

BRB No. 98-1426 BLA

THELMA ORLOSKY (Divorced )  
Widow of FRANCIS ORLOSKY) )  
 )  
Claimant-Petitioner )  
 )  
v. ) DATE ISSUED:  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )  
 )  
Respondent ) DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (96-BLA-0728) of Daniel L. Leland in claims filed by the miner and survivor 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). In the miner's claim, Administrative Law Judge Mollie W. Neal, in a Decision and Order issued on August 17, 1993, credited the miner with thirty-eight years and nine months of coal mine employment, and determined that the miner's case involved a request for modification pursuant to 20 C.F.R. §725.310.<sup>1</sup> Judge Neal concluded that the miner's claim was denied because

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<sup>1</sup>The miner filed his initial application for benefits on February 23, 1982. Director's Exhibit 1. The district director found the miner entitled to benefits. Director's Exhibit 19. Employer controverted liability, and after a hearing on the merits, Administrative Law Judge Thomas Burke denied benefits in a Decision and

he failed to establish the existence of pneumoconiosis. After noting that claimant did not assert a mistake in fact, the administrative law judge concluded that the prior denial by Judge Burke contained no mistake in fact. The administrative law judge then found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis and death due to pneumoconiosis, and thus, insufficient to demonstrate a change in conditions and denied modification. Accordingly, benefits were denied. On appeal, the Board affirmed the findings of Judge Neal that the newly submitted evidence was insufficient to establish a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. See *Orlosky v. Director, OWCP*, BRB No. 94-0158 BLA (June 20, 1994)(unpub.). The Board reaffirmed its Decision and Order on reconsideration by Order dated November 1, 1994. See *Orlosky v. Director, OWCP*, BRB No. 94-0158 BLA (Nov. 1, 1994)(unpub.).

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Order dated December 27, 1988. Director's Exhibits 21, 42. Claimant appealed the denial of benefits to the Board. During the pendency of this appeal, claimant notified the Board that a Motion for Modification had been filed with the district director and requested the Board to reassign the case to the Office of the District Director. By Order dated January 26, 1990, the Board remanded this case to the district director for processing of the request for modification. Director's Exhibits 47, 51. *Orlosky v. Jones and Laughlin Steel Corp.*, BRB No. 89-0295 (Jan. 26, 1990) (unpub.).

In the survivor's claim, filed in December 1989, Administrative Law Judge Leland (the administrative law judge) credited the miner with thirty-eight years and six months of coal mine employment. Based on the filing date, he adjudicated the survivor's claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found the evidence of record insufficient to establish the existence of pneumoconiosis or death due to pneumoconiosis at 20 C.F.R. §§718.202(a) and 718.205(c). Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's finding that the autopsy evidence was insufficient to establish the existence of pneumoconiosis and death due to pneumoconiosis at Sections 718.202(a) and 718.205(c).<sup>2</sup> See *Orlosky v. Director, OWCP*, BRB No. 92-1189 BLA (June 20, 1994)(unpub.). The Board reaffirmed its Decision and Order on reconsideration by Order dated November 1, 1994. See *Orlosky v. Director, OWCP*, BRB No. 92-1189 BLA (Nov. 1, 1994)(unpub.).

Claimant timely filed a request for modification on April 24, 1995 in both the miner's and survivor's claims. Director's Exhibit 78. Following a hearing, the administrative law judge again denied benefits in both the miner's and survivor's claims. Since the miner had died,<sup>3</sup> the administrative law judge determined that there could be no change in conditions. He reviewed the newly submitted evidence, and concluded that it did not demonstrate a mistake in a determination of fact pursuant to Section 725.310. Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's conclusion that the newly submitted positive x-ray did not show a mistake in his determination that the weight of the x-ray evidence was negative for pneumoconiosis at Section 718.202(a)(1); that the medical opinions of Drs. Naeye and Mendelow were entitled to greater weight based on their status as Board-certified pathologists; and that Section 725.310 applied to this case. The Board, however, vacated, in part, the Decision and Order of the administrative law judge and remanded this case for the administrative law judge to explain why the authorship of articles on coal workers' pneumoconiosis entitled the

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<sup>2</sup>By Order dated November 26, 1993, the Board, on its own motion, consolidated the appeal filed in the survivor's claim with the appeal filed in the miner's claim. *Orlosky v. Director, OWCP*, BRB Nos. 92-1189 BLA and 94-0158 BLA (Nov. 26, 1993) (unpub.); see 20 C.F.R. §802.104. In addition, the Board noted that in BRB No. 94-0158 BLA, claimant did not request reinstatement of the miner's prior appeal filed in docket number, BRB No. 89-0295 BLA. Thus, the Board stated that it would only consider the issues raised in claimant's appeal of the Decision and Order Denying Petition for Modification. *Id.*

<sup>3</sup>The miner died on January 11, 1989. Director's Exhibit 9.

report of Dr. Naeye to greater weight than the medical opinion of Dr. Goldblatt, a Board-certified pathologist who had performed numerous autopsies on coal miners.<sup>4</sup> See *Orlosky v. Director, OWCP*, BRB No. 97-0760 BLA (Feb. 26, 1998)(unpub.).

On remand, the administrative law judge accorded greater weight to the medical opinion of Dr. Naeye after explaining his reason for crediting this report over the report of Dr. Goldblatt. He again found the medical opinion evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a). Accordingly, benefits were again denied. In the instant appeal, claimant argues that the administrative law judge erred in failing to find that the existence of pneumoconiosis was established by the autopsy evidence. The Director, Office of Workers' Compensation Programs (the Director), in a letter response, urges affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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).

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<sup>4</sup>Both Drs. Naeye and Goldblatt reviewed the miner's autopsy slides, autopsy protocol, and the miner's records. Director's Exhibits 78, 80.

In order to establish entitlement to benefits in a miner's claim under Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Furthermore, in order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis.<sup>5</sup> See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence. Claimant argues that the reason provided by the administrative law judge for crediting the medical report of Dr. Naeye over the medical report of Dr. Goldblatt indicates that the administrative law judge assumed that Dr. Goldblatt was not an expert, an assumption claimant asserts is wrong as, in claimant's view, Dr. Goldblatt is more qualified than Dr. Naeye. Claimant also contends that the administrative law judge failed to discuss all the medical evidence of record because he failed to consider that Dr. Goldblatt reviewed all the evidence of record and explained in detail the cause of the miner's death from a myocardial infarction, a fact which claimant contends Dr. Naeye did not discuss. Finally, claimant argues that by dismissing the report of his expert, the administrative law judge substituted his opinion for that Dr. Goldblatt.

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<sup>5</sup>Since the miner's last coal mine employment took place in Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

We find claimant's arguments without merit. The administrative law judge, in compliance with the remand order, explained his reasons for crediting the medical opinion of Dr. Naeye, who concluded that the miner did not have coal workers' pneumoconiosis and that pneumoconiosis did not cause, contribute to or hasten the miner's death from cardiopulmonary arrest, and not according determinative weight to the medical opinion of Dr. Goldblatt, who diagnosed coal workers' pneumoconiosis and concluded that the miner's death was related to his pneumoconiosis.<sup>6</sup> See Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Director's Exhibits 59, 67, 70, 78-80; Claimant's Exhibit 1. In reaching his decision, the administrative law judge did not substitute his opinion for that of Dr. Goldblatt; rather he weighed, considered and credited the medical opinion evidence after reviewing all of the evidence of record. See *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Likewise, contrary to claimant's assertion, the administrative law judge did not assume that Dr. Goldblatt was not an expert; instead, he permissibly credited the medical opinion of the physician he concluded was more qualified. See *Church v. Eastern Associated Coal Co.*, 20 BLR 1-20 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Thus, the administrative law judge properly concluded that the autopsy evidence of record was insufficient to meet claimant's burden of proving the existence of pneumoconiosis at Section 718.202(a). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We, therefore, affirm the administrative law judge's denial of benefits in both the miner's and survivor's claims as it is supported by substantial evidence. See *Trumbo, supra*; *Perry, supra*.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

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<sup>6</sup>The administrative law judge noted that in his prior Decision and Order, he stated that Dr. Goldblatt had performed over 2000 autopsies, but had not published any articles on coal workers' pneumoconiosis while Dr. Naeye had published articles on coal workers' pneumoconiosis and coauthored the book on pathology standards for pneumoconiosis. The administrative law judge found the report of Dr. Naeye entitled to more weight because he had published scholarly articles which were subject to peer review. See Decision and Order on Remand at 2. The administrative law judge also recognized that Dr. Naeye had practical experience in performing autopsies. *Id.*

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge