

BRB No. 97-0941 BLA

MARLENE A. KULHA)
(Widow of STEVE KULHA))
)
 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 and Order Denying Motion for Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Rita Roppolo (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order and Order Denying Motion for Reconsideration (96-BLA-0490) of Administrative Law Judge Daniel L. Leland denying benefits on a 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 administrative law judge credited the miner with at least twenty-seven and one-half years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to

¹Claimant is the widow of the deceased miner, Steve Kulha, who died on April 12, 1982. Director's Exhibits 1, 5.

establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).² Accordingly, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310,³ and thus, he denied benefits. Claimant subsequently filed a Motion for Reconsideration, which the

²The administrative law judge found that “[t]he irrebuttable presumption in §718.304 is not applicable because the lung biopsy did not reveal massive lesions in the lungs and the record contains no chest x-rays showing large opacities.” Decision and Order at 8 n.3.

³Claimant filed her survivor’s claim on September 27, 1983. Director’s Exhibit 1. On April 4, 1988, Administrative Law Judge George P. Morin issued a Decision and Order denying benefits. Director’s Exhibit 20. Although Judge Morin credited the miner with at least twenty-seven years and five months of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis, he nonetheless found the evidence insufficient to establish that the miner’s death was due to pneumoconiosis. *Id.* Judge Morin subsequently issued an Order Denying Reconsideration and Modification on May 31, 1988. Director’s Exhibit 22. On March 29, 1990, the Board affirmed Judge Morin’s denial of benefits. *Kulha v. Director, OWCP*, BRB No. 88-2085 BLA (Mar. 29, 1990)(unpub.). Further, the Board denied claimant’s subsequent request for reconsideration on November 1, 1993, *Kulha v. Director, OWCP*, BRB No. 88-2085 BLA (Nov. 1, 1993)(unpublished Order), and November 16, 1994, *Kulha v. Director, OWCP*, BRB No. 88-2085 BLA (Nov. 16, 1994)(unpublished Order on Motion for Reconsideration). Claimant filed a request for modification on April 14, 1995. Director’s Exhibit 36.

administrative law judge summarily denied. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order.⁴

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

⁴Claimant filed a brief in reply to the Director's response brief which reiterates claimant's assertions.

Claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2). In *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989), the United States Court of Appeals for the Third Circuit, wherein jurisdiction for this case arises, held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) in a case in which the disease actually hastens his death. The administrative law judge correctly stated that “[t]here are three physicians who address the issue of whether pneumoconiosis hastened the miner’s death.” Decision and Order at 8. Whereas Drs. Hales and Naeye opined that pneumoconiosis did not contribute to the miner's death, Director's Exhibits 15, 18, 43, Dr. Goldblatt opined that pneumoconiosis contributed to the miner's death,⁵ Director's Exhibits 36, 40; Claimant's Exhibit 5.⁶ The administrative law judge properly accorded determinative weight to the opinions of Drs. Hales and Naeye over the contrary opinion of Dr. Goldblatt because the administrative law judge found them to be better documented and reasoned.⁷ See *Clark v.*

⁵Claimant asserts that the administrative law judge ignored Dr. Goldblatt's September 10, 1996 report. Contrary to claimant's assertion, the administrative law judge properly considered this report. Decision and Order at 7-8; Claimant's Exhibit 5.

⁶The death certificate lists acute myocardial infarction, severe coronary arteriosclerosis and old intensive myocardial infarction as conditions contributing to the miner's death. Director's Exhibit 5. Further, Dr. Pelaez, in a pathology report, opined that an acute and organizing myocardial infarct was the cause of the miner's death. Director's Exhibit 6.

⁷The administrative law judge stated that the reports of Drs. Hales and Naeye

Karst-Robbins Coal Co., 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject claimant's assertion that the administrative law judge erroneously substituted his opinion for that of Dr. Goldblatt. Moreover, we reject claimant's assertion that the administrative law judge erred in failing to explain why he accorded greater weight to Dr. Naeye's opinion than to Dr. Goldblatt's opinion, since Dr. Goldblatt's qualifications are superior to the qualifications of Dr. Naeye. An administrative law judge is not required to defer to a doctor with superior qualifications. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

"comport with all the medical evidence in this case, including the autopsy report and the miner's medical records." Decision and Order at 8. However, the administrative law judge stated that "Dr. Goldblatt made an **assumption** that the miner had a diminished oxygen supply in the blood and his entire theory of how pneumoconiosis contributed to death is based upon this **assumption**." Decision and Order at 9 (emphasis added). Further, the administrative law judge observed that Dr. Goldblatt's "reports clearly go beyond the established medical evidence to try and make some connection between the miner's severe heart disease and his simple pneumoconiosis." *Id.*

In addition, we reject claimant's argument that the administrative law judge erred by relying on Dr. Naeye's opinion because Dr. Naeye relied on the reports of Drs. Gardner and Garson, which are not in the record.⁸ The administrative law judge, within a proper exercise of his discretion as trier of fact, determined that "[i]t is clear from reading Dr. Naeye's report that [Dr. Gardner's and Dr. Garson's] reports did not form a substantial basis for his opinion as his report specifically addresses his interpretation of the autopsy slides." Decision and Order at 6 n.2; see *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Finally, claimant argues that Dr. Hales' opinion is hostile to the Act. Since claimant did not assert that Dr. Hales' opinion is hostile to the Act at the hearing or otherwise while the case was pending before the administrative law judge, we reject claimant's assertion as untimely raised. See *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Lyon v. Pittsburg & Midway Coal Co.*, 7 BLR 1-199 (1984). Therefore, we affirm the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). See *Lukosevicz, supra*. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. See *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Furthermore, we affirm the administrative law judge's finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310. See *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge properly based his conclusion that claimant failed to establish a mistake in a determination of fact on the administrative law judge's "complete review of the record." Decision and Order at 7.

Accordingly, the administrative law judge's Decision and Order denying benefits and his Order Denying Motion for Reconsideration are affirmed.

⁸We reject claimant's assertion that Dr. Naeye's opinion does not apply to the miner based on the miner's age at the time of his death and the miner's history as a non-smoker. Contrary to claimant's assertion, Dr. Naeye's report does not indicate that Dr. Naeye was unaware of the miner's correct age at the time of his death or that the miner was a non-smoker.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge