BRB Nos. 10-0458 BLA
and 10-0484 BLA

LUCILLE MARTIN (o/b/o and Widow of DALE MARTIN)	)	
Claimant-Respondent Petitioner	)	
v.	)	
JEWELL SMOKELESS COAL CORPORATION	)	DATE ISSUED: 04/28/2011
Employer-Petitioner Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decisions and Orders on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Paul (Rick) Rauch (Harrison Moberly), Indianapolis, Indiana, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-0001) of Administrative Law Judge Donald W. Mosser awarding benefits on a miner's 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*)) (the Act). Claimant[1] appeals the Decision and Order on Remand (05-BLA-5026) of Administrative Law Judge Donald W. Mosser denying benefits on a survivor's claim filed pursuant to the Act. The Board has consolidated the appeals for purposes of decision only.[2] Because the administrative law judge issued separate decisions in regard to these claims, the Board will address them separately.

The Miner's Claim

The miner's claim is before the Board for the fourth time. In its last decision, the Board affirmed the administrative law judge's finding of eleven years and five months of coal mine employment,[3] and his finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). *L.M.* [*Martin*] *v. Peabody Coal Co.*, BRB Nos. 08-0268 BLA, 07-0727 BLA, 07-0411 BLA (Dec. 30, 2008) (unpub.). The Board, however, vacated the administrative law judge's findings that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* The Board instructed the administrative law judge, on remand, to reconsider the opinions of Drs. Dultz, Cohen, Garcia, Repsher, Renn, and Tuteur, and to specifically address whether their opinions are adequately reasoned and documented. *Id.* The Board also instructed the administrative law judge to consider the CT scan evidence at 20 C.F.R. §718.202(a)(4). *Id.*

On remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established that the miner's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

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[1] Claimant is the surviving spouse of the deceased miner, who died on March 4, 2003. Claimant's Exhibit 5 (S). An exhibit in the miner's claim will be designated with an "M," and an exhibit in the survivor's claim will be designated with an "S."

[2] The miner's claim was filed on February 17, 1993, and the survivor's claim was filed on November 24, 2003. The recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to either claim in this case, because the claims were filed before January 1, 2005.

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

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions of error. Claimant has filed an additional brief, reiterating her support of the administrative law judge's award of benefits.

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. 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 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*).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis.[4] On remand, in his consideration of whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Dultz, Cohen, Cook, Repsher, Renn, and Tuteur. While all of the physicians opined that the miner suffered from chronic obstructive pulmonary disease (COPD), they differed as to whether it was caused, in significant part, by the miner's coal mine dust exposure. Drs. Dultz and Cohen opined that the miner suffered from COPD due to both coal mine dust exposure and cigarette smoking. Claimant's Exhibits 1 (M), 13(M), 20 (M), 23 (M). Conversely, Drs. Repsher, Renn, and Tuteur attributed the miner's COPD exclusively to his cigarette smoking. Employer's Exhibits 30-31 (M), 33(M), 35(M). Dr. Cook opined that the miner's obstructive airways disease was not due to his coal mine employment. Director's Exhibit 23 (M).

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

In evaluating the conflicting evidence, the administrative law judge accorded less weight to the opinions of Drs. Repsher, Renn, and Tuteur because he found that these doctors failed to adequately explain how they eliminated the miner's eleven years and five months of coal mine dust exposure as a contributor to his disabling COPD. Decision and Order on Remand at 10-12. The administrative law judge also accorded less weight to the opinions of Drs. Repsher, Renn, and Tuteur because the physicians relied upon studies that are contrary to those accepted by the Department of Labor. *Id.* at 12. The administrative law judge also found that Dr. Cook's opinion was not sufficiently reasoned. *Id.* Conversely, the administrative law judge found that Dr. Cohen's diagnosis of legal pneumoconiosis was well-reasoned and well-documented. *Id.* at 8-9. The administrative law judge also credited Dr. Cohen's opinion based upon Dr. Cohen's superior qualifications, and because he found that Dr. Cohen's opinion is consistent with the Department's recognition that coal mine dust can contribute significantly to a miner's obstructive lung disease, independent of clinical pneumoconiosis. *Id.* The administrative law judge further found that Dr. Cohen's opinion was supported by that of the miner's treating physician, Dr. Dultz. *Id.* The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in relying on Dr. Cohen's opinion to support a finding of legal pneumoconiosis, because Dr. Cohen's opinion is not sufficiently reasoned. Employer also maintains that the administrative law judge provided claimant with an impermissible presumption that his COPD arose from his coal mine dust exposure. These arguments are without merit.

Dr. Cohen noted that the miner's symptoms of chronic lung disease began five years after he started his coal mine employment. Claimant's Exhibit 13 (M). Dr. Cohen opined that the miner's pulmonary function studies showed a severe pulmonary impairment with severe diffusion impairment due to obstructive lung disease. *Id.* Dr. Cohen also opined that the miner's arterial blood gas studies revealed a significant gas exchange abnormality. *Id.* Dr. Cohen explained that these findings were consistent with "both coal dust and tobacco smoke induced lung injury."[5] *Id.* Dr. Cohen noted that

[5] Dr. Cohen explained that the medical literature shows a significant relationship between coal mine dust exposure and obstructive lung disease:

> [H]ighly sophisticated scientific studies of thousands of miners consistently show a relationship between coal dust exposure and declines in lung function: dust-caused impairment is at a level comparable to that of cigarette smoke and the effect of dust exposure on FEV1 is highly significant in both smokers and non-smokers. Once again, the results show

modern medical and scientific studies confirm the link between occupational exposure to coal mine dust and obstructive lung disease and emphysema. *Id.*. Moreover, Dr. Cohen noted that obstructive lung disease from coal mine dust exposure can occur in the presence or absence of clinical pneumoconiosis. *Id.* Dr. Cohen explained the effect of the miner's eleven-year coal mine dust exposure history and his 58-61 pack-year smoking history on his COPD:

> There is no evidence of differential susceptibility to toxins which cause COPD. To suggest that a patient is exclusively susceptible to tobacco smoke and somehow resistant to the effects of coal mine dust (or vice versa) is biologically implausible. In fact, smokers who also mine have an additive risk for developing significant obstruction.
>
> In [this] case, [the miner] was exposed to significant levels of two very important toxins which are well described in the literature to cause COPD – coal mine dust and tobacco smoke. The effects of these toxins on the lungs in terms of causing COPD are indistinguishable. The epidemiological studies strongly suggest that both contribute, in an additive fashion, and there is no reason to exclude the effects of either one. In my opinion, [the miner's] obstructive impairment undoubtedly was the result of both cigarette smoke and coal mine dust exposure.

Claimant's Exhibit 13 (M) at 9 (footnote omitted).

Contrary to employer's contention, the administrative law judge permissibly accorded greater weight to Dr. Cohen's opinion because he found it to be consistent with the Department's recognition that coal mine dust can contribute significantly to a miner's obstructive lung disease independent of clinical pneumoconiosis. Decision and Order on Remand at 8; *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (indicating that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]"); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Because the administrative law judge specifically found that Dr. Cohen set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that the miner's disabling

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> a significant relationship between the loss of function and coal dust exposure just like in [the miner's] case.

Claimant's Exhibit 13 (M).

COPD was due to both smoking and coal dust exposure, we affirm the administrative law judge's permissible finding that Dr. Cohen's diagnosis of legal pneumoconiosis is well reasoned. *See Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 448, 16 BLR 2-74 (7th Cir. 1992); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Moreover, because Dr. Cohen specifically opined that claimant's coal mine dust exposure caused his COPD, we affirm the administrative law judge's conclusion that Dr. Cohen's opinion is sufficient to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.201(a)(2), (b).

Moreover, contrary to employer's contention, the administrative law judge permissibly accorded greater weight to Dr. Cohen's opinion, based upon his superior qualifications. The administrative law judge noted that Dr. Cohen, in addition to being Board-certified in Internal Medicine and Pulmonary Disease, is the Director of Pulmonary Medicine and Occupational Medicine at Cook County Hospital in Chicago. Decision and Order on Remand at 9; Claimant's Exhibits 13(M), 14 (M). Dr. Cohen is also the Director of the Black Lung Clinics Program at Cook County Hospital. *Id.* As the United States Court of Appeals for the Seventh Circuit has recognized, it is "rational to give great weight to Dr. Cohen's views, particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research." *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265 (7th Cir. 2001).

We also reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Repsher, Renn and Tuteur.[6] On remand, the administrative law judge permissibly questioned the opinions of Drs. Repsher and Renn, that the miner's COPD was due solely to smoking, because he found that the doctors did not adequately explain why the reversibility on the miner's pulmonary function studies necessarily eliminated a finding of legal pneumoconiosis. *See Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002); *Summers*, 272 F.3d at 483, 22 BLR at 2-280; Decision and Order on Remand at 11. The administrative law judge also found that Dr. Renn improperly relied upon the absence of complicated pneumoconiosis to rule out coal mine dust exposure as a cause of the miner's obstructive impairment. Decision and Order on Remand at 10; Employer's Exhibit 33 (M) at 39. As the administrative law judge noted, the regulations do not require a finding of complicated pneumoconiosis before a miner's disabling chronic

[6] The administrative law judge found that Dr. Cook's opinion, that the miner's obstructive airways disease was not due to his coal mine employment, was not sufficiently reasoned. Decision and Order on Remand at 12. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

obstructive pulmonary disease can be found to be attributable to coal dust exposure. *See* 65 Fed. Reg. 79,951 (2000) ("The statute contemplates an award of benefits based upon proof of pneumoconiosis as defined in the statute (which encompasses simple pneumoconiosis), and not just upon proof of complicated pneumoconiosis."). Consequently, the administrative law judge properly accorded less weight to Dr. Renn's opinion.

The administrative law judge permissibly found that Dr. Tuteur's opinion was entitled to less weight because the doctor, in excluding coal mine dust exposure as a cause of the miner's obstructive lung disease, improperly focused on generalities and statistics, rather than on the miner's specific condition.[7] *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Decision and Order on Remand at 11-12. Further, the administrative law judge permissibly accorded less weight to the opinions of Drs. Repsher, Renn, and Tuteur because he found that the physicians did not adequately explain how they eliminated the miner's coal mine dust exposure as a source of the miner's obstructive impairment.[8] *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); Decision and Order on Remand at 10-12. Consequently, the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Repsher, Renn, and Tuteur.[9]

[7] Dr. Tuteur explained that, in assessing the causes of obstructive lung disease for a cigarette-smoking coal miner, "one is playing a statistical game." Employer's Exhibit 31(M) at 58. Dr. Tuteur cited studies demonstrating that, while fourteen to twenty percent of smokers will develop obstruction similar to that of the miner in this case, only one to three percent of non-smoking coal miners will develop such a condition. *Id.* at 58-59.

[8] After noting that cigarette smoking is "the most common and powerful cause" of chronic obstructive pulmonary disease (COPD), Dr. Repsher opined that it "would be very unlikely" that the miner's coal mine dust exposure caused his COPD. Employer's Exhibit 28 (M). Dr. Renn opined that the severe obstruction demonstrated by the miner's 1980 pulmonary function study could not have been caused by his five years of coal mine dust exposure as of that date. Employer's Exhibit 33 (M) at 23. Although Dr. Renn acknowledged that it "might happen," he opined that it was "almost inconceivable." *Id.* Dr. Tuteur also opined that the miner's five years of coal mine dust exposure (the amount of exposure that the miner had by 1980 when he had a measureable "substantial impairment") was insufficient to cause his degree of obstruction, but Dr. Tuteur did not provide a basis for this opinion. *Id.*

[9] Because the administrative law judge provided proper bases for according less weight to the opinions of Drs. Repsher, Renn, and Tuteur, the Board need not address

Employer next contends that the administrative law judge erred in his consideration of the CT scan evidence. While several physicians interpreted the CT scan evidence as revealing the presence of COPD, the administrative law judge accurately noted that the physicians did not link the disease to either coal mine dust exposure or cigarette smoking. Decision and Order on Remand at 13. Consequently, the administrative law judge found that the CT scan evidence was insufficient to either establish, or refute, the existence of legal pneumoconiosis. *Id.* Because the administrative law judge's weighing of the CT scan evidence is rational, it is affirmed.

The function of the administrative law judge, as fact-finder, is to weigh the conflicting medical evidence. *See Poole*, 897 F.2d at 893, 13 BLR at 2-355. In this case, the administrative law judge reviewed the opinions of Drs. Repsher, Renn, and Tuteur and found that they are not well-reasoned and are entitled to less weight than the better reasoned opinion of Dr. Cohen. Because substantial evidence supports the administrative law judge's determination to accord the greatest weight to Dr. Cohen's opinion as to the etiology of the miner's COPD, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis in the form of COPD due to coal mine dust exposure and cigarette smoking.[10] 20 C.F.R. §718.202(a)(4); *Beeler*, 521 F.3d at 726, 24 BLR at 2-104; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

The administrative law judge, relying upon Dr. Cohen's opinion, found that the 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 14. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710 (1983). We, therefore, affirm the administrative law judge's award of benefits in the miner's claim.

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employer's remaining arguments regarding the weight accorded to those opinions. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[10] Employer contends that the administrative law judge erred in his consideration of Dr. Dultz's opinion. Because the administrative law judge, in finding that the medical opinion evidence established the existence of legal pneumoconiosis, permissibly accorded the greatest weight to Dr. Cohen's opinion, his error, if any, in regard to his consideration of Dr. Dultz's opinion, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The Survivor's Claim

The survivor's claim is before the Board for the second time. In the last decision, the Board vacated the administrative law judge's findings that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R § 718.202(a)(4), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Martin*, BRB Nos. 08-0268 BLA, 07-0727 BLA, and 07-0411 BLA. The Board instructed the administrative law judge, on remand, to reconsider the opinions of Drs. Dultz, Cohen, Renn, and Tuteur,[11] and to specifically address whether their opinions are adequately reasoned and documented. *Id.* The Board also instructed the administrative law judge to consider the CT scan evidence at 20 C.F.R. §718.202(a)(4). *Id.*

On remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis. However, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis.[12] The Director has not filed a response brief. In a reply brief, claimant reiterates her previous contentions of error.

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes that

[11] Because claimant's survivor's claim is subject to the evidentiary limitations set forth at 20 C.F.R. §725.414, the administrative law judge considered a more limited set of evidence in his adjudication of this claim.

[12] Because employer argues in support of the ultimate result reached by the administrative law judge - a denial of benefits - employer's argument is properly before the Board. *See King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-91-92 (1983); *see also Dalle-Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-68 (3d Cir. 1987).

pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). For the same reasons that he articulated in his adjudication of the miner's claim, the administrative law judge credited Dr. Cohen's opinion over those of Drs. Renn and Tuteur, and found that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD due to coal mine dust exposure and cigarette smoking. Decision and Order on Remand at 10. We, therefore, affirm the administrative law judge's finding of legal pneumoconiosis in the survivor's claim, for the same reasons set out above in our discussion of the miner's claim.

In regard to the cause of the miner's death, the administrative law judge considered the miner's death certificate and the medical opinions of Drs. Dultz, Cohen, Tuteur, and Renn. The miner's death certificate was completed by Dr. Bittar, who attributed the miner's death to respiratory failure due to chronic pulmonary disease, abdominal aortic aneurysm, and coronary artery disease. Claimant's Exhibit 5 (S).

Dr. Dultz opined that the immediate cause of the miner's death was pneumonia. Claimant's Exhibit 7 (S) at 45-46. However, Dr. Dultz further opined that the miner's legal pneumoconiosis (COPD due to coal mine dust exposure and cigarette smoking) was a contributing cause of the miner's death. *Id.* at 46-47. Dr. Dultz explained that a "normal person can handle a fairly extensive pneumonia and continue to breathe, but someone with chronic lung disease is at much greater risk of having respiratory failure as a result of pneumonia." *Id.* at 46.

Dr. Cohen opined that the miner's legal pneumoconiosis hastened his death in two ways:

> First, [the miner] was unable to undergo a surgical procedure because of his COPD. This procedure would likely have prolonged his life. Second, he died from respiratory failure and pneumonia. He did not have normal underlying lungs, but in fact had lungs which had been severely damaged by the effects of his coal mine dust and tobacco smoke exposures. His lungs could not withstand the insult of his hospital acquired pneumonia as

> well as a normal lung would have. Therefore, I believe, to a reasonable degree of medical certainty, that he died sooner than he would have, had he had normal lungs.

Claimant's Exhibit 18 (S) at 11.

Dr. Tuteur opined that multiple conditions contributed to the miner's death:

> [The miner] died in the post-procedure period of attempting to correct an abdominal aortic aneurysm, a partial manifestation of his severe peripheral vascular disease. This procedure was followed by spinal cord infarct, pseudomembranous colitis, atrial fibrillation, congestive heart failure, nosocominal pneumonia, and death.
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> [The miner] had multiple co-morbidities at the time of his abdominal aortic aneurysm surgery. He had coronary artery disease. He had peripheral vascular and chronic obstructive pulmonary disease. When he developed first the complication of ischemia to the spinal cord and lower extremity paralysis . . . , and then he developed nosocomial infection, particularly nosocomial pneumonia, it is this increased defense mechanism of his lungs due to the chronic obstructive pulmonary disease that put him at in increased risk for the development of pneumonia.

Employer's Exhibit 27 (S) at 7, 49.[13]

Dr. Renn opined that the miner's death was due to "ischemic necrosis of the bowel resulting from thromboemboli to his inferior mesenteric artery." Employer's Exhibit 3(S) at 7. Dr. Renn further opined that the miner's death "would have occurred when and in what manner it did, whether he had normal lung function or compromised lung function." *Id.* at 9.

After noting that the Seventh Circuit has recognized that pneumoconiosis will be considered a substantially contributing cause of a miner's death if it hastens his death, the

[13] Because Dr. Tuteur attributed the miner's COPD solely to his cigarette smoking, he opined that the miner's death was not due to legal pneumoconiosis. Employer's Exhibit 1 (S) at 7. However, Dr. Tuteur acknowledged that, if the miner's COPD was caused by both coal mine dust exposure and cigarette smoking, he would agree that this condition contributed to the miner's death. Employer's Exhibit 27 (S) at 62.

administrative law judge looked to the law of the United States Court of Appeals for the Sixth Circuit for further guidance regarding the kind of evidence that can meet the "hastening" standard. The administrative law judge noted that the Sixth Circuit has held that pneumoconiosis only "hastens" a death if it does so through a specifically defined process that reduces the miner's life by an estimable time. Decision and Order on Remand at 10-11, *citing Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303, 24 BLR 2-257, 2-266 (6th Cir. 2010). The administrative law judge further noted that the Sixth Circuit has held that a medical opinion, that pneumoconiosis makes someone weaker, and therefore less resistant to some other trauma, is legally insufficient to satisfy the "hastening" standard. Decision and Order on Remand at 10, *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Based upon the Sixth Circuit's articulation of the hastening standard, the administrative law judge found that the opinions of Drs. Dultz and Cohen, that the miner's legal pneumoconiosis hastened his death by rendering him less capable of withstanding the effects of the pneumonia that caused his death, were insufficient to support a finding that the miner's death was due to pneumoconiosis. Decision and Order on Remand at 11-12. The administrative law judge found that it was "more reasonable" to rely on the opinions of Drs. Tuteur and Renn, that the miner's death was not due to legal pneumoconiosis. *Id.* at 12. The administrative law judge, therefore, found that the evidence did not establish that the miner's death was due to legal pneumoconiosis.

Claimant contends that the administrative law judge erred in finding that the opinions of Drs. Dultz and Cohen, that the miner's legal pneumoconiosis hastened his death by rendering him less capable of withstanding the effects of the pneumonia that caused his death, are insufficient to support a finding that the miner's death was due to pneumoconiosis. Claimant's Brief at 8. We agree. Contrary to the standard employed by the administrative law judge, the Seventh Circuit has recognized that "benefits must be paid if [pneumoconiosis] hastens death from another source." *Villain*, 312 F.3d at 334, 22 BLR at 2-587) (affirming an administrative law judge's finding that a miner's pneumoconiosis hastened his death from colon cancer). In support of this view, the Seventh Circuit has relied upon the fact that the Department, in promulgating 20 C.F.R. §718.205(c), recognized that "the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support." *Villain*, 312 F.3d at 335, 22 BLR at 2-588, *citing* 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000). Consequently, because the opinions of Drs. Dultz and Cohen, if credited, support a finding that the miner's death was hastened by his legal pneumoconiosis under the relevant standard, as set forth in *Railey* and *Villain*, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c), and remand the case for further

consideration.[14]

In evaluating the conflicting evidence at 20 C.F.R. §718.205(c), the administrative law judge, on remand, may permissibly find that a physician's opinion is entitled to less weight on the issue of death causation if it is based on a finding that the miner did not suffer from any type of coal mine dust-related disease. *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

Attorney's Fee Request

In regard to the miner's claim, claimant's counsel has filed a fee petition for services performed before the Board in *L.M.* [*Martin*] *v. Peabody Coal Co.*, BRB Nos. 08-0268 BLA, 07-0727 BLA, and 07-0411 BLA (Dec. 30, 2008) (unpub.), between February 8, 2007 and January 6, 2009. Claimant's counsel requests a total fee of $26,515.49 for 125.10 hours of legal services at an hourly rate of $210.00, and expenses of $244.49. Employer objects that counsel's fee is excessive.[15] Claimant's counsel replies that his requested fee is reasonable.

The Act provides that when a claimant wins a contested case, the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The

[14] In addition to opining that the miner's legal pneumoconiosis hastened his death by rendering him less capable of withstanding the effects of his pneumonia, Dr. Cohen also opined that the miner's legal pneumoconiosis contributed to his death by rendering him unable to undergo a surgical procedure that "would likely have prolonged his life." Claimant's Exhibit 18 (S) at 11. The administrative law judge found that the evidence demonstrated that surgery was not performed on the miner's ischemic bowel because of several health problems, not just his legal pneumoconiosis. Decision and Order on Remand at 12. The administrative law judge further found that Dr. Cohen's opinion that the miner's legal pneumoconiosis precluded life-prolonging surgery was speculative. *Id.* Because claimant does not challenge the administrative law judge's finding that this aspect of Dr. Cohen's opinion is insufficient to support a finding of death due to pneumoconiosis, it is affirmed. *Skrack*, 6 BLR at 1-711.

[15] We accept employer's brief in opposition to claimant's counsel's fee petition as part of the record before the Board. 20 C.F.R. §802.217.

regulations further provide that:

> Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, the amount of benefits awarded, and, when the fee is to be assessed against the claimant, shall take into account the financial circumstances of the claimant. A fee shall not necessarily be computed by multiplying time devoted to work by an hourly rate.

20 C.F.R. §802.203(e).

The Board's regulations further provide that counsel's fee application must contain specific information, including a "complete statement of the extent and character of the necessary work done." 20 C.F.R. §802.203(d)(1). In this case, for most of the time entries on his fee petition, claimant's counsel combined different types of services that he rendered on a given day, and listed them as a single item. As a result, it is impossible for the Board to determine the amount of time he spent on each service, and determine whether the requested time was reasonable. Because claimant's counsel's fee petition does not comport with the regulatory requirements, it is defective. *Miller v. Director, OWCP*, 4 BLR 1-640, 1-643 (1982). Claimant's counsel must cure these defects before the Board can address his fee petition.

We also find merit with employer's additional objections. Claimant's counsel's request for 125.10 hours of legal services is excessive. Claimant's counsel justifies his hourly rate of $210.00, in part, based on his experience in black lung litigation (including appeals to the Board), and his management of the miner's claim since 1996. That expertise should be reflected in a reduced number of hours for work performed, and in the type of work necessary.[16]

In sum, claimant's counsel, in submitting his amended fee petition, must specifically indicate, for each entry, how his requested time relates to the adjudication of the miner's claim, as opposed to the survivor's claim. Further, counsel must indicate the reason for the service, and must indicate how much time he spent on each service.

[16] Counsel, with his experience, should not have found it necessary to conduct "legal research" regarding Board procedures. Moreover, while it is reasonable for an attorney to make periodic inquiries as to the status of a case, *see Miller v. Director, OWCP*, 4 BLR 1-640, 1-643-44 (1982), given that there were no inordinate delays in the Board's processing of the miner's claim, counsel's repeated status inquiries were both excessive, and unnecessary. *Hill v. Director,* OWCP, 4 BLR 1-280, 1-283 (1981).

Moreover, claimant's counsel's fee request should be limited to work performed before the Board. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186 (1986). Finally, if claimant's counsel seeks compensation for postage, telephone, and photocopying expenses, he must demonstrate that these expenses were reasonable and necessary to the work performed before the Board. *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128, 130 (1989).

Because claimant's counsel has not provided a complete fee application, we grant him thirty (30) days in which to submit an amended fee petition. *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1055 (9th Cir. 2009). Employer may file a response to claimant's counsel's amended fee petition within ten (10) days from receipt of the petition. 20 C.F.R. §802.203(g).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits in the miner's claim is affirmed. The administrative law judge's Decision and Order on Remand denying benefits in the survivor's claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge