

BRB No. 00-0161 BLA

ROSE GREEN)	
(Widow of CURTIS B. GREEN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN ENERGY,)	
INCORPORATED)	
)	DATE ISSUED:
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 Second Request for Modification of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Rose Green, Grundy, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Second Request for Modification (98-BLA-0821 and 98-BLA-0822) of Administrative Law Judge Lawrence P. Donnelly 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). This case has been before the Board previously.² The administrative law judge considered the medical evidence and

¹Claimant is the surviving spouse of Curtis Green, who died on January 24, 1992. Director's Exhibit 4.

²In *Green v. Eastern Energy, Inc.*, BRB No. 96-0935 BLA (Sep. 30, 1996)(McGranery, J., concurring in part, dissenting in part)(unpub.), the Board affirmed the administrative law judge's determination that claimant's survivor's claim did not constitute a request for modification of the denied miner's claim, affirmed the finding that there was no mistake in a determination fact with respect to the survivor's claim, and affirmed the administrative law judge's denial of claimant's request for modification in the survivor's claim. On December 16, 1996, the Board issued an Order denying claimant's Motion for Reconsideration. On December 15, 1997, claimant submitted additional medical evidence and through her lay representative, requested modification of the survivor's claim. *Green v. Eastern Energy, Inc.*, BRB No. 96-0935 BLA (Decision and Order. 16, 1996)(McGranery, J., concurring in part, dissenting in part)(unpub.);

determined that no mistake in fact exists pursuant to 20 C.F.R. §725.310 regarding the previous determination in this case that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's findings.³ Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not participate in this appeal.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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).

In claimant's letter requesting appeal of the administrative law judge's decision, she stated that she did not understand why she was advised by her attorney "not to go" to the hearing. Claimant's letter of appeal received October 12, 1999. The record indicates that claimant, through her lay representative, requested a formal hearing on February 25, 1998 with regard to her second request for modification. Director's Exhibit 77. On February 8, 1999, claimant, through her attorney, Joseph E. Wolfe requested that her case be decided on the record and stated that opposing counsel had no objection to the request. On February 19, 1999 Administrative Law Judge Lawrence P. Donnelly issued an order, canceling the hearing and providing the parties with the opportunity to submit additional evidence and written closing arguments.

The parties to a claim may waive their rights to a hearing before the adjudication officer, by filing a written waiver with the Chief Administrative Law Judge or the administrative law judge assigned to the case. *See* 20 C.F.R. §725.461. The adjudicator must assure that any attempted waiver of the right to a hearing is made with full knowledge of the claimant's rights, the facts of the case and the applicable law. The

Director's Exhibit 73.

³Claimant submitted an additional, handwritten letter, undated, seeking clarification why her attorney, Joe Wolfe, had advised her not to attend the hearing.

waiver must be in writing, and it must be voluntary and intentional. *See* 20 C.F.R. §725.461(a). A waiver may be withdrawn, upon a showing of good cause, any time prior to the issuance of a written decision. *Id.* Based on the facts in this case, we hold that the record supports the administrative law judge's finding that claimant's through her attorney waived her right to a hearing. Therefore, the administrative law judge properly decided the case based upon the record.

In considering whether a mistake in a determination of fact occurred, the administrative law judge reviewed Administrative Law Judge Marvin J. Bober's denial of the miner's claim, Administrative Law Judge Robert G. Mahony's denials of the survivor's claim and subsequent request for modification, and the Board's previous decisions in this case. Decision and Order at 4; Director's Exhibits 50, 58, 62, 68. The administrative law judge stated that "[b]ased upon my independent review of the entire record, I have reached the same conclusion as Judge Mahony, and affirmed by the Benefits Review Board, regarding Claimant's failure to establish that the miner's death was due to pneumoconiosis, pursuant to §718.205(c)." Decision and Order at 5. The administrative law judge further found that based on his review of the medical evidence previously submitted, the opinions of Drs. Ferguson, Naeye, Caffrey and Fino "far outweigh" the opinion of Dr. Sutherland. *Id.* He found that although Dr. Sutherland was the miner's treating physician, his opinion is poorly reasoned and inconsistent with the objective medical evidence.

The administrative law judge acted within his discretion in according diminished weight to Dr. Sutherland's opinions, based on his finding that they were unreasoned and unsupported by the underlying objective evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, the administrative law judge rationally found that although Dr. Sutherland was the miner's treating physician, the credentials of the physicians opining that pneumoconiosis did not play a role in the miner's death were superior to those of Dr. Sutherland, and their opinions were thus entitled to greater weight. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *McMath, supra*; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Inasmuch as the administrative law judge's findings are supported by substantial evidence, we affirm his determination 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).⁴ The administrative law judge's finding that there was not a mistake in a

⁴We note that the administrative law judge did not specifically refer to the medical evidence submitted by employer on modification, namely Dr. Fino's June 14, 1995 and January 30, 1998 opinions and Dr. Hippensteel's January 15, 1999 opinion. Employer's

determination of fact is therefore affirmed. *See* 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990).

Exhibits 1, 2. This error does not require remand, however, as these opinions support the administrative law judge's ultimate conclusion that the evidence fails to establish that the miner's death was due to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Denying Second Request for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge