enhanced by his status as the autopsy prosector." *Id.* The administrative law judge found that Dr. Kahn did not possess "any credentials which would entitle his opinion to additional probative weight." *Id.*

The administrative law judge failed to indicate any awareness of the fact that Drs. Tucker and Kahn, like Dr. Naeye, are Board-certified in Anatomic and Clinical Pathology. *See* Director's Exhibits 75, 76. Moreover, although the administrative law judge permissibly considered the fact that Dr. Naeye, in addition to being a Board-certified pathologist, served on a 1979 committee that published the official standards for diagnosing pneumoconiosis, *see generally Worach v. Director, OWCP*, 17 BLR 1-105 (1993), the administrative law judge failed to explain why this factor was more

significant than Dr. Tucker's status as the autopsy prosector, a factor that the administrative law judge acknowledged entitled Dr. Tucker's opinion to "enhanced" weight.[14] In light of these errors, we vacate the administrative law judge's finding that the autopsy evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2).

The administrative law judge properly found that the miner was not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).[15] 2003 Decision and Order at 17-18.

In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge credited the opinions of Drs. Tuteur and Repsher that the miner did not suffer from pneumoconiosis, Employer's Exhibits 1-4, over Dr. Pakron's contrary opinion. 2003 Decision and Order at 19-20; Claimant's Exhibit 1. The administrative law judge acted within his discretion in finding that Dr. Pakron's diagnosis of pneumoconiosis 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). The administrative law judge also found that the opinions of Drs. Tuteur and Repsher that the miner did not suffer from pneumoconiosis were well reasoned and well documented. 2003 Decision and Order at 19. The administrative law judge further noted that both Drs. Tuteur and Repsher based their opinions on a review of all of the evidence of record.[16] *Id.* Since it is based upon substantial evidence, we affirm

[14] The administrative law judge also failed to adequately consider whether Drs. Tucker and Kahn possessed any additional qualifications which would entitle their opinions to additional weight. For example, the record reflects that Dr. Tucker is a Professor and Vice Chair in the Department of Pathology at the University of South Alabama. Director's Exhibit 75. The record also reflects that Dr. Kahn is a Clinical Associate Professor of Pathology at the West Virginia School of Medicine, as well as a consulting pathologist for the National Institute of Occupational Safety and Health (NIOSH). Director's Exhibit 76.

[15] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because the miner filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, the Section 718.306 presumption only applies to survivor's claims filed prior to June 30, 1982. *See* 20 C.F.R. §718.306.

[16] The administrative law judge also noted that Dr. Repsher previously examined the miner. 2003 Decision and Order at 19.

the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge erroneously found that the record does not contain any newly submitted pulmonary function or arterial blood gas studies. 2003 Decision and Order at 20-21. Although the record contains the results of newly submitted pulmonary function studies, none of these studies is qualifying.[17] Consequently, we affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii).

Although the administrative law judge noted that "one doctor" diagnosed the miner with cor pulmonale, the administrative law judge noted that two pulmonary specialists, Drs. Tuteur and Repsher, testified that the miner did not suffer from cor pulmonale.[18] 2003 Decision and Order at 21. Because the record does not contain any newly submitted evidence supportive of a finding that the miner suffered from cor pulmonale *with* right-sided congestive heart failure as required by *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[17] In his March 7, 2001 report, Dr. Pakron noted that during the miner's hospitalization in October of 2000, the miner "had complete PFT's." Director's Exhibit 63. Dr. Pakron, however, did not provide the results of this study. Dr. Pakron also noted that the miner underwent a pulmonary function study in his office on November 9, 2000. *Id.* Dr. Pakron indicated that the miner's FEV1 result on that date was 1.47, a result considered qualifying under the regulations for the miner's age and height. Dr. Pakron also noted that the miner's "FEC" value was 2.30. To the extent that Dr. Pakron meant to indicate that the miner's "FVC" value was 2.30, the miner's FVC value would also be considered qualifying, thus rendering the miner's November 9, 2000 pulmonary function qualifying. However, because Dr. Pakron did not reference the miner's FVC and MVV values from the November 9, 2000 pulmonary function study, the administrative law judge's failure to address this study is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[18] During a March 3, 2003 deposition, Dr. Tuteur opined that the miner did not have cor pulmonale. Employer's Exhibit 3 at 19. During a March 4, 2003 deposition, Dr. Repsher similarly opined that the miner did not suffer from cor pulmonale. Employer's Exhibit 4 at 27.

In finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited the opinions of Drs. Repsher and Tuteur that the miner was not totally disabled from a respiratory or pulmonary standpoint over Dr. Pakron's contrary opinion.[19] In regard to Dr. Pakron's opinion, the administrative law judge stated:

> Dr. Pakron concluded that the miner was totally disabled from lung disease because the miner suffered from severe hypoxemia. Dr. Pakron cited pulmonary function tests and arterial blood gas studies to support his diagnosis of hypoxemia, but he failed to address any of the miner's other medical difficulties, among them his severe diabetic condition and obesity, any one of which could have been the cause of his total disability. In addition, I find that Dr. Pakron did not exercise reasonable medical judgment to conclude that the miner was totally disabled from a respiratory or pulmonary condition.

2003 Decision and Order at 21.

The administrative law judge erred in discrediting Dr. Pakron's opinion because he "failed to address any of the miner's other medical difficulties, among them his severe diabetic condition and obesity, any one of which could have been the cause of his total disability." 2003 Decision and Order at 21. The cause of a miner's total respiratory or pulmonary disability is not relevant at 20 C.F.R. §718.204(b). The administrative law judge also found that "Dr. Pakron did not exercise reasonable medical judgment to

[19] In his March 7, 2001 report, Dr. Pakron opined that the miner was totally disabled from his lung disease because of severe chronic hypoxemia. Director's Exhibit 63. Dr. Pakron interpreted the miner's November 9, 2000 pulmonary function study as being consistent with obstructive and restrictive dysfunction. *Id.* Dr. Pakron also provided an explanation for his finding of severe hypoxemia. Dr. Pakron explained that:

> On November 9, 2000, [the miner] had a room air saturation of 64 percent. On 3 liters per minute, his oxygen saturation came up to 94 percent. Thus, he had very severe hypoxemia. Even walking, using oxygen at 5 liters per minute, his oxygen saturation still dropped to 84 percent. Records from Gulfport Memorial Hospital from October of 2000 show blood gases on 100 percent oxygen mask with a pH of 7.38, a PCO2 of 32, a PO2 of 68. Again, rather significant hypoxemia for having 100 percent oxygen mask. Echocardiogram did not demonstrate any evidence of left ventricular dysfunction. There was mitral and tricuspid regurgitation however.

Director's Exhibit 63.

conclude that the miner was totally disabled from a respiratory or pulmonary condition." *Id.* However, Dr. Pakron clearly articulated his basis for finding that the miner suffered from severe hypoxemia. Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In his consideration of whether the newly submitted evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis, the administrative law judge stated:

> As discussed thoroughly above, the evidence establishes that the miner does not have pneumoconiosis. Drs. Tuteur, Repsher and Naeye all concluded that the miner was not totally disabled due to pneumoconiosis. Although Dr. Pakron did conclude otherwise, he did not cite any evidence, other than referring to and concurring with Dr. Segarra's findings, that the miner had pneumoconiosis; thus, he did not provide sufficient evidentiary support for his opinion. I find that the miner was not totally disabled due to pneumoconiosis.

2003 Decision and Order at 22.

The administrative law judge erred in discrediting Dr. Pakron's opinion because the evidence was insufficient to establish the existence of pneumoconiosis. As previously discussed, the administrative law judge committed numerous errors in finding the evidence insufficient to establish the existence of pneumoconiosis. Consequently, we also vacate the administrative law judge's finding that the newly submitted evidence is insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and remand the case for further consideration. On remand, should the administrative law judge find the evidence sufficient to establish modification under 20 C.F.R. §725.310 (2000), the administrative law judge must consider all of the evidence of record to determine whether the miner is entitled to benefits on the merits of his 1998 claim. *Nataloni*, *supra*; *Kovac*, *supra*

We now turn our attention to the administrative law judge's consideration of the survivor's claim. The administrative law judge properly noted that the claim was subject to the evidentiary limitations set out at 20 C.F.R. §725.414. *See* 2003 Decision and Order at 23 n.6. After noting the evidentiary limitations imposed by the revised regulations, the administrative law judge stated that:

> I note that the evidence that was admissible in the request for modification, which was adjudicated under the pre-amended regulations, is not necessarily admissible as well in the survivor's claim. Specifically, the opinions of Drs. Tuteur and Repsher, which were based upon a review of all medical data, both newly and previously submitted, are not admissible for the survivor's claim, or at least, the portions of their opinions which are not based on independently admissible evidence must not be considered. The same holds true for the x-ray reading of Dr. Segarra, because he viewed more than two chest x-ray films. The CT scan portion of his reading, however, is admissible. The autopsy reports of Drs. Tucker and Naeye are both admissible, as they were each submitted by opposing parties. Since only one autopsy report may be submitted by each party, the report of Dr. Kahn is not to be considered. Dr. Pakron's medical report is also admissible, but again, any portion of his medical report which is not independently admissible is not to be considered.
>
> While these evidentiary requirements may not change the result in this particular case, I note them in the interest of a thorough consideration of the record in accord with the amended regulations.

2003 Decision and Order at 23 n.6.

The administrative law judge erred in not permitting the parties to designate the evidence that they wished to have considered in the survivor's claim. At the hearing, the administrative law judge failed to acknowledge the evidentiary limitations imposed in regard to the survivor's claim. Thus, we remand the case to the administrative law judge to allow the parties an opportunity to address which evidence to have considered in support of their affirmative cases. *See* 20 C.F.R. §725.414.

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).[20] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish 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); *see Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

We initially hold that the administrative law judge acted within his discretion in discrediting the miner's death certificate because the coroner's determination was not shown to be based upon either an autopsy or upon his personal knowledge of the deceased miner.[21] *See Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Copley v. Olga Coal Co.*, 6 BLR 1-181 (1983); 2003 Decision and Order at 25; Director's Exhibit 73.

However, as Director notes in his response brief, the administrative law judge's finding that claimant failed to establish that the miner's death was due to pneumoconiosis

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[20] 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).

[21] Mr. Gary T. Hargrove, a county coroner, completed the miner's death certificate. Mr. Hargrove listed the miner's immediate cause of death as coronary artery disease. Director's Exhibit 73. Mr. Hargrove listed pneumoconiosis, cor pulmonale and congestive heart failure as other significant conditions contributing to the miner's death. *Id.*

was based upon the fact that the miner did not suffer from pneumoconiosis. Director's Brief at 2. The Director accurately notes that the administrative law judge "did not make an independent cause-of-death finding based on the assumption that [the miner] did have pneumoconiosis." *Id.* In light of the fact that the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis has not been affirmed, we vacate the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration. On remand, should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis, he should address whether the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's 2003 Decision and Order denying modification in the miner's claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion. The administrative law judge=s 2003 Decision and Order denying benefits in the survivor's claim is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge