

BRB No. 99-1181 BLA

KATIE WEEKS)	
(Widow of JAMES WEEKS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DRUMMOND COMPANY,)	DATE ISSUED:
INCORPORATED)	
)	
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 - Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Robert D. Whitfield, Chicago, Illinois, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits (98-BLA-0710 and 98-

¹ Claimant, Katie Weeks, is the widow of James Weeks, the miner, who died on October 31, 1993. Director's Exhibits 28, 29. Having previously filed multiple claims which were all finally denied, the miner filed his most recent application for benefits on March 24, 1991. Director's Exhibit 1. The survivor's claim is not dated, but the Board previously noted that Administrative Law Judge John C. Holmes found the claim to have been filed "apparently on December 7, 1993." Director's Exhibit 57 at 1 n.1, *citing* Director's Exhibit 49 at 1; Director's Exhibit 26. Both claims are presently pending.

BLA-0711) of Administrative Law Judge Gerald M. Tierney on both a miner's and survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The case is before the Board for the third time.² Administrative Law Judge John C. Holmes adjudicated both claims pursuant to 20 C.F.R. Part 718 and found that the miner did not suffer from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), was not totally disabled due to pneumoconiosis prior to his death pursuant to 20 C.F.R. §718.204, and his death was not due to or hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on both claims. Director's Exhibit 49.

Claimant appealed and the Board affirmed Administrative Law Judge Holmes's findings pursuant to 20 C.F.R. §§718.204(b) and 718.205(c), and, consequently, affirmed his finding that entitlement to benefits was precluded on both claims. *Weeks v. Alabama By-Products Corp.*, BRB No. 96-0363 BLA (Apr. 28, 1997)(unpub.); Director's Exhibit 57. Within one year of this decision, claimant filed a petition for modification in accordance with 20 C.F.R. §725.310. Director's Exhibit 62.

Acknowledging that this case involved a request for modification, Administrative Law Judge Gerald M. Tierney (the administrative law judge) found that because claimant failed to establish, by a preponderance of the evidence, that the miner was totally disabled due to pneumoconiosis or that his death was due to or hastened by pneumoconiosis, she failed to demonstrate a mistake in a determination of fact in the previous denial. In addition, the administrative law judge conducted a *de novo* review of the entire record and found that claimant failed to establish either a mistake in fact or a change in conditions pursuant to Section 725.310. Accordingly, the administrative law judge denied benefits on both claims.

² In the initial Decision and Order, Administrative Law Judge Parlen L. McKenna adjudicated the miner's claim pursuant to 20 C.F.R. Part 718 and denied benefits, which was subsequently affirmed by the Board. *Weeks v. Mulga Coal Co.*, BRB No. 87-3105 BLA (Apr. 28, 1989)(unpub.); Director's Exhibit 24.

On appeal, claimant argues that the administrative law judge erroneously failed to find the existence of pneumoconiosis, total respiratory disability, and death due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits on both claims. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating he will not participate in this appeal.³

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 the 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).

³ We affirm the administrative law judge's finding that claimant failed to establish a change in conditions pursuant to Section 725.310 inasmuch as this determination is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3.

Claimant initially contends that the administrative law judge provided no references in the record to support his crediting of the opinions of Drs. Naeye⁴ and Russakoff over that of Dr. Vincent. Claimant additionally argues that Dr. Vincent's opinion was entitled to greater weight because he was the miner's treating physician. Claimant's arguments lack merit. The administrative law judge, within a permissible exercise of discretion, found that the opinions of Drs. Russakoff and Naeye were entitled to greater weight inasmuch as the opinions of these physicians were better reasoned, *see Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985), documented, *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985), and rendered by physicians with demonstrated expertise,⁵ *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998)(experts' respective qualifications are important indicators of reliability of their opinions); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985). Decision and Order at 2; Director's Exhibits 5, 21, 29, 32, 42, 56. Inasmuch as the administrative law judge was not required to automatically accord dispositive weight to Dr. Vincent's opinion, we affirm the administrative law judge's crediting of the opinions of Drs. Russakoff and Naeye. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984).

Claimant asserts that the administrative law judge erroneously found that the Board, in its most recent decision, was unaware of Dr. Vincent's medical opinion dated August 18, 1993 diagnosing chronic obstructive pulmonary disease due to pneumoconiosis based on the fact that the Board specifically held that no physician of record opined that the miner's emphysema and chronic obstructive pulmonary disease were due to pneumoconiosis. Contrary to claimant's argument, however, in the Board's most recent decision the Board held, under Section 718.304, that "...no physician of record opined that the miner's bullous emphysema was tantamount to a diagnosis of *complicated pneumoconiosis*." *Weeks v. Alabama By-Products Corp.*, BRB No. 96-0363 BLA, *slip op.* at 2 (Apr. 28, 1997)(unpub.);

⁴ Citing several articles, claimant additionally argues that Dr. Naeye's opinion, that centrilobular emphysema is unlikely to result from coal mine employment, is contrary to a majority of epidemiological studies. We reject claimant's argument inasmuch as claimant's allegation essentially amounts to a request for the Board to reweigh the evidence, which it is not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988).

⁵ Dr. Russakoff is Board-certified in internal and pulmonary medicine, Dr. Naeye is Board-certified in pathology, Dr. Vincent is Board-eligible in family medicine, and Dr. Avsar's medical qualifications are not contained in the record. Director's Exhibits 5, 29, 32, 56.

Director's Exhibit 57 at 2 [emphasis added]. Furthermore, the administrative law judge examined both of Dr. Vincent's reports⁶ and found that the body of the 1993 report was incorporated into the 1994 report, and that therefore, both reports were considered by the Board and Administrative Law Judge Holmes. Decision and Order at 2-3; Director's Exhibit 49 at 4. We, therefore, reject claimant's contention.

Claimant contends further that the administrative law judge improperly failed to discuss the relationship between the miner's chronic obstructive pulmonary disease and his coal mine employment and cigarette smoking histories. We disagree. It is well established that the administrative law judge may not substitute his expertise for that of a qualified physician, and such a discussion may have contravened this standard. *See Amax Coal Co. v. Director, OWCP [Rehmel]*, 993 F.2d 600, 17 BLR 2-91 (7th Cir. 1993); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986).

⁶ A review of the record reveals two reports completed by Dr. Vincent, the miner's treating physician. In his August 18, 1993 report, Dr. Vincent diagnosed "severe bullous emphysema superimposed on chronic obstructive pulmonary disease due to pneumoconiosis." Director's Exhibits 21, 29. In a report dated November 16, 1994, Dr. Vincent reviewed evidence relevant to the miner's death and diagnosed, *inter alia*, "severe bullous emphysema superimposed on chronic obstructive pulmonary disease," omitting the phrase "due to pneumoconiosis." Director's Exhibit 42.

Claimant argues that the administrative law judge failed to address the qualifying blood gas study administered on May 1, 1991, the conflicting total disability assessments of Drs. Russakoff and Naeye, and the contrary, probative evidence of total disability under Section 718.204(c). Although claimant correctly argues that the administrative law judge failed to determine whether claimant established modification with respect to total respiratory disability under Section 718.204(c), an element previously adjudicated against the miner, *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994)(*en banc*); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), we deem this error harmless inasmuch as the administrative law judge properly found that claimant failed to satisfy her burden, as a matter of law, of demonstrating that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(b). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge properly found that the opinions of Drs. Russakoff and Naeye that pneumoconiosis did not substantially contribute to the miner's total disability⁷ were better reasoned, documented and rendered by physicians with superior expertise. *See Black Diamond Coal Mining Co. v. Director, OWCP [Marcum]*, 95 F.3d 1079, 1083, 20 BLR 2-325, 2-331-332 (11th Cir. 1996), *citing Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990); Decision and Order at 3. We affirm the administrative law judge's Section 718.204(b) determination inasmuch as there is no credible medical opinion of record to establish that pneumoconiosis was a substantially contributing cause of the miner's pulmonary disability,⁸

⁷ In a report dated May 1, 1991, Dr. Russakoff found no evidence of pneumoconiosis and that the miner's total respiratory disability was due to chronic obstructive pulmonary disease caused by cigarette smoking history and genetic disorders that allow large bullae to form. Director's Exhibit 5. On June 17, 1994, Dr. Naeye opined that miner's coal workers' pneumoconiosis was "far too mild to have prevented [him] from doing hard physical labor in the coal mining industry." Director's Exhibit 32. Notwithstanding the conflicting assessments as to whether the miner was totally disabled, neither physician rendered an opinion sufficient to establish total disability due to pneumoconiosis in accordance with the standard pronounced in *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

⁸ In addition to the opinions of Drs. Russakoff and Naeye, there are four other physicians' opinions of record that are relevant to Section 718.204(b). In both his 1993 and 1994 reports, Dr. Vincent opined that the decedent was "totally disabled for gainful employment because of difficulty with his breathing." Director's Exhibits 21, 29, 42. On an undated checklist, Dr. Avsar checked boxes indicating that the miner could not perform his regular coal mine employment, his impairment was caused by coal mine employment, and pneumoconiosis was responsible for the miner's decreased lung function. Director's Exhibits 20, 29. On January 5, 1984, Dr. Risman diagnosed anthracosis, but nevertheless, opined, "there is no evidence of bronchopulmonary disease caused by pneumoconiosis in this individual and

and therefore, claimant failed to satisfy her burden as a matter of law in accordance with standard pronounced in *Lollar, supra*.

Relevant to Section 718.205(c), claimant avers that the administrative law judge impermissibly failed to discuss the issue of whether pneumoconiosis hastened the miner's death and failed to address the diagnosis of anthracosis contained in the autopsy report. Inasmuch as the administrative law judge permissibly found that the opinions of Drs. Russakoff and Naeye, stating that the miner's death was not hastened by pneumoconiosis, outweighed those of Drs. Vincent and Avsar, he reasonably found that claimant failed to establish, by a preponderance of the evidence, that the miner's death was due to or hastened by pneumoconiosis. *See Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997); Decision and Order at 3; Director's Exhibits 28, 29, 32, 42, 56. We, therefore, reject claimant's argument. Hence, we affirm the administrative law judge's finding that a *de novo* review of the entire record revealed neither a mistake in a determination of fact or a change in conditions pursuant to Section 725.310 inasmuch as this determination is rational, contains no reversible error, and is supported by substantial evidence. *See Kingery, supra; Nataloni, supra*; Decision and Order at 3.

Claimant's failure to satisfy her burden of affirmatively establishing that the miner was totally disabled due to pneumoconiosis under Section 718.204(b) and that his death was due to or hastened by pneumoconiosis under Section 718.205(c) precludes a finding of modification pursuant to Section 725.310 and a finding of entitlement to benefits on both the miner's and survivor's claim. *See Worrell, supra; Bradberry, supra; Lollar, supra*.

affecting his dyspnea... ." Director's Exhibit 24. On October 9, 1980, Dr. Shelton opined that the miner did not have "inhalation lung disease" accompanied by a normal spirogram and blood gas studies. Director's Exhibit 24.

Accordingly, the Decision and Order - Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge