BRB No. 09-0545 BLA

LEAMON HAMILTON (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACKFIELD COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 04/28/2010
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-6574) of Administrative Law Judge Joseph E. Kane awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).[1] This case involves a subsequent claim filed on June 20, 2003.[2]

Procedural History

In the initial decision, the administrative law judge credited the miner with twenty-one years of coal mine employment,[3] and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered the miner's 2003 claim on the merits. The administrative law judge found that the evidence established the existence of both clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). After finding that the miner was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge further found that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded

[1] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the miner's subsequent claim was filed before January 1, 2005.

[2] The miner initially filed a claim for benefits on July 1, 1991. Director's Exhibit 1. The district director denied the claim on December 12, 1991. *Id.* There is no indication that the miner took any further action in regard to his 1991 claim. The miner filed a second claim on February 12, 2001. Director's Exhibit 2. In a Proposed Decision and Order dated May 10, 2002, the district director denied the claim because the evidence did not establish that the miner was totally disabled due to pneumoconiosis. *Id.* There is no indication that the miner took any further action in regard to his 2001 claim.

[3] The record reflects that the miner's most recent coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

benefits.

Pursuant to employer's appeal,[4] the Board held that the administrative law judge, in considering whether the medical opinion evidence established total disability, failed to reconcile the conflicting descriptions of the exertional requirements of the miner's usual coal mine employment. *Hamilton v. Blackfield Coal Co.*, BRB No. 06-0568 BLA (Apr. 18, 2007) (unpub.). The Board, therefore, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b)(2)(iv) and 725.309(d), and remanded the case for reconsideration. *Id.* The Board also vacated the administrative law judge's disability causation finding pursuant to 20 C.F.R. §718.204(c).[5] *Id.*

On May 7, 2007, claimant filed a "Motion for Modification and Remand" with the Board. Director's Exhibit 41 (46). Claimant requested that the miner's claim be remanded to the district director for the initiation of modification proceedings. In support of her modification request, claimant submitted a copy of Dr. Dennis' March 9, 2007 autopsy report diagnosing the miner with progressive massive fibrosis. Claimant also requested that the miner's claim be consolidated with her survivor's claim.

In remanding the case to the administrative law judge, the Board forwarded claimant's motion for modification. Although claimant's motion was directed to the Board, the administrative law judge construed it as being directed to him. The administrative law judge initially ordered that the case be remanded to the district director for "appropriate proceedings." Director's Exhibit 41 (338). However, after considering employer's motion for reconsideration, the administrative law judge determined that modification proceedings were not appropriate, vacated his remand Order, and ordered the district director to return the miner's claim record to the Office of Administrative Law Judges.[6] Director's Exhibit 41 (5).

---

[4] The miner died on November 21, 2006, while employer's appeal was pending before the Board. Claimant, the surviving spouse of the deceased miner, is pursuing the miner's claim. Although claimant filed a survivor's claim on February 5, 2007, that claim is not before the Board in this appeal.

[5] The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *Hamilton v. Blackfield Coal Co.*, BRB No. 06-0568 BLA (Apr. 18, 2007) (unpub.). The Board also affirmed the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Id.*

[6] The miner's claim, consisting of Director's Exhibits 1-45, was forwarded to the Office of Administrative Law Judges on October 22, 2008. Director's Exhibits 43-45.

In an Order dated November 17, 2008, the administrative law judge noted that claimant contended that newly-available autopsy evidence established the existence of complicated pneumoconiosis. The administrative law judge found that judicial economy favored a reopening of the record on remand, explaining that:

> Evidence of complicated pneumoconiosis is clearly probative and would be dispositive of the remaining issues of disability and disability causation. 20 C.F.R. §718.304. Moreover, I disagree that reopening the record violates the Board's mandate. The remand order requires that I reconsider the issues of total disability and total disability due to pneumoconiosis on remand. The Board did not limit the scope of evidence that I may consider in doing so. Moreover, the Board has held that an administrative law judge has discretion to reopen the record in appropriate circumstances.

November 17, 2008 Order at 2-3.

The administrative law judge, therefore, reopened the record and allowed the parties thirty days to file additional evidence "limited to affirmative and rebuttal autopsy evidence, newly-available treatment records, and supplemental opinions from the parties' medical experts." November 17, 2008 Order at 3. The administrative law judge further stated that "[i]n fairness to both sides, whose experts relied on affirmative evidence currently in the record, the parties may not substitute new evidence for affirmative evidence currently in the record." *Id.*

In response to the administrative law judge's Order, employer submitted treatment notes from Pikeville Medical Center and Dr. Caffrey's August 29, 2007 autopsy report. By Order dated February 10, 2009, the administrative law judge admitted this evidence as Employer's Exhibits 3 and 4, respectively.[7]

The Administrative Law Judge's Decision and Order On Remand

In his Decision and Order on Remand, the administrative law judge initially found that the autopsy evidence did not establish the existence of complicated pneumoconiosis. The administrative law judge, therefore, found that the miner could not establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

[7] Dr. Dennis' March 9, 2007 autopsy report was already a part of the Director's Exhibits. Director's Exhibit 41 (49).

Pursuant to the Board's remand instructions, the administrative law judge next reconsidered the evidence regarding the exertional requirements of the miner's usual coal mine employment. The administrative law judge found that the miner's usual coal mine employment as a mechanic and buggy operator involved "heavy and some very heavy manual labor." Based in part upon this determination, the administrative law judge found that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), thereby establishing a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). Weighing all of the evidence together, the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge, after reopening the record on remand, erred in not allowing employer to redesignate its affirmative medical evidence. Employer also contends that the administrative law judge erred in considering Dr. Dennis' autopsy report because it was not properly made a part of the record. Employer further contends that the administrative law judge erred in excluding part of Dr. Caffrey's autopsy report from consideration. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b), (c) and 725.309. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject employer's arguments that the administrative law judge, on remand, unfairly restricted employer's right to redesignate its affirmative medical evidence, and erred in his consideration of the autopsy reports of Drs. Dennis and Caffrey. However, the Director asserts that the administrative law judge erred in finding that Dr. Dennis' report does not support a finding of complicated pneumoconiosis. In a combined reply brief, employer reiterated its previous contentions.

The Board 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*).

The Administrative Law Judge's Evidentiary Rulings After Reopening the Record on Remand

Employer contends that the administrative law judge, after electing to admit new evidence on remand, erred in not permitting the parties to develop new affirmative evidence pursuant to 20 C.F.R. §725.414. As employer recognizes, it is within an

administrative law judge's discretion to admit new evidence on remand. *Lynn v. Island Creek Coal Co.*, 6 BLR 1-146 (1989). However, in this case, the administrative law judge correctly noted that the introduction of any new evidence had to comply with the evidentiary limitations set forth at 20 C.F.R. §725.414.[8] The administrative law judge found that admitting new autopsy evidence on remand fostered "judicial economy," because evidence of complicated pneumoconiosis could be dispositive of the remaining unresolved issues of total disability and disability causation. November 17, 2008 Order at 2. Because the parties had not previously submitted autopsy evidence, the administrative law judge correctly determined that the submission of autopsy evidence would be in compliance with the evidentiary limitations. The administrative law judge also permitted the introduction of new medical treatment records and supplemental reports from the parties' experts.

Contrary to employer's contention, the administrative law judge did not err in not allowing the parties to substitute a completely new set of affirmative evidence on remand. The parties had a full opportunity to develop their affirmative and rebuttal evidence when the case was first before the administrative law judge. As the administrative law judge explained, because the parties' experts relied on affirmative evidence currently in the record, it would be unfair to allow the parties to substitute new affirmative evidence for

[8] Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

the affirmative evidence that was already in the record. November 17, 2008 Order at 3. Because employer was allowed an opportunity to develop its affirmative medical evidence, and to respond to claimant's new autopsy evidence, its due process rights were not violated.[9]

Employer next argues that Dr. Dennis' autopsy report should be stricken from the record. Employer's contention has no merit. As the Director notes, Section 725.456(a) provides that all documents transmitted to the Office of Administrative Law Judges under 20 C.F.R. §725.421 "*shall* be placed into evidence by the administrative law judge, subject to objection by any party." 20 C.F.R. §725.456(a) (emphasis added). On October 22, 2008, the district director, pursuant to 20 C.F.R. §725.421, transmitted to the Office of Administrative Law Judges all of the evidence submitted to him, including Dr. Dennis' autopsy report that was included as a part of Director's Exhibit 41. The administrative law judge, as required by 20 C.F.R. §725.456(a), correctly placed this evidence into the record.

Employer, however, contends that it was not provided notice of the admission of Dr. Dennis' autopsy report. In support of its contention, employer notes that the district director, in an October 14, 2008 letter addressed to claimant, stated that "[n]o additional evidence ha[d] been submitted by any party since the remand of [the miner's] claim." Director's Exhibit 41-2. However, it is clear that employer received a copy of Director's Exhibit 41, including a copy of Dr. Dennis' autopsy report.[10] Employer supplied its own expert, Dr. Caffrey, with a copy of Dr. Dennis' autopsy report for review. *See* Employer's Exhibit 4. Additionally, employer referenced Director's Exhibit 41

---

[9] Citing *G.B.* [*Brown*] v. *Horn Construction Co.*, BRB No. 08-0289 BLA (Jan. 30, 2009) (unpub.), employer contends that it should be allowed to redesignate its affirmative evidence on remand. Employer's reliance upon this unpublished decision is misplaced. In that decision, the Board remanded the case to the administrative law judge with instructions that he ensure that the x-ray evidence complied with the evidentiary limitations. On remand, the administrative law judge reopened the record to allow the claimant to designate the x-rays that she relied upon in support of her affirmative case, and to allow the employer to designate its rebuttal evidence. In that case, because the claimant had not clearly designated her affirmative x-ray evidence, she was permitted to do so, on remand. Conversely, in this case, both claimant and employer designated their affirmative and rebuttal evidence when the case was first before the administrative law judge.

[10] The district director's October 22, 2008 transmittal notice states that "[c]opies of all evidence contained in the administrative files have either previously been sent to the parties or are transmitted with this notice." Director's Exhibit 43.

numerous times in its Supplemental Brief on Remand that it filed with the administrative law judge on March 9, 2009. Consequently, we reject employer's contention that Director's Exhibit 41, including Dr. Dennis' autopsy report, was not properly admitted into the record.

Employer next argues that the administrative law judge erred in determining that Dr. Caffrey's autopsy report was not admissible in its entirety, but only to the extent it was based on autopsy evidence. We disagree. The administrative law judge properly found that Dr. Caffrey's report of his review of the autopsy report and tissue slides was admissible as employer's affirmative autopsy report.[11] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237-38 (2006) (*en banc*). But, because Dr. Caffrey also considered clinical evidence, the administrative law judge reasonably determined that Dr. Caffrey's report "constitutes both an autopsy report and a medical report." Decision and Order on Remand at 8; *see Keener*, 23 BLR at 1-237-38. As employer had already submitted two medical reports in support of its affirmative case (the reports of Drs. Fino and Westerfield), the administrative law judge properly found that the portion of Dr. Caffrey's report that constituted a medical report was inadmissible. *Id.* Thus, we find no error in the administrative law judge's decision to admit Dr. Caffrey's report as employer's affirmative autopsy evidence, and to limit his consideration of the report to Dr. Caffrey's review of the autopsy report and slides. We, therefore, reject employer's allegations of error in the administrative law judge's evidentiary rulings, and we turn to the administrative law judge's consideration of the merits of the claim.

Total Disability

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based."

[11] Dr. Caffrey reviewed the miner's autopsy slides, autopsy report, and other medical evidence. Employer's Exhibit 4.

20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that the miner was totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Employer contends that the administrative law judge, in his consideration of the issue of total disability, erred in finding that the miner's usual coal mine employment involved heavy to very heavy labor. Employer specifically contends that the administrative law judge erred in crediting the miner's 2001 and 2003 descriptions of the exertional requirements of his usual coal mine employment over the description that the miner provided in 1991.

Claimant bears the burden of establishing the exertional requirements of the miner's usual coal mine employment. *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984). In this case, the miner, as part of his 1991 claim, completed a "Description of Coal Mine Work and Other Employment." Although the miner indicated that his usual coal mine work as a mechanic and buggy operator required him to crawl back and forth through the mines for seven and one-half hours per day, lift ten to twelve pounds three to four times per day, and lift one hundred pounds once a day (with help), the miner qualified his responses by noting that he did "anything that needed to be done." Director's Exhibit 1 (72).

In his two subsequent claims, filed in 2001 and 2003, the miner also completed "Description of Coal Mine Work and Other Employment" forms. In each instance, the miner indicated that his work as a mechanic and buggy operator required him to crawl for four hours per day and lift and carry fifty pounds a distance of 200 to 300 feet throughout the day. Director's Exhibits 2 (260), 6. On each form, the miner noted that he was required to haul rock dust.

Drs. Rasmussen and Fino also addressed the exertional requirements of the miner's usual coal mine employment. In an August 5, 2003 report, Dr. Rasmussen described the exertional requirement of the miner's last coal mine employment:

> His last job was that of mechanic in a small mine. He operated equipment. He carried tools. He did heavy lifting. He set timbers. He rock dusted carrying 50 [pound] rock dust bags. He shoveled the ribs. Thus, he did considerable heavy and some very heavy manual labor.

Director's Exhibit 10.

Dr. Rasmussen's description of the miner's job duties in his July 7, 2004 report is consistent with his 2003 description:

> [The miner's] last job was that of underground mechanic and shuttle car operator. He carried heavy tools weighing 50-70 [pounds]. He repaired cables and broken boxes. He shoveled at the tailpiece and around the coal feeder. He also operated the coal feeder crushing rock. He set timbers when pillaring. He built cribs. Thus, he did considerable heavy and some very heavy manual labor.

Director's Exhibit 41 (299).

However, in two reports, Dr. Fino stated that the miner told him that his last job as a mechanic and shuttle coal operator did not require heavy labor. Director's Exhibits 2 (66), 41 (252).

In his Decision and Order on Remand, the administrative law judge followed the Board's directive to reconsider the conflicting descriptions of the exertional requirements of the miner's coal mine employment. The administrative law judge found that the miner's 2001 and 2003 descriptions of his coal mine duties were more probative because they are more detailed than the miner's earlier description in 1991. Decision and Order on Remand at 13. The administrative law judge also found that the miner's 1991 description was "quite terse," as the miner qualified his response at that time by noting that he did "anything that needed to be done." *Id.* The administrative law judge also found that Dr. Rasmussen's account of the miner's exertional requirements was more likely to be accurate because he provided consistent and detailed descriptions of the miner's job duties. *Id.* Conversely, the administrative law judge noted that there was no evidence that Dr. Fino inquired of, or considered, the specific tasks that the miner was required to perform. *Id.* The administrative law judge permissibly found that, while it was possible that Dr. Fino simply relied on the miner's own description of his work, Dr. Rasmussen considered the miner's specific duties and tasks and classified such work as "heavy" and in some cases "very heavy." *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Because it is supported by substantial evidence, we affirm the administrative law judge's characterization of the exertional requirements of the miner's usual coal mine employment as involving heavy to very heavy labor.

Having found that the miner's usual coal mine employment involved heavy to very heavy labor, the administrative law judge found that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §§718.204(b), 725.309(d). Decision and Order on Remand at 14. Dr. Rasmussen opined that the miner did not retain the respiratory capacity to perform his usual coal mine employment. In addition,

employer concedes that, if the exertional requirements of the miner's usual coal mine employment involved heavy manual labor, the opinions of Drs. Fino and Westerfield also support a finding of total disability. *See* Employer's Brief at 37-38. Consequently, we affirm the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). We, therefore, also affirm the administrative law judge's finding that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final.[12] 20 C.F.R. §725.309(d). Additionally, because employer does not challenge the administrative law judge's finding that all of the evidence of record establishes total disability pursuant to 20 C.F.R. §718.204(b), this finding is also affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Total Disability Causation

Employer argues that the administrative law judge erred in finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[13] In considering whether the evidence established that the

[12] Employer argues that the administrative law judge erred in not comparing the evidence in the prior claim to the new evidence in the subsequent claim to ensure that the new evidence differed qualitatively. Under the revised version of Section 725.309, claimant no longer has the burden of proving a "material change in conditions;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based. *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Consequently, we reject employer's contention that the administrative law judge was required to conduct a qualitative comparison of the old and new evidence pursuant to 20 C.F.R. §725.309.

[13] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

miner's total disability was due to pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Rasmussen, Robinette, and Westerfield, as well as the autopsy reports of Drs. Dennis and Caffrey. While Drs. Rasmussen and Robinette attributed the miner's respiratory disability, in part, to his coal dust exposure, Director's Exhibits 10, 41 (234, 299), Dr. Westerfield opined that the miner's coal workers' pneumoconiosis was not a significant contributing factor to his respiratory disability.[14] Director's Exhibit 41 (290). In regard to the autopsy evidence, Dr. Dennis diagnosed, *inter alia*, "anthracosilicosis with macular development greater than 3 cms. focal and prominent emphysematous changes." Director's Exhibit 41. Dr. Caffrey opined that the "amount of lesions of simple coal workers' pneumoconiosis could not have caused the [miner] any significant degree of pulmonary disability." Employer's Exhibit 4.

The administrative law judge found that Dr. Rasmussen's opinion was the most persuasive because the doctor addressed all three of the possible causes of the miner's respiratory impairment: coal dust exposure, cigarette smoking, and tuberculosis. Dr. Rasmussen opined that the two risk factors for the miner's disabling lung disease were his cigarette smoking and coal dust exposure. Director's Exhibit 41 (299). Dr. Rasmussen explained that both of these factors contributed to the miner's respiratory disability because they "[b]oth cause similar lung tissue destruction and small airway disease." *Id.* Dr. Rasmussen characterized the miner's coal dust exposure as a "major contributing factor" to his respiratory disability. *Id.* Although Dr. Rasmussen opined that the miner's "active treated pulmonary tuberculosis" could have also contributed to the miner's respiratory disability, he explained that this condition "appear[ed] to have been of minimal significance since [the miner] was able to work almost 30 years after treatment." Director's Exhibit 10. The administrative law judge found that Dr. Rasmussen's opinion regarding the contribution of the miner's coal dust exposure was supported by that of Dr. Robinette. Decision and Order on Remand at 15-16.

By contrast, the administrative law judge found that Dr. Westerfield's opinion was conclusory, noting that the doctor did not explain why he believed that smoking was the predominant cause of the miner's pulmonary impairment. Decision and Order on Remand at 15. The administrative law judge also found that Dr. Westerfield's basis for excluding the miner's coal dust exposure as a cause of his pulmonary impairment, *i.e.*, the fact that the miner's coal dust exposure had ceased thirteen years ago, was inconsistent with the progressive nature of pneumoconiosis. *Id.* In regard to the autopsy evidence, the administrative law judge noted that Drs. Dennis and Caffrey differed as to

---

20 C.F.R. §718.204(c)(1).

[14] Dr. Fino did not address the cause of the miner's disabling pulmonary impairment. Director's Exhibit 41 (252).

the extent of the miner's pneumoconiosis. Because he could find no basis to credit one physician's assessment over the other, the administrative law judge found that the autopsy evidence was "inconclusive as to the extent of pneumoconiosis in the [m]iner's lungs, and the issue of disability causation." *Id.*

Consequently, having found Dr. Rasmussen's opinion to be the most persuasive opinion of record, the administrative law judge found that the medical evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order on Remand at 15-16.

Employer contends that the administrative law judge erred in crediting Dr. Rasmussen's opinion, that the miner's total disability was due, in part, to coal dust exposure, over the contrary opinions of Drs. Westerfield and Caffrey. We disagree. The administrative law judge found that Dr. Rasmussen's opinion was the most persuasive because Dr. Rasmussen addressed all of the possible etiologies for the miner's pulmonary disability and explained why he determined that the miner's coal dust exposure and cigarette smoking contributed to the miner's pulmonary impairment. The administrative law judge permissibly found that Dr. Rasmussen's disability causation opinion was the best reasoned opinion of record and was, therefore, entitled to the greatest weight. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

The administrative law judge also rationally found that Dr. Westerfield's opinion, that the miner's pulmonary impairment could not have been attributable to coal dust exposure because his coal mine employment had ended thirteen years earlier, was inconsistent with the amended regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); Decision and Order on Remand at 15. The administrative law judge, therefore, permissibly accorded less weight to Dr. Westerfield's opinion.

Employer contends that the administrative law judge erred in not according greater weight to Dr. Caffrey's opinion, that the degree of the miner's simple coal workers' pneumoconiosis was insufficient to have caused him any significant degree of pulmonary disability. Employer's Exhibit 4. We disagree. The administrative law judge noted that Dr. Caffrey's assessment regarding the severity of the miner's pneumoconiosis revealed by the miner's autopsy slides differed from Dr. Dennis' assessment. Dr. Dennis, the autopsy prosector, opined that the miner's autopsy slides revealed a more severe degree of pneumoconiosis, diagnosing progressive massive fibrosis, as well as anthracosilicosis with macular development of over three centimeters. Given the conflicting opinions by

"equally well-qualified" pathologists regarding the degree of pneumoconiosis revealed by the autopsy slides, the administrative law judge permissibly found that the autopsy evidence was inconclusive and, therefore, not determinative of the disability causation issue. Decision and Order on Remand at 15; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

Thus, having found that that Dr. Rasmussen's well-reasoned and documented opinion was the most persuasive opinion of record, Decision and Order on Remand at 15, the administrative law judge permissibly accorded the greatest weight to his opinion that the miner's totally disabling pulmonary impairment was due to his pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the miner's total disability was due to pneumoconiosis. *See* 20 C.F.R. §718.204(c). We, therefore, affirm the administrative

law judge's award of benefits.[15]

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[15] In light of our affirmance of the administrative law judge's award of benefits, we need not address the contention of the Director, Office of Workers' Compensation Programs, that the administrative law judge erred in finding that Dr. Dennis' opinion does not support a finding of complicated pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).