BRB No. 08-0520 BLA

O.M.M. (Widow of N.M.) Claimant-Respondent v. RED ASH SALES COMPANY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/29/2009 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

William Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits of Administrative Law Judge Michael P. Lesniak, rendered on a survivor's claim[1] 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-four years of coal mine employment and accepted employer's stipulation that the miner suffered from simple pneumoconiosis. The administrative law judge further determined that the evidence was sufficient to establish the existence of complicated pneumoconiosis, which thereby entitled claimant to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that the miner's pneumoconiosis arose out of his coal mine employment. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge "abused his discretion in reopening the record to receive the opinion of Dr. Perper." Employer's Brief at 6. Employer further asserts that the administrative law judge erred in relying on Dr. Perper's opinion to find that the miner had complicated pneumoconiosis. Employer maintains that the administrative law judge has failed to adequately explain the basis for his credibility determinations and requests that the Board vacate the award of benefits and instruct the administrative law judge on remand to exclude Dr. Perper's opinion from consideration. Claimant responds, urging affirmance of the administrative law judge's evidentiary ruling and the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

[1] The miner, N.M., filed a claim for benefits on May 26, 1983, which was denied on February 24, 1993. Director's Exhibit 1. The miner died on April 6, 2004 and his widow, O.M.M., filed her survivor's claim on June 2, 2004. Director's Exhibit 3.

[2] The record reflects that the miner's coal mine employment was in Virginia and West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

A. Admission of Dr. Perper's Report

Initially, we address employer's assertion that the administrative law judge erred in admitting Dr. Perper's report. At the hearing held on April 25, 2007, claimant's counsel identified the report of Dr. Perper dated March 8, 2007, for admission into the record as Claimant's Exhibit 1. However, because counsel did not have a physical copy of Dr. Perper's report, he requested time, post-hearing, to provide a copy of the report to the administrative law judge. Hearing Transcript (HT) at 5-6. When asked by the administrative law judge whether employer had any objection to the admission of Dr. Perper's report, counsel for employer responded that he had received a copy of Dr. Perper's report on April 10, 2007, less than twenty days prior to the hearing. HT at 6. Employer's counsel stated that he had no objection to the admission of Dr. Perper's opinion into the record if employer was given the opportunity to respond to Dr. Perper's opinion post-hearing. *Id*. The administrative law judge agreed to allow claimant to provide a copy of Dr. Perper's report after the hearing and granted employer's request to obtain supplemental opinions from its physicians in rebuttal of Dr. Perper's report. *Id*. The parties were given sixty days, or until July 25, 2007, to submit their respective evidence and then an additional thirty days to file post-hearing briefs. *Id*. at 21.

After the hearing, employer submitted the supplemental opinions of Drs. Crouch and Zaldivar in response to Dr. Perper's opinion, but claimant's counsel did not provide a copy of Dr. Perper's report to the administrative law judge. Employer's Exhibits 9, 10. In its post-hearing brief, employer noted that "no proffer of Dr. Perper's report has been made by [claimant]" and further stated:

> Following the hearing, supplemental reports form Dr. Zaldivar, ([Employer's Exhibit] 9) and Dr. Crouch ([Employer's Exhibit] 10) were proffered and exchanged with the parties. These reports offered as rebuttal to Dr. Perper's report are no longer necessary as [claimant] did not produce Dr. Perper's report for you following the hearing.

Employer's Post-Hearing Brief (Aug. 1, 2007). Counsel for claimant also filed a post-hearing brief, which cited to Dr. Perper's opinion in support of an award of benefits, but offered no explanation as to why the administrative law judge had not been given a copy of Dr. Perper's report. Claimant's Post-Hearing Brief (Aug. 18, 2007).

Claimant's counsel later submitted, by facsimile, a motion to accept the medical report of Dr. Perper along with a copy of Dr. Perper's report to the administrative law judge for consideration. The motion stated in pertinent part:

> [Claimant] . . . respectfully requests that this Court accept the enclosed medical report of Dr. Joshua Perper as evidence in the above styled Black Lung Claim. Counsel for [c]laimant was contacted by [the administrative

> law judge] on this day and was directed to immediately submit the report of Dr. Perper and this motion.

Motion to Accept Medical Report (Nov. 16, 2007). Upon receipt of claimant's facsimile motion, the administrative law judge scheduled a telephone conference with the parties. Transcript of Conference Call (Nov. 16, 2007) at 4-5. The administrative law judge explained that he was concerned with the wording of the facsimile motion and stated:

> I asked my law clerk to call Mr. Wolfe's office . . . to find out if they wanted to submit [Dr. Perper's report] and if so, to file a motion if they wanted to submit it.
>
> I [wanted] to immediately straighten out the fact that I didn't call. I didn't contact Mr. Wolfe's office. . . . My law clerk called and asked whoever answered the phone over there to submit a motion, but instead, I got a [facsimile] of Dr. Perper's report and this motion indicated that I called. I wanted to straight[en] the record out immediately that I did not call and I did not ask for Dr. Perper's report to be sent immediately[.]

Id. at 6. The administrative law judge then asked whether employer had any objection to Dr. Perper's report. Employer's counsel replied:

> I don't think I have a choice but to object to it. They had their opportunity after the hearing to submit it within [sixty] days and something should have been triggered when they got the supplemental report from Dr. Zaldivar in early June or the supplemental report from Dr. Crouch later in June for them to review their file to see whether or not the report had been proffered. It never has been. I think the record is closed. I object to it being admitted at this time.

Id at 8-9. In response to employer's objection, the administrative law judge advised claimant's counsel that, "I am going to have to have an understanding of what happened, Mr. Wolfe. So would you please file a good cause type of motion?" *Id*. at 9. The administrative law judge asked counsel to act quickly in providing his explanation as to why Dr. Perper's report was not timely provided to the court, and also gave employer's counsel ten days after receipt of the motion to respond. Thereafter, the conference call was terminated.

On November 26, 2007, claimant's counsel filed a motion requesting that the administrative law judge admit Dr. Perper's report into the record for good cause shown.[3]

[3] Counsel alleged that Dr. Perper's report had not been provided due to a clerical error. Motion Establishing Good Cause to Accept the Copy of the Report of Dr. Perper

On January 8, 2008, the administrative law judge issued an Order admitting Dr. Perper's report. As grounds for this ruling, the administrative law judge stated:

> In considering [c]laimant's request I find that [c]laimant has established good cause for admission of Dr. Perper's report. While clerical error alone does not automatically constitute good cause, in this case, the fact that [e]mployer received a copy of Dr. Perper's report, that [e]mployer did not object to the admission of Dr. Perper's report at the hearing, that [e]mployer was on notice that Claimant intended the report to be a part of the record, and, that [e]mployer is not prejudiced by the late admission of the report does establish good cause.

Order Admitting Evidence for Good Cause at 2. Thereafter, the administrative law judge issued his Decision and Order – Awarding Benefits on March 11, 2008, relying in part on Dr. Perper's report to find that claimant had established her entitlement to benefits.

Employer asserts that the administrative law judge abused his discretion in admitting Dr. Perper's report and that he improperly engaged in an *ex parte* communication with claimant's counsel *vis-a-vis* his law clerk in order to supplement the record with Dr. Perper's report. Employer specifically explains:

> Rather than being a neutral trier of fact, adjudicating the evidence which the parties presented, [the administrative law judge] acted *sua sponte*, after the evidentiary record closed, to direct his law clerk to point out an error to claimant's counsel and perhaps even solicit a correction from claimant for the failure to proffer evidence which had been promised to the [a]dministrative [l]aw [j]udge. [He] further abused his discretion in suggesting that good cause would have to be established to accept the untimely proffer of the evidence and how to proceed.

(Nov. 26, 2007). Counsel explained that after the hearing, he returned to the office and made the following entry into his computer tracking system: "04/25/2007 KDD S B post hearing; send the judge a copy of the evidence sumary [sic] and a copy fo [sic] hte [sic] perper report." *Id*. He explained that due to the misspellings that were made in the original entry, his staff misinterpreted his instructions, and believed that Dr. Perper's report had already been submitted to the administrative law judge. *Id*. Counsel asked that Dr. Perper's report be admitted as evidence, noting that since employer had already been provided a copy of Dr. Perper's report prior to the hearing, it was not prejudiced by the clerical error. *Id*.

Employer's Brief at 11. We reject employer's assertions of error as they are without merit.

Under the Administrative Procedure Act (APA), an *ex parte* communication is defined as "an oral or written communication *not on the public record* with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. §551(14), as incorporated into the Act by 5 U.S.C. §554(c), 33 U.S.C. §919(d), 30 U.S.C. §932(a) (emphasis added). The APA specifically prohibits an *ex parte* communication under the following circumstance:

> [N]o member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication *relevant to the merits of the proceeding*[.]

5 U.S.C. §557(d)(1) (emphasis added). However, if an *ex parte* communication relevant to the merits of the proceedings does occur, a remedy is provided under Section 557(d)(1)(C), which states:

> [A] member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:
>
> (i) all such written communications;
>
> (ii) memoranda stating the substance of all such oral communications; and
>
> (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph.

5 U.S.C. 557(d)(1)(C).

In this case, we do not find it necessary to specifically resolve whether the communication that occurred between the administrative law judge's law clerk and claimant's counsel was prohibited because it involved an issue *relevant to the merits of the proceeding.* Even if we accept employer's assertion that the conversation initiated by the administrative law judge between his law clerk and claimant's counsel constitutes a prohibited *ex parte* communication, we hold that any prejudice to employer by that *ex parte* communication was remedied by the fact that the administrative law judge placed the content of the conversation on the formal record. Transcript of Conference Call

(Nov. 16, 2007) at 5-6. Thus, because the administrative law judge complied with the requirements of Section 557(d)(1)(C), we reject employer's assertion that the *ex parte* communication, in and of itself, requires exclusion of Dr. Perper's report.

We also reject employer's assertion that the administrative law judge usurped his role as a "neutral" fact-finder in order to assist claimant in proffering evidence for his case. Employer's Brief at 11. Contrary to employer's suggestion, the administrative law judge did not undertake an *ex parte* communication with claimant's counsel in order to influence the weight or credibility of the evidence. Rather, the administrative law judge explained that he was prompted by employer's post-hearing brief to ascertain why claimant's counsel had not provided a copy of Dr. Perper's report to the court as agreed upon at the hearing. As the adjudication officer empowered to conduct formal hearings, an administrative law judge is granted broad discretion in resolving procedural matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). In accordance with this principle, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *Clark*, 12 BLR at 1-153. Upon consideration of the circumstances of this case, we hold that employer has not met this burden. We conclude that the administrative law judge acted within his discretion in inquiring whether claimant's counsel intended to submit Dr. Perper's report for consideration and by also informing counsel that he would have to show good cause for why Dr. Perper's report was not timely provided to the administrative law judge within the time frame established at the hearing.

Finally, we also reject employer's contention that the administrative law judge erred in concluding that claimant's counsel demonstrated good cause for the late proffer of Dr. Perper's report. Contrary to employer's contention, the administrative law judge rationally considered, overall, whether it was fair to penalize claimant and exclude Dr. Perper's report from the record based solely on a clerical error by claimant's counsel. Transcript of Conference Call (Nov. 16, 2007) at 10. The administrative law judge permissibly concluded that in light of the fact that Dr. Perper's report had been exchanged with employer's counsel, but not the administrative law judge, prior to the hearing, and employer had already submitted supplemental opinions by two of its medical experts to rebut Dr. Perper's report, there was no undue prejudice to employer in reopening the record for admission of Dr. Perper's report. *See Clark*, 12 BLR at 1-153; Order Admitting Evidence for Good Cause at 2. Thus, we reject employer's argument and affirm the administrative law judge's decision to admit Dr. Perper's report into the record.

B. Death Due to Pneumoconiosis

Employer also argues on appeal that the administrative law judge erred in finding that the miner suffered from complicated pneumoconiosis and that claimant was entitled to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis. We disagree.

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo*, 17 BLR at 1-87.

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by Section 718.304, creates an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis if (a) an x-ray of the miner's lungs shows at least one opacity greater than one centimeter in diameter; (b) a biopsy or autopsy reveals massive lesions in the lungs; or (c) when diagnosed by other means reveals a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); 20 C.F.R. §718.304(a)-(c).

The administrative law judge determined that the record did not contain a well-reasoned and well-documented opinion that established that pneumoconiosis caused, substantially contributed to, or hastened the miner's death under the provisions of Section 718.205(c)(1), (2), (4), or (5),[4] and thus, he considered whether claimant was able to

[4] The administrative law judge correctly noted that while Dr. Jelic diagnosed complicated pneumoconiosis, Dr. Perper is the only physician who directly opined that

invoke the irrebuttable presumption of death due to pneumoconiosis by establishing that the miner suffered from complicated pneumoconiosis pursuant to Section 718.304.[5] Decision and Order at 16; *see* 20 C.F.R. §718.205(c)(3). The administrative law judge found that "the issue of whether or not complicated pneumoconiosis is present rests on the pathology opinions" of Drs. Jelic, Crouch, Roggli and Perper, addressing the size of the coal macules identified on autopsy.[6] Decision and Order at 16; Director's Exhibits 11, 12; Claimant's Exhibit 1; Employer's Exhibits 1, 4, 8, 10.

Dr. Jelic performed the autopsy and described multiple black dots throughout the lung parenchyma of all lobes. Director's Exhibit 11. Under "microscopic description," Dr. Jelic wrote, "[c]oal nodules (mixed dust nodules) and silicotic nodules occasionally merge forming areas of fibrosis measuring 1 to 1.5 [centimeters] and denoting progressive massive fibrosis." *Id*. Dr. Jelic did not address the cause of the miner's death. *Id*. In a deposition conducted on January 15, 2007, Dr. Jelic acknowledged that he did not describe the size of the coal nodules on gross examination because he believed the size of the nodules would be more accurately measured on microscopic examination of the slides. Dr. Jelic reiterated that he found coal nodules forming areas from 1 to 1.5 centimeters, which he defined as progressive massive fibrosis. Employer's Exhibit 4 at 21, 28-29.

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the miner's death was due to pneumoconiosis. Decision and Order at 15-16; Claimant's Exhibit 1. Because the administrative law judge found that Dr. Perper's death causation opinion was based, in part, on inadmissible evidence, he gave no weight to Dr. Perper's opinion regarding the cause of the miner's death, but still found Dr. Perper's opinion to be probative as to the existence of complicated pneumoconiosis. *Id*. at 16.

[5] We affirm as unchallenged on appeal, the administrative law judge's findings with respect to the length of the miner's coal mine employment, and his findings pursuant to 20 C.F.R. §718.205(c)(1), (2), (4), (5). S*krack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The administrative law judge correctly noted that Dr. Zaldivar indicated that the issue of complicated pneumoconiosis must be resolved based on the pathology evidence, and that Dr. Ghio concluded that the miner did not have complicated pneumoconiosis, relying on Dr. Crouch's pathology report. Decision and Order at 16. The administrative law judge gave little weight to the opinions of Drs. Zaldivar and Ghio at 20 C.F.R. §718.304(b) because they were not pathologists. We affirm the administrative law judge's findings with regard to Drs. Zaldivar and Ghio as they are not challenged by employer in this appeal. *Skrack*, 6 BLR at 1-711; Decision and Order at 16.

Dr. Crouch performed a microscopic review of the autopsy slides and diagnosed the single large lesion for coal workers' pneumoconiosis as 8 millimeters in maximum diameter. Director's Exhibit 12. She noted that while one section of the upper lobe showed a close approximation of a few micronodules and nodules, she opined that there was no evidence of massive fibrosis or conglomerate silicosis. *Id*. Dr. Crouch diagnosed emphysema due to smoking and simple coal workers' pneumoconiosis. *Id*. She opined that the "dust-related changes" in the miner's lungs were too mild to have contributed to the miners' death. *Id*.

Dr. Roggli performed a microscopic review of the autopsy slides and diagnosed "changes of simple coal workers' pneumoconiosis with micronodules, coal dust macules and occasional macronodules, the largest of which measures 8 [millimeters] in maximum size." Employer's Exhibit 1. Dr. Roggli diagnosed centrilobular emphysema, moderate to severe simple coal workers' pneumoconiosis, with no evidence of progressive massive fibrosis. *Id*. He opined that "it is unlikely" that the miner's death was contributed to or hastened by simple coal workers' pneumoconiosis. *Id*.

Dr. Perper examined the autopsy slides, along with the reports of Dr. Jelic and Dr. Crouch. Dr. Perper reported coal nodules with a few reaching up to 1.3 centimeters in size, which he opined was consistent with complicated pneumoconiosis.[7] Claimant's Exhibit 1. Dr. Perper diagnosed complicated pneumoconiosis on a background of moderate to severe simple pneumoconiosis and centrilobular emphysema. *Id*.

In weighing these four conflicting opinions as to the existence of complicated pneumoconiosis, the administrative law judge noted that Drs. Jelic, Crouch, Roggli and Perper, "are all well-credentialed pathologists[,]" thus, "their relative qualifications are not determinative" as to the weight to accord their opinions. Decision and Order at 17. The administrative law judge determined that Dr. Perper's pathology findings, that the miner had coal macules in excess of one centimeter, were "better reasoned and documented" than those of Drs. Crouch and Roggli. *Id*.

On appeal, employer challenges the administrative law judge's decision to credit Dr. Perper's opinion for two reasons. First, employer asserts that the administrative law judge erred in failing to reject Dr. Perper's opinion, in its entirety, because he reviewed evidence that was not admitted into the record in accordance with 20 C.F.R. §725.414. Employer argues that "Dr. Perper's opinion was spoiled by the fact he had seen much evidence outside the record" and maintains that the administrative law judge erred in

[7] Dr. Perper provided a legend of microphages, and stated, "[Figure] 1 of slide/A shows at its top a lung section of two coalescing nodules measuring in aggregate up to 1.3 [centimeters]. The lower lung section in [Figure] 1 shows a solid fibro-anthracotic areas [sic] exceeding 1.3 centimeters." Claimant's Exhibit 1.

redacting only that portion of Dr. Perper's opinion dealing with pulmonary disability. Employer's Brief at 13. According to employer, "it is unclear [from the administrative law judge's decision] just how much of the report is considered and how the [administrative law judge] determined that the 'pathology' portion of the opinion was not influenced by the consideration of the other materials." *Id*. We reject employer's allegation of error as it is without merit.

In *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) McGranery & Hall, J.J., concurring and dissenting), the Board held that it is within the discretion of the administrative law judge to determine the appropriate treatment of admissible evidence which contains references to evidence excluded because it exceeds the evidentiary limitations set forth in Section 725.414. The Board held that an administrative law judge should not *automatically* exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. *Harris*, 23 BLR at 1-108. If the administrative law judge finds that the opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Id*. Rather, he may redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled.[8] *Harris*, 23 BLR at 1-108; s*ee Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004) (*en banc*).

In this case, contrary to employer's assertion, the administrative law judge specifically addressed the fact that Dr. Perper reviewed evidence from the living miner's claim that was not admitted in the survivor's claim in accordance with Section 725.414, and stated that he was redacting this evidence from consideration. Decision and Order at 6 n.8, 12. The administrative law judge determined that the redacted evidence from the miner's claim was "critical to Dr. Perper's findings that 'pneumoconiosis was a major cause of the miner's pulmonary disability . . . and a hastening factor of his death.'" Decision and Order at 12, *citing* Claimant's Exhibit 1. However, the administrative law judge found that Dr. Perper diagnosed complicated pneumoconiosis based on his review of the miner's autopsy slides, which were properly admitted into the record in the survivor's claim. *Id*. at 13-14. Thus, because the administrative law judge reasonably exercised his discretion in finding that Dr. Perper's opinion regarding the existence of complicated pneumoconiosis was not improperly tainted by a review of inadmissible

[8] In addition, the Board emphasized that exclusion is not a favored option as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) McGranery & Hall, J.J., concurring and dissenting).

evidence, we reject employer's argument. *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-66-67.

Employer's second argument with regard to Dr. Perper's opinion is that the administrative law judge did not adequately explain why he found it to be the most convincing. Employer's Brief at 15. We disagree. The administrative law judge specifically explained that he found Dr. Perper's opinion to be the "best reasoned and documented among the various pathology opinions" because Dr. Perper's report "includes extensive discussions of his microscopic findings, together with microphotographs, legends, and an analysis of the legends of microphotographs and an equivalency analysis in conjunction with citations to medical literature."[9] Decision and Order at 17. In contrast to Dr. Perper's opinion, the administrative law judge permissibly determined that Dr. Roggli's report was cursory and that Dr. Crouch's discussion of the pathology evidence, while more extensive than Dr. Roggli, was "still far less thorough than that of Dr. Perper." *Id*. The administrative law judge also considered Dr. Crouch's opinion to be less credible as to the existence of complicated pneumoconiosis as she was "the only pathologist who characterized the extent of the miner's pneumoconiosis as 'mild to moderate simple' pneumoconiosis," while Dr. Roggli diagnosed moderate to severe simple pneumoconiosis and Drs. Jelic and Perper diagnosed complicated pneumoconiosis. *Id.*, *citing* Employer's Exhibit 8 at 13.

Although employer challenges the weight accorded the conflicting medical opinions as to the existence of complicated pneumoconiosis, employer's assertions of error on appeal amount to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We conclude that the administrative law judge acted within his discretion in reaching his credibility determinations in this case. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Clark*, 12 BLR at 153. Thus, we

[9] Employer asserts that that most of the nodules measured by Dr. Perper were 6 to 7 millimeters and that he only diagnosed "one area that exceeded 10 millimeters which actually was a coalescence of two small nodules." Employer's Brief at 15. To the extent that employer suggests that Dr. Perper's opinion does not support a finding of complicated pneumoconiosis, we disagree. Contrary to employer's contention, and as noted by the administrative law judge, "Dr. Perper did not simply find two coalescing nodules measuring a total 1.3 [centimeters], but also a solid fibro-anthracotic [mass] exceeding 1.3 [centimeters]" in the lower section of the lungs. Decision and Order at 14. The administrative law judge properly found that Dr. Perper reported that "the [p]athological lesions of 1.0 centimeter or larger are equivalent to radiological lesions of the same size or larger" and qualify as complicated pneumoconiosis. *Id*., *citing* Claimant's Exhibit 1 at 19.

affirm the administrative law judge's decision to assign controlling weight to the opinion of Dr. Perper as to the existence of complicated pneumoconiosis pursuant to Section 718.304(a). *Hicks*, 21 BLR at 2-340; *Lester*, 993 F.2d at 1146, 17 BLR at 2-118. We further affirm the administrative law judge's finding that the miner suffered from complicated pneumoconiosis arising out of his coal mine employment. *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-28 (4th Cir. 2007). Because substantial evidence supports the administrative law judge's determination that the miner suffered from complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant is entitled to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Sections 718.205(c)(3), 718.304, and the award of benefits in this survivor's claim.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge