



BRB No. 18-0375 BLA

REBECCA JEAN RILEY)
(Widow of ROBERT RAY RILEY))
)
 Claimant-Petitioner)

v.)

ISLAND CREEK COAL COMPANY)
c/o WELLS FARGO DISABILITY)
MANAGEMENT)
)
 Employer-Respondent)

DATE ISSUED: 12/19/2019

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order on Remand of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Daniel K. Evans and Kaley A. Porter (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (2012-BLA-05786) of Administrative Law Judge Adele Higgins Odegard denying benefits pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's third request for modification of the denial of a survivor's claim filed on December 11, 2002,² and is before the Board for the second time.³ Director's Exhibit 3.

In the administrative law judge's initial Decision and Order, she found the miner had 41.30 years of coal mine employment, and legal⁴ and clinical⁵ pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a)(2), (4), 718.203(b). She found, however, that claimant failed to establish the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). Consequently, the administrative law judge found claimant failed

¹ Claimant is the widow of the miner, who died on December 3, 2002. Director's Exhibit 9. The miner filed a claim for benefits on May 31, 1973, which was denied on September 3, 1980. Director's Exhibit 1.

² The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this claim because it was filed before January 1, 2005. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010).

³ We incorporate the procedural history of this case as set forth in the Board's prior decision in *Riley v. Island Creek Coal Co.*, BRB No. 15-0329 BLA, slip op. at 2-4 (Apr. 18, 2016) (unpub.).

⁴ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁵ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

to establish a mistake in the determination of the ultimate fact of entitlement⁶ and denied benefits.⁷ 20 C.F.R. §725.310.

On appeal, the Board affirmed the administrative law judge's finding that claimant failed to establish pneumoconiosis was a substantially contributing cause of the miner's death and thus affirmed the denial of benefits.⁸ *Riley v. Island Creek Coal Co.*, BRB No. 15-0329 BLA (Apr. 18, 2016) (unpub.).

Pursuant to claimant's appeal, the United States Court of Appeals for the Fourth Circuit⁹ held the administrative law judge failed to consider medical records from the miner's final hospitalization in December 2002. Noting its inability to conclude these medical records could not have affected the administrative law judge's evaluation of the medical opinion evidence, the court vacated her finding that claimant failed to establish the

⁶ Administrative Law Judge Adele Higgins Odegard (the administrative law judge) concluded Administrative Law Judge Michael P. Lesniak made a mistake in a determination of fact in concluding there was no evidence the miner had cardiac arrhythmia and hypoxemia. 2015 Decision and Order at 18. She nonetheless found neither condition was a significant factor during the miner's final year of life and rejected the medical opinions attributing the miner's fatal stroke to these conditions (and thus to pneumoconiosis). *Id.* at 18. Having rejected claimant's medical experts for this and other reasons, she denied benefits because claimant failed to establish the miner's death was due to pneumoconiosis. *Id.* at 32.

⁷ The administrative law judge also rejected employer's argument that considering claimant's third request for modification did not render justice under the Act. 2015 Decision and Order at 30-32.

⁸ The Board affirmed the administrative law judge's discrediting of Drs. Perper, Kahn, and Green because they based their death causation opinions in part on an overestimation of the severity of the miner's clinical pneumoconiosis. *Riley*, BRB No. 15-0329 BLA, *slip op.* at 8-9. Because the administrative law judge provided a valid reason for discrediting the opinions supportive of claimant's burden of proof, the Board declined to consider claimant's arguments that she erred in determining the miner's smoking history and failed to consider relevant treatment records relating to hypoxemia, atrial fibrillation, and chronic obstructive pulmonary disease (COPD)/legal pneumoconiosis. *Riley*, BRB No. 15-0329 BLA, *slip op.* at 9 n.17.

⁹ Because the miner's last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 6.

miner's death was due to pneumoconiosis. The court therefore vacated the Board's decision affirming the administrative law judge's denial of benefits and remanded the case for further consideration of the death causation issue. *Riley v. Island Creek Coal Co.*, No. 16-1680 (4th Cir. May 5, 2017) (unpub.).

On remand, the administrative law judge again found claimant failed to establish pneumoconiosis substantially contributed to the miner's death and denied benefits.

In the present appeal, claimant argues the administrative law judge failed to comply with the Fourth Circuit's remand instructions in evaluating the medical evidence and erred in finding claimant failed to establish the miner's death was due to pneumoconiosis. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal. Claimant filed a reply brief, reiterating her arguments on appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and 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, 363 (1965).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record 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). The administrative law judge may correct "any mistake . . . including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497 (4th Cir. 1999); see *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).

Death Due to Pneumoconiosis

Because no statutory presumptions apply, claimant must establish by a preponderance of the evidence the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Failure to establish any one of these elements precludes an award of benefits. See *Trumbo*, 17 BLR at 1-87-88. A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of his death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" if it hastens

the miner's death. 20 C.F.R. §718.205(b)(6); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80 (4th Cir. 1992).

On remand, the administrative law judge summarized and incorporated by reference her prior consideration of the medical opinions of Drs. Perper, Kahn, Green, Swedarsky, Bush, Oesterling, Bellotte, and Vey.¹⁰ 2018 Decision and Order on Remand at 6-8, referencing 2015 Decision and Order at 27-30; Director's Exhibits 32, 34, 40, 55, 67, 83, 106; Claimant's Exhibit 1; Employer's Exhibits 3, 4, 6, 7. The physicians agreed the precipitating cause of the miner's death was a stroke. 2015 Decision and Order at 22. The physicians further agreed the miner suffered from clinical and legal pneumoconiosis, but disagreed as to whether pneumoconiosis contributed to his fatal stroke. *Id.* Drs. Perper, Kahn, and Green opined the combined effect of the miner's clinical pneumoconiosis and chronic obstructive pulmonary disease (COPD)/legal pneumoconiosis contributed to pulmonary insufficiency and hypoxemia. Director's Exhibits 32, 55, 67, 106; Claimant's Exhibit 1. They opined the hypoxemia, in turn, precipitated or aggravated the miner's atrial

¹⁰ The administrative law judge also considered a death certificate and an autopsy report. 2015 Decision and Order at 22. In the death certificate, Dr. Sine listed the immediate cause of the miner's death as a cerebrovascular accident due to diabetes mellitus type II and coronary artery disease. Director's Exhibit 9. In the autopsy report, Dr. Swedarsky, the prosector, diagnosed severe atherosclerotic vascular disease, severe atherosclerotic coronary artery disease, status post 2-vessel bypass surgery, cardiomegaly, ischemic myocardial injury, COPD/emphysema, bilateral pulmonary congestion with acute pneumonia, and simple coal workers' pneumoconiosis. Director's Exhibit 11. At deposition, Dr. Swedarsky opined the degree of pneumoconiosis present would not have affected the miner's respiratory function. Director's Exhibit 55 at 11, 21-22. He opined the miner had "no significant" fibrosis and his clinical pneumoconiosis was "towards the minimal end of the disease." *Id.* at 21-22, 44. The administrative law judge incorporated her prior finding that accorded most weight to Dr. Swedarsky's opinion because he alone, as the autopsy prosector, had the ability to palpate the miner's lung tissue for nodules to make an informed determination as to the severity of his clinical pneumoconiosis. 2018 Decision and Order at 8; 2015 Decision and Order at 19. As the administrative law judge permissibly accorded most weight to Dr. Swedarsky's opinion, we affirm her finding that the extent of the miner's clinical pneumoconiosis was "minimal." 2015 Decision and Order at 19, 27; see *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) (noting the autopsy prosector's ability to assess the size of nodules in gross and under microscope gave him an additional perspective); *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-23 (1992); *Gruller v. BethEnergy Mines, Inc.*, 16 BLR 1-3 (1991).

fibrillation, which contributed to his stroke and/or worsened his outcome.¹¹ Director's Exhibits 32, 55, 67, 106; Claimant's Exhibit 1. In contrast, Dr. Swedarsky opined the miner's respiratory disease, including his pneumoconiosis, did not play a significant role in his death. Director's Exhibit 55 at 11. Drs. Bush, Oesterling, Bellotte, and Vey similarly opined the miner's clinical and legal pneumoconiosis did not contribute to his death. Director's Exhibits 34, 40, 83; Employer's Exhibits 3, 4, 6, 7.

The administrative law judge noted she previously discredited the opinions of Drs. Perper, Kahn, and Green in part because their conclusions that the miner's hypoxemia contributed to his death were not well-reasoned.¹² 2018 Decision and Order on Remand at

¹¹ Dr. Perper reviewed the miner's autopsy slides and medical records and opined his clinical pneumoconiosis and causally associated COPD/legal pneumoconiosis contributed to pulmonary insufficiency and hypoxemia, which precipitated or aggravated his cardiac arrhythmia and thus contributed to his stroke. Director's Exhibit 32 at 28-29; 55 at 19-21, 30.

Dr. Kahn reviewed the miner's autopsy slides and medical records and opined his clinical pneumoconiosis, together with his pulmonary emphysema, compromised his pulmonary function and predisposed him to develop bronchopneumonia when he suffered his stroke, and thus hastened his death. Director's Exhibit 67. Dr. Kahn estimated that coal workers' pneumoconiosis involved 30% of the lung's terminal respiratory units, a degree "that cannot help but to effect the exchanges of gases in the lungs." *Id.* He stated this may leave a patient asymptomatic until he is stressed by exercise or other concurrent disease process, at which point his pulmonary reserve becomes overwhelmed and the coal workers' pneumoconiosis contributes to the terminal process. *Id.* Dr. Kahn explained that the hypoxia that develops from the inability to rid the body of carbon dioxide compromises metabolic functions and precipitates cardiac arrhythmias, including cardiac arrest and death. *Id.*

Dr. Green reviewed the miner's autopsy slides and medical records and opined his clinical pneumoconiosis and legal pneumoconiosis contributed to hypoxemia, cardiac arrhythmia, and cor pulmonale, which increased the risk of stroke. Claimant's Exhibit 1; Director's Exhibit 106 at 32-34, 39-41, 48-49, 53. He therefore concluded that "without additional risk factors due to medical and legal pneumoconiosis, it is likely that [the miner] would not have had a stroke on that particular day and/or the stroke would have been much milder in severity." Claimant's Exhibit 1 at 9.

¹² The administrative law judge also previously discredited the opinions of Drs. Perper, Kahn, and Green for other reasons, including their mistaken belief that the degree of the miner's clinical pneumoconiosis was significant. As discussed, she accorded the

6-7, *referencing* 2015 Decision and Order at 28. Specifically, she found that while claimant submitted evidence documenting hypoxemia at various times, it was “by no means certain that [the miner] had hypoxia at the end of his life.” *Id.* After considering the medical records she previously overlooked as instructed by the Fourth Circuit court,¹³ the administrative law judge determined they do not support a finding the miner was hypoxemic at the time he suffered his fatal stroke and therefore did not alter her prior credibility determinations. 2018 Decision and Order on Remand at 4-8; Director’s Exhibits 32, 55, 67, 106; Director’s Exhibit 55 at 11.

We reject claimant’s assertion the administrative law judge erred in finding the miner’s treatment and hospitalization records do not establish he had hypoxemia at the time of his death. Claimant’s Brief at 27-28. The administrative law judge found the records from the last years and months of the miner’s life to be most probative in determining the cause of his death. 2018 Decision and Order on Remand at 5; 2015 Decision and Order at 17; Director’s Exhibits 10, 11, 25. Some of these are contained in records from treating physicians at Monongalia General Hospital, dating from November 21, 1997 through October 24, 2002, and at Wedgewood Family Practice, dating from January 2, 2002 through November 4, 2002. Director’s Exhibits 10, 11. In her prior decision, the administrative law judge correctly noted these records mostly pertain to non-respiratory

most weight to Dr. Swedarsky’s opinion that the miner’s clinical pneumoconiosis was “minimal” based on his status as the autopsy prosector. 2015 Decision and Order at 19. The administrative law judge accurately observed that Drs. Perper, Kahn, and Green, “the physicians who concluded that the [m]iner’s clinical pneumoconiosis was significant, also concluded that the [m]iner’s respiratory condition . . . played a significant role in causing the [m]iner’s stroke or hastening the [m]iner’s death – either by increasing the risk of cardiac arrhythmia, or by causing hypoxia that complicated the [m]iner’s condition.” 2015 Decision and Order at 27. Thus, the administrative law judge discounted their opinions that the combined effect of clinical and legal pneumoconiosis was a significant contributing factor to the miner’s death, because they each relied, in part, on their mistaken belief the miner’s clinical pneumoconiosis was more severe than the “minimal” degree of disease found by the administrative law judge. 2015 Decision and Order at 27.

¹³ The Fourth Circuit instructed the administrative law judge to consider the records from the miner’s final hospitalization in December 2002, located at Director’s Exhibit 25. *Riley v. Island Creek Coal Co.*, No. 16-1680 (4th Cir. May 5, 2017) (unpub.), slip op. at 4. Upon review, the administrative law judge acknowledged she had also overlooked the remaining records at Director’s Exhibit 25. 2018 Decision and Order on Remand at 4. She numbered each of the pages in Director’s Exhibit 25 on remand. 2018 Decision and Order on Remand at 5 n.8; *see* Director’s Exhibit 25 at 1-78.

problems, and reflect the miner was not acutely ill or complaining of shortness of breath.¹⁴ 2015 Decision and Order at 17; Director’s Exhibit 10, 11. On remand she considered additional records from approximately ten hospitalizations in 2001 and 2002, including the miner’s final hospitalization from December 1, 2002 to December 3, 2002, the date of his death. 2018 Decision and Order on Remand at 5; Director’s Exhibit 25. She accurately observed that while many of these records list the miner’s history of severe, steroid-dependent COPD, most of the 2001 and 2002 hospitalizations were for acute, non-respiratory medical problems.¹⁵ 2018 Decision and Order at 6; Director’s Exhibit 25. We affirm these findings as supported by substantial evidence. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (explaining that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212 (4th Cir. 2000).

Substantial evidence also supports the administrative law judge’s conclusion that the miner’s hospitalization records from 2001 and 2002 do not reflect he was “regularly using oxygen.” 2018 Decision and Order on Remand at 6; Claimant’s Brief at 29. As claimant notes, the record contains evidence of oxygen use during certain periods. Claimant’s Brief at 10-11. Specifically, on December 15, 1999, Dr. Kanj prescribed supplemental oxygen during the night, and in April 2000 he noted the miner was

¹⁴ A treatment record dated April 2, 2002 from Wedgewood Family Practice notes the miner was suffering from acute bronchitis but was not in respiratory distress and an x-ray report dated April 9, 2002 notes a history of shortness of breath. Director’s Exhibit 10.

¹⁵ Claimant asserts each of the miner’s four last hospitalizations had a “significant respiratory component.” Claimant’s Brief at 12. The first three of these hospitalizations, dating from April and May 2002, identify exacerbations of COPD, bronchitis, cough, and shortness of breath as reasons for or symptoms during the admissions. Director’s Exhibit 25 at 26, 47, 50, 52, 54. Although the miner’s fourth and final hospitalization in December 2002 identifies the miner’s diagnosis of COPD, it does not reference any respiratory complaints. Director’s Exhibit 25 at 17-21. Rather, it states the miner presented in the emergency room with blurred vision, slurred speech, and clumsiness in the left arm and left leg. *Id.* at 17. His blood pressure was normal and his “pulse oximeter [was] in the 90s on room air.” *Id.* Dr. Carey, the attending physician, listed his impressions as: probable transient ischemic attack versus acute cerebrovascular accident; diabetes; chronic atrial fibrillation; steroid-dependent COPD; and renal insufficiency. *Id.* at 17-19. During the course of his stay, the miner developed fevers, chills, and nausea. On December 2, 2002, he “became hypertensive . . . with dense left hemiplegia noted with advancing cerebrovascular accident” and “eventually succumbed to his illness and passed away on December 3, 2002.” *Id.* at 21.

maintained on oxygen. Claimant's Exhibit 4 at 3, 5. Further, claimant testified the miner was on oxygen for "over a year" in 2001. 2013 Hearing Transcript at 51. However, there is only one hospital record from 2002, dated April 14, 2002, referencing oxygen use. While the physician indicated he would "keep [the miner] on oxygen 1-2 liters nasal cannula to keep his saturations greater than 92%," there is no indication the miner was still on oxygen when he had his fatal stroke in December 2002. Director's Exhibit 25 at 54. Rather, as the administrative law judge accurately noted, the records from the miner's final hospitalization "do not mention whether the [m]iner had hypoxia at the time that he suffered his stroke" and state he had "blood oxygenation in the 90s on room air."¹⁶ 2018 Decision and Order on Remand at 6; Director's Exhibit 25 at 17.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). The Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Here, the administrative law judge considered all of the relevant evidence and explained her findings, as required by the Administrative Procedure Act.¹⁷ *See* 30 U.S.C. §923(b); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). We therefore reject claimant's arguments to the contrary and affirm the administrative law judge's permissible conclusion that while the miner had hypoxemia and used supplemental oxygen at times throughout his life, the records do not support a finding that the miner had

¹⁶ Claimant notes correctly that while the miner's final emergency room admission note lists his "blood oxygenation in the 90s on room air," the subsequent death summary states his blood oxygenation at admission was "90% on room air." Claimant's Brief at 13, *referencing* Director's Exhibit 25 at 17, 20. Claimant asserts that in light of the physician's April 14, 2002 notation he would "keep [the miner] on oxygen . . . to keep his saturations greater than 92%," an oxygen level of only 90% is abnormal. Claimant's Brief at 13. Contrary to claimant's assertion, however, this discrepancy between the admission summary and the death summary supports, rather than undermines, the administrative law judge's conclusion "it is by no means certain that the [m]iner had hypoxia at the end of his life." 2018 Decision and Order on Remand at 6.

¹⁷ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented" 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

hypoxia or any respiratory abnormalities, such as shortness of breath, at the time of his death. *See Compton*, 211 F.3d at 212; 2018 Decision and Order on Remand at 7.

We also reject claimant's argument the administrative law judge failed to comply with the Fourth Circuit's remand instructions "to consider the impact of the records of [the miner's] final hospitalization on her evaluation of the evidence." *Riley*, No. 16-1680, slip op. at 4; Claimant's Brief at 5, 6 n.3, 8. Contrary to claimant's contention, the administrative law judge did not simply consider whether individual doctors had reviewed the records from the miner's final hospitalization when rendering their opinions. Claimant's Brief at 8. Rather, she reviewed all of the records in Director's Exhibit 25, including the records from the miner's final hospitalization, and found they are "consistent" with the treatment records she previously reviewed and do not establish that the miner was hypoxemic at the time he suffered his stroke. 2018 Decision and Order on Remand at 4-5, 7. Because the totality of the hospitalization and treatment records from the last years and months of the miner's life do not reflect he had hypoxemia at the time of his death, she permissibly discredited as not well-reasoned the opinions of Drs. Perper, Kahn, and Green, that the miner's pneumoconiosis contributed to his death in part by causing hypoxemia which increased his risk for stroke.¹⁸ *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 2018 Decision and Order on Remand at 7. As the administrative law judge permissibly discredited the only medical opinions supportive of a finding that pneumoconiosis was a

¹⁸ Claimant asserts the administrative law judge erred in finding the miner had a forty pack-year smoking history, ending in 1978. Claimant's Brief at 31-36; 2015 Decision and Order at 13. Claimant acknowledges the administrative law judge found the miner had both clinical and legal pneumoconiosis, but generally asserts the length of the miner's smoking history "was still very important to [the administrative law judge] both in terms of the percentage of legal pneumoconiosis attributable to coal mine dust exposure and in terms of the weight to give various doctors's [sic] opinions." Claimant's Brief at 31; *citing* 2015 Decision and Order at 13, 22. Claimant has not explained, however, and the record does not reflect, how the administrative law judge's determination regarding the miner's cigarette smoking history, even if it was erroneous, affected her evaluation of the conflicting medical opinions on the death causation issue. 2018 Decision and Order on Remand at 6-8; 2015 Decision and Order at 26-30. Thus, any error by the administrative law judge in evaluating the miner's smoking history is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

substantially contributing cause of the miner's death,¹⁹ we affirm her finding that claimant did not establish the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205.

Because claimant did not establish that the miner's death was due to pneumoconiosis, an essential element of entitlement in a survivor's claim under 20 C.F.R. Part 718, we affirm her denial of survivor's benefits on modification.²⁰ See 20 C.F.R. §§718.205; 725.310; *Trumbo*, 17 BLR at 1-87-88.

¹⁹ Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Perper, Kahn, and Green on the issue of death causation, we need not address claimant's remaining arguments regarding the weight accorded to their opinions. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Further, as the administrative law judge permissibly discredited the only physicians who concluded pneumoconiosis contributed to the miner's death, we need not address claimant's arguments regarding the weight accorded on remand to Dr. Swedarsky's contrary opinion. *Id.*

²⁰ Claimant correctly asserts the administrative law judge's statement on remand that "there is no mistake in determination of fact, as is required in order to grant the Claimant's modification request" conflicts with her prior finding that Judge Lesniak mistakenly concluded the miner did not have cardiac arrhythmia and hypoxemia. See 2018 Decision and Order on Remand at 8 n.17; 2015 Decision and Order at 18; Claimant's Brief at 4-5. As discussed *supra*, the administrative law judge previously denied modification because claimant failed to establish the miner's death was due to pneumoconiosis. 2015 Decision and Order at 32. As the administrative law judge again denied modification based on claimant's failure to establish death causation, any error in stating there is no mistake in a determination of fact is harmless. See *Shinseki*, 556 U.S. at 413; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

Accordingly, we affirm the administrative law judge's Decision and Order on Remand denying benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge