

BRB No. 00-0221 BLA

PHYLLIS H. COX	)	
(Widow of ARNOLD COX)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OAKWOOD MINING	)	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 Modification Request of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Phyllis H. Cox, Oakwood, Virginia, *pro se*.

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, the miner's widow, without the assistance of counsel, appeals the Decision

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<sup>1</sup> Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, on behalf of claimant, requested review of the administrative law judge's Decision and Order Denying Second Modification Request, but Mr. Carson is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

and Order Denying Second Modification Request (99-BLA-554) of Administrative Law Judge Lawrence P. Donnelly on a miner's claim and 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 is before the Board for the second time. The miner filed a claim on November 21, 1989. He died on March 23, 1991, while his claim was pending. On May 21, 1991, claimant, his widow, filed a survivor's claim. Considering both claims, Administrative Law Judge Stuart A. Levin determined that the miner established twenty-three years of coal mine employment, but that the miner failed to establish total disability pursuant to 20 C.F.R. §718.204(c), and that claimant failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and denied benefits on both claims. Director's Exhibits 1, 41, 55, 109. Claimant appealed, and in *Cox v. Oakwood Mining Corp.*, BRB No. 93-1698 BLA (Sept. 28, 1994)(unpub.), the Board affirmed the administrative law judge's finding that claimant failed to establish total disability at Section 718.204(c) on the miner's claim, and affirmed the finding that claimant failed to establish death due to pneumoconiosis at Section 718.205(c) on the survivor's claim. Accordingly, the Board affirmed the denial of benefits on both claims. Director's Exhibit 117. Claimant filed a timely request for modification and submitted new evidence. Judge Levin reviewed the newly submitted evidence and determined that claimant failed to establish a mistake in determination of fact pursuant to 20 C.F.R. §725.310, and again denied benefits. Director's Exhibit 135. Claimant appealed, and in *Cox v. Oakwood Mining*, BRB No. 96-1773 BLA (Aug. 22, 1997)(unpub.), the Board affirmed the administrative law judge's findings and affirmed the denial of benefits. Director's Exhibit 142. Claimant filed another timely request for modification, and again submitted new evidence. Administrative Law Judge Lawrence P. Donnelly (the administrative law judge) determined that claimant failed to establish a mistake in a determination of fact and denied benefits. Claimant appeals, generally contending that the administrative law judge erred in failing to award benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has not participated in this appeal.

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<sup>2</sup> Administrative Law Judge Levin noted that at 20 C.F.R. §718.205(c), "all of the physicians who evaluated the cause of death acknowledged the presence of pneumoconiosis." Director's Exhibit 109. However, Judge Levin made no specific findings regarding the presence of pneumoconiosis at 20 C.F.R. §718.202(a). Subsequently, Judge Levin stated that regarding the existence of pneumoconiosis, "there is no disagreement upon that point." Director's Exhibit 135. Employer has not challenged this finding, which we affirm. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>3</sup> The Board previously affirmed the administrative law judge's finding of no total disability at 20 C.F.R. §718.204(c)(1)-(3) as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Claimant has not submitted any new evidence relevant to these subsections.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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).

As the miner is deceased, claimant cannot establish modification on the basis of a change in condition. *See Wojtowicz v. Duquense Light Co.*, 12 BLR 1-162 (1989). The newly submitted evidence consists of reports and a deposition from Dr. Sutherland, who stated that the miner had restrictive and obstructive lung disease associated with pneumoconiosis, that pneumoconiosis contributed to death, and any further coal dust exposure would have caused further restrictive and irreversible lung disease. Director's Exhibit 144; Claimant's Exhibit 1. In addition, Dr. Sutherland stated that he was not a pulmonary specialist, and did not refer the miner to one, stating that Dr. Sargent, who is a pulmonary specialist, would "probably" be in a better position to assess the miner's condition. Employer's Exhibit 4.

The administrative law judge properly weighed the newly submitted evidence in conjunction with the previously considered evidence, and permissibly found that the opinions of Drs. Sargent, Fino, Robinette, Tomaszewski, Naeye and Caffrey, all of whom concluded that the miner's pneumoconiosis was too mild to have caused any respiratory impairment, were entitled to greater weight based upon their superior qualifications in the fields of pulmonary medicine and pathology. Director's Exhibits 31, 50; Employer's Exhibit 10; Board's slip op. at 3. (Sept. 28, 1994); Director's Exhibit 117; Decision and Order at 4; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). In addition, the administrative law judge rationally found their opinions more consistent with the objective evidence, including an autopsy report which failed to diagnose a restrictive and obstructive lung disease. *Woody v. Valley Camp Coal Co.*, 73 F.3d 360, 20 BLR 2-113 (4th Cir. 1995); *Jewell Smokeless Coal Co. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994). We therefore affirm the administrative law judge's finding that Dr. Sutherland's opinion is entitled to little weight, and is outweighed by the remaining physicians' opinions. As such, we affirm the

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<sup>4</sup> In addition, Dr. Sutherland stated in his December 20, 1989 report that the miner is totally disabled due to pneumoconiosis. Director's Exhibit 10. That report was considered by the Judge Levin in his previous Decision and Order. *See* Director's Exhibits 109, 117.

<sup>5</sup> The administrative law judge also noted that employer had previously submitted a report by Dr. Fino, which is not included in the Director's Exhibits. Employer's Exhibit 1; Decision and Order at 3, n.1.

administrative law judge's finding that claimant failed to establish a mistake in determination of fact, and therefore, properly denied modification pursuant to Section 725.310. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge.

