BRB No. 03-0253 BLA

MILA M. DALE (Widow of ROY R. DALE) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/18/2003 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Timothy S. Williams (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2001-BLA-0774) of Administrative Law Judge Pamela Lakes Wood rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] The miner's claim was filed on April 2, 1986 and benefits were awarded on it by Administrative Law Judge Henry W. Sayrs on February 28, 1989. Director's Exhibits 25-1, 25-52. Judge Sayrs credited the miner with forty years of coal mine employment[2] and found that the miner established the existence of pneumoconiosis by a preponderance of the chest x-ray readings pursuant to 20 C.F.R. §718.202(a)(1)(2000), and by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4)(2000). Director's Exhibit 25-52 at 6-7. Chest x-rays and medical opinions were the only types of evidence submitted on the issue of pneumoconiosis in the miner's claim. Judge Sayrs additionally found that employer did not rebut the presumption that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b)(2000). Director's Exhibit 25-52 at 8. Judge Sayrs further determined that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204, and awarded benefits. Director's Exhibit 25-52 at 8-12.

Employer appealed but did not challenge Judge Sayrs's finding that the existence of pneumoconiosis arising out of coal mine employment was established. Consequently, the Board affirmed Judge Sayrs's finding as unchallenged. *Dale v. Eastern Associated Coal Corp*., BRB No. 89-1022 BLA, slip op. at 2 n.1 (Apr. 9, 1991)(unpub.). The Board went on to affirm the award of benefits. *Id*. at 2-4.

The miner received benefits for total disability due to pneumoconiosis until his death from respiratory failure on November 23, 1999. Director's Exhibits 6, 7. No autopsy was performed. Claimant filed her application for survivor's benefits on December 13, 1999. Director's Exhibit 1.

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 25-2, 25-3. 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, 1-202 (1989)(*en banc*).

Employer contested all elements of entitlement. In support of employer's contention that the miner did not have pneumoconiosis, employer submitted chest x-ray readings, hospitalization records, and opinions by Drs. Branscomb and Zaldivar that the miner had neither clinical nor legal pneumoconiosis. Director's Exhibit 20; Employer's Exhibits 1-5.

Claimant, by counsel, asserted that employer was estopped from relitigating the issue of the existence of pneumoconiosis arising out of coal mine employment determined in the miner's claim. Hearing Tr. at 9; Claimant's Brief, Feb. 11, 2002, at 5-7. Employer argued that collateral estoppel did not apply because 1) employer submitted new evidence that was unavailable previously, 2) the allocation of the burden of proof differed between the miner's claim and the survivor's claim, 3) the standard for determining the existence of pneumoconiosis in Part 718 claims was changed in the interim by *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and 4) a physician who diagnosed pneumoconiosis in the miner's claim subsequently pled guilty to fraud. Closing Argument on Behalf of Employer, Feb. 8, 2002 at 4-8.

Administrative Law Judge Pamela Lakes Wood addressed each of the parties' arguments and found that the elements of collateral estoppel were established as to the issue of the existence of pneumoconiosis arising out of coal mine employment determined in the miner's claim. Decision and Order at 5. In so finding, the administrative law judge determined that "the pneumoconiosis Judge Sayrs found in 1989 was both 'clinical' (based upon x-ray evidence) and 'legal' (based upon medical opinion evidence)." Decision and Order at 5 n.5.

The administrative law judge found that no exceptions to the doctrine of collateral estoppel were applicable. Decision and Order at 6-8. The administrative law judge noted that no autopsy evidence was submitted in the survivor's claim, but rather, chest x-rays and medical opinions. The administrative law judge found this new evidence to be "essentially cumulative of that previously of record on the pneumoconiosis issue" in the miner's claim. Decision and Order at 6. Additionally, the administrative law judge observed that Judge Sayrs did not apply the true doubt rule when he found the existence of pneumoconiosis established in 1989. Decision and Order at 8. The administrative law judge therefore determined that the subsequent invalidation of the true doubt rule by *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), did not reallocate the burden of proof on the pneumoconiosis issue between the miner's and survivor's claims in this case. The administrative law judge further considered that since Judge Sayrs found pneumoconiosis established by both the chest x-ray readings at Section 718.202(a)(1)(2000) and the medical opinions at Section 718.202(a)(4)(2000), his "failure to discuss the section as a whole would at most be harmless error under *Compton*." Decision and Order at 8. The administrative law judge additionally

concluded that employer's submission of Dr. Modi's guilty plea was merely a request for "a reweighing of the evidence . . . precluded by the doctrine of collateral estoppel." Decision and Order at 7. Consequently, the administrative law judge found that employer was precluded from relitigating the issue of the existence of pneumoconiosis in the survivor's claim, and found that claimant "has established that the Miner ha[d] clinical and legal pneumoconiosis arising out of his coal mine employment . . . ." Decision and Order at 8.

The administrative law judge found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). She determined that Dr. Rasmussen's opinion that pneumoconiosis hastened the miner's death was the best reasoned opinion of record, that Dr. Rasmussen was well-qualified to address the issue, and that his opinion was corroborated by those of Drs. Sherman, Cardona, and Azzo. The administrative law judge gave less weight to the contrary opinions of Drs. Branscomb and Zaldivar to the extent that the physicians relied on the absence of pneumoconiosis, and found unpersuasive the physicians' additional statements that even assuming the miner had clinical coal workers' pneumoconiosis, his death was due solely to smoking. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of pneumoconiosis in the survivor's claim. Employer argues further that the administrative law judge erred in her analysis of the medical evidence when she found that the miner's death was due to pneumoconiosis. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision to apply collateral estoppel. Employer has filed a reply brief reiterating its contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), 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* 20 C.F.R. §§718.205(a)(1)-(3); 718.202(a); 718.203; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2),(c)(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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co*., 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in applying collateral estoppel as to the prior finding of pneumoconiosis because the parties in the survivor's claim are different. Employer's Brief at 15. Employer was a party to the miner's claim. The fact that claimant was not a party to the miner's claim does not preclude the application of collateral estoppel to employer. *Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 334, 22 BLR 2-581, 2-586 (7th Cir. 2002)(describing the same scenario as "a straightforward application of offensive nonmutual issue preclusion"). We therefore reject employer's contention.

Employer argues that the administrative law judge erred in applying the doctrine of collateral estoppel because, employer asserts, the finding of the existence of pneumoconiosis in the miner's claim was based on the true doubt rule, which is no longer valid. Employer's Brief at 15-17. Employer additionally argues that *Compton* subsequently changed the law in the Fourth Circuit regarding the method of determining the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), such that the issue of the existence of pneumoconiosis in the survivor's claim is not identical to the issue determined in the miner's claim. *Id*. Employer's contentions lack merit.

For collateral estoppel to apply in this case, claimant must establish that: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Sedlack v. Braswell Services Group, Inc*., 134 F.3d 219, 224 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-137 (1999)(*en banc*). The Board has recognized that "relitigation of an issue is not barred when there is a difference in the allocation of the burdens of proof and production, or a difference in the substantive legal standards pertaining to the two proceedings." *Collins v. Pond Creek Mining Co*., 22 BLR 1-229, 1-232 (2003)(citations omitted).

Here, there is no difference in the allocation of the burden of proof between the miner's claim and the survivor's claim. As the administrative law judge found, Judge Sayrs did not rely on the true doubt rule to find the existence of pneumoconiosis established in 1989. Review of Judge Sayrs's decision reflects that he found the existence of pneumoconiosis established by a preponderance of the evidence. Director's

Exhibit 25-52 at 5-7. Because Judge Sayrs placed the burden on the miner to establish the existence of pneumoconiosis, the administrative law judge correctly found that *Ondecko*'s subsequent invalidation of the true doubt rule did not alter the allocation of the burden of proof as between the two claims on the pneumoconiosis issue.

Additionally, the administrative law judge did not err in determining that the change in law rendered by *Compton* did not require relitigation of the pneumoconiosis issue in this case. Based on 30 U.S.C. §923(b), which requires that all relevant evidence be considered, the Fourth Circuit court held in *Compton* that all types of evidence submitted under Section 718.202(a)(1)-(a)(4) must be weighed together to determine whether a preponderance of the evidence establishes the existence of pneumoconiosis. *Compton*, 211 F.3d at 208-11, 22 BLR at 2-169-74. The court explained that "absent contrary evidence, evidence relevant to any one of the four subsections may establish pneumoconiosis. However, whether or not a particular piece or type of evidence actually *is* a sufficient basis for a finding of pneumoconiosis will depend on the evidence in each case." *Compton*, 211 F.3d at 209, 22 BLR at 2-171 (emphasis in original).

In 1989, Judge Sayrs found pneumoconiosis established at both subsections for which evidence was submitted, (a)(1) and (a)(4). Since the x-ray readings and medical opinions in the miner's claim were not in conflict, there was no contrary evidence for Judge Sayrs to have weighed together under *Compton*. These facts distinguish this case from those in which the Board has disapproved the application of collateral estoppel because the finding of the existence of pneumoconiosis in the miner's claim was made without weighing together contrary evidence at Section 718.202(a). *Sturgill v. Old Ben Coal Co.*, --- BLR ---, BRB No. 02-0874 BLA (Aug. 28, 2003); *Collins*, 22 BLR at 1-232. Accordingly, we hold that in this particular case, the administrative law judge properly determined that the issue of the existence of pneumoconiosis in the survivor's claim was identical to the issue previously litigated. *Hughes*, 21 BLR at 1-137.

Employer next contends that the administrative law judge erred in applying collateral estoppel because the "actually determined" element was not met. Employer argues that in 1989, Judge Sayrs found only clinical pneumoconiosis established by x-rays and by medical opinions which employer characterizes as having diagnosed only clinical pneumoconiosis based on x-ray readings. Employer thus contends that the issue of legal pneumoconiosis was not actually determined in the miner's claim. Employer's Brief at 20-21.

Employer's contention lacks merit. Judge Sayrs had before him medical opinions that diagnosed legal pneumoconiosis. Director's Exhibit 25-14 (Dr. Bharsar, diagnosing emphysema due to dust exposure in coal mine employment); Director's Exhibit 25-59 (Dr. Zaldivar, diagnosing emphysema "resulting from both smoking and coal mine work"). Before crediting those opinions at Section 718.202(a)(4)(2000), Judge Sayrs

specified that the issue for decision was "whether the [miner] has pneumoconiosis as defined by the Act and applicable regulations," and he set forth the full legal definition of "pneumoconiosis." Director's Exhibit 25-52 at 5, quoting 20 C.F.R. §718.201(2000). Judge Sayrs confirmed that he had determined the issue of legal pneumoconiosis when he explained that employer did not rebut the presumption at Section 718.203(b)(2000) because "the medical opinions in the record state that some of the [miner's] respiratory or pulmonary conditions are related to coal dust exposure in coal mine employment." Director's Exhibit 25-52 at 8. Therefore, the administrative law judge in the survivor's claim properly found that Judge Sayrs had actually determined the issue of legal pneumoconiosis in the miner's claim. *Hughes*, 21 BLR at 1-137.

Employer argues that even if the elements of collateral estoppel were met, the administrative law judge erred by failing to find that exceptions to collateral estoppel were applicable in this case. Employer contends that it submitted new evidence that was unavailable previously, *i.e.*, chest x-ray readings and medical data from the miner's treatment records covering the ten years following his claim award, and medical opinions by Drs. Branscomb and Zaldivar based in part on that data. Employer's Brief at 18-20. Employer points out that in the survivor's claim, Dr. Zaldivar retracted his previous diagnosis of pneumoconiosis.

Contrary to employer's contention, the administrative law judge permissibly found that employer did not submit the sort of evidence to justify an exception to collateral estoppel. The Board has recognized an exception to collateral estoppel where autopsy evidence is available in the survivor's claim that was not available at the time of the adjudication of the miner's claim. *Hughes*, 21 BLR at 1-137 n.2. The administrative law judge noted correctly that no autopsy evidence was available in this case. She found that the x-rays and medical opinions submitted in the survivor's claim were "essentially cumulative of that previously of record on the pneumoconiosis issue." Decision and Order at 6. The administrative law judge's finding was proper under *Hughes*. Employer's contention that Dr. Zaldivar retracted his prior diagnosis of pneumoconiosis based on the new evidence does not alter the analysis. When the United States Court of Appeals for the Seventh Circuit approved the Board's autopsy exception in *Villain*, the court explained that where no autopsy is performed, the miner "le[aves] behind only the sorts of x-ray, ventilatory-capacity, and blood-gas readings--indicators with high rates of false positives and false negatives--that were available during his life." *Villain*, 312 F.3d at 334, 22 BLR at 2-587. In the survivor's claim, Dr. Zaldivar retracted his prior diagnosis of pneumoconiosis because he concluded that he misread an x-ray in 1988. Employer's Exhibit 3 at 6. The administrative law judge properly concluded that Dr. Zaldivar's change of opinion was based on x-ray evidence that was "clearly distinguishable from the autopsy evidence involved in *Hughes*." Decision and Order at 7; *see Villain*, 312 F.3d at 334, 22 BLR at 2-587 (characterizing autopsy results as "highly reliable evidence"). Therefore, we reject employer's contention.

Employer argues that an exception to collateral estoppel should have been found because Dr. Modi, who authored one of the medical opinions credited by Judge Sayrs in the miner's claim, later pled guilty to fraud. Employer's Brief at 18. Employer cites no authority for its apparent proposition that later evidence of a witness's alleged lack of credibility is a sufficient basis for avoiding collateral estoppel. Moreover, had the Modi conviction evidence been submitted into the record of the miner's claim, at most it would have resulted in the rejection of Dr. Modi's report. There would still have been substantial evidence to support the finding of legal pneumoconiosis based on the reports of Drs. Bharsar and Zaldivar. Accordingly, the administrative law judge properly found that the later evidence of Dr. Modi's conviction did not establish an exception to collateral estoppel. *Hughes*, 21 BLR at 1-137 n.2.

Employer contends that the administrative law judge failed to consider whether an exception to offensive nonmutual collateral estoppel was warranted under *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Employer's Brief at 14-15. Because the use of offensive nonmutual collateral estoppel may be unfair in certain circumstances, the question of whether it should be applied is committed to the "broad discretion" of trial courts. *Parklane Hosiery*, 439 U.S. at 331; *Sales v. Grant*, 158 F.3d 768, 780-81 (4th Cir. 1998)(reviewing trial court's decision whether to apply offensive collateral estoppel for abuse of discretion). In granting this discretion to the courts, the United States Supreme Court discussed illustrative factors that may justify a court's refusal to permit offensive nonmutual collateral estoppel. *Parklane Hosiery*, 439 U.S. at 329-32. The record reflects that employer did not present this issue to the administrative law judge. Because employer did not raise this issue with the administrative law judge, the administrative law judge did not address it. Accordingly, employer has waived the issue.[3] *Armco, Inc. v. Martin*, 277 F.3d 468, 476, 22 BLR 2-334, 2-347 (4th Cir. 2002); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995).

Therefore, we affirm the administrative law judge's finding that the elements of collateral estoppel were established. Consequently, we affirm the administrative law judge's finding that the existence of pneumoconiosis arising out of coal mine employment was established in the survivor's claim pursuant to Sections 718.201, 718.202(a), and 718.203(b).

Pursuant to Section 718.205(c), employer contends that the administrative law judge erred by discounting the opinions of Drs. Branscomb and Zaldivar that the miner's death was unrelated to pneumoconiosis, to the extent these physicians relied on the absence of either clinical or legal pneumoconiosis in rendering their opinions. Employer cites *Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*), for the proposition that

[3] In any event, review of the record does not reveal any of the factors set forth as fairness concerns in *Parklane Hosiery*. *See* 439 U.S. at 329-33.

an administrative law judge may not discount a physician's causation opinion for failure to diagnose pneumoconiosis where the physician assumes that pneumoconiosis was present. Employer's Brief at 23-24.

Employer's contention lacks merit. In *Abshire*, the administrative law judge discounted a physician's opinion as to the cause of the miner's total disability because the physician did not diagnose pneumoconiosis. However, the administrative law judge did so without considering the physician's additional opinion that even if the miner suffered from coal workers' pneumoconiosis, the physician's opinion as to the source of the miner's disability would remain unchanged. *Abshire*, 22 BLR at 1-214-15. Consequently, the Board held that although the administrative law judge had the discretion to give less weight to the physician's opinion because the physician did not diagnose pneumoconiosis, the administrative law judge failed to address all of the relevant evidence, necessitating a remand for further consideration. *Abshire*, 22 BLR at 1-214-15 and n.15.

Here, by contrast, the administrative law judge gave "less weight" to the opinions of Drs. Branscomb and Zaldivar to the extent they relied on the absence of either clinical or legal pneumoconiosis, and then considered the physicians' assumption that even if clinical coal workers' pneumoconiosis were present, the miner's death was unrelated to pneumoconiosis:

> [T]he opinions of both Drs. Zaldivar and Branscomb are entitled to less weight based upon this factor, even though each of them went on to address the probable contribution by pneumoconiosis to the Miner's death if it were assumed to exist. I find their analyses[,] based upon a hypothetical situation which they eschew[,] to be weak, as an assumption of the existence of the disease says nothing about its clinical significance.

Decision and Order at 15. Because the administrative law judge in this case considered that Drs. Branscomb and Zaldivar assumed the existence of pneumoconiosis for part of their opinions, she did not run afoul of *Abshire*. Additionally, because the administrative law judge was authorized to consider the reasoning of the medical opinions, *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997), she did not err in finding that the physicians' assumption of pneumoconiosis was insufficient to cure the defect in their opinions. Therefore, we reject employer's contention.

Employer next argues that the administrative law judge contravened *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), by "dismiss[ing]" the opinions of Drs. Branscomb and Zaldivar as to the cause of death because they did not diagnose pneumoconiosis. Employer's Brief at 24.

The administrative law judge did not violate *Scott* or *Toler* by considering the physicians' failure to diagnose pneumoconiosis. Where an administrative law judge has found the existence of pneumoconiosis arising out of coal mine employment established, and a physician opines that the miner has neither clinical nor legal pneumoconiosis, the administrative law judge "may not credit a medical opinion" that pneumoconiosis did not cause the miner's disability "unless the [administrative law judge] can and does identify specific and persuasive reasons for concluding that the doctor's judgment" on causation "does not rest upon her disagreement with the [administrative law judge's] finding . . . ." *Toler*, 43 F.3d at 116, 19 BLR at 2-83. The reason for the rule is that the physician's opinion "is in direct contradiction to the [administrative law judge's] finding that [the miner] suffers from pneumoconiosis arising out of his coal mine employment . . . ." *Scott*, 289 F.3d at 269, 22 BLR 2-384.

Here, the administrative law judge found both clinical and legal pneumoconiosis arising out of coal mine employment established. Drs. Branscomb and Zaldivar state that the miner had neither clinical nor legal pneumoconiosis. Employer's Exhibits 2-5. Accordingly, the administrative law judge "could only give weight to t[he] opinions [of Drs. Branscomb and Zaldivar] if [s]he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most." *Scott*, 289 F.3d at 269, 22 BLR at 384. Since the administrative law judge could only give weight to the causation opinions of Drs. Branscomb and Zaldivar to the extent she could provide specific and persuasive reasons for doing so, she did not contravene *Scott* and *Toler* by merely giving their opinions "less weight." Decision and Order at 15. Therefore, we reject employer's contention.

Employer contends that the administrative law judge erred by crediting Dr. Rasmussen's opinion that pneumoconiosis hastened the miner's death because she mischaracterized Dr. Rasmussen's opinion and did not consider its reasoning. Employer's Brief at 25.

Upon review, we conclude that the administrative law judge did not mischaracterize Dr. Rasmussen's opinion, and that substantial evidence supports the administrative law judge's determination to give greater weight to Dr. Rasmussen's opinion. The record reflects that the miner died of respiratory arrest after he suffered a post-surgical collapse of the right lung, followed by pneumonia. Director's Exhibits 6, 7. Dr. Rasmussen explained that clinical and legal pneumoconiosis damaged the miner's lungs by causing impairment in oxygen transfer and by causing obstruction. Claimant's Exhibit 1 at 5-6, 8; Claimant's Exhibit 3 at 6, 8. Dr. Rasmussen explained that these impairments from pneumoconiosis hastened the miner's death from respiratory failure because they increased his susceptibility to lung collapse and pneumonia, and, more critically, because they caused the miner's left lung to be in too poor of a condition to sustain the miner's life once his right lung collapsed. Claimant's Exhibit 3 at 9. The

administrative law judge was persuaded by Dr. Rasmussen's explanation and found his opinion to be "the best reasoned and documented" of record. Decision and Order at 16. This was a permissible finding by the administrative law judge and it is supported by substantial evidence. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood*, 105 F.3d at 951, 21 BLR 2-31-32. Review of the administrative law judge's Decision and Order reflects that she considered the physicians' qualifications as required when she weighed the medical opinions. *Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275. Additionally, the administrative law judge found Dr. Rasmussen's opinion "corroborated by the opinions of Drs. Sherman, Cardona, and Azzo." Decision and Order at 16. Dr. Sherman, who is Board-certified in Internal Medicine and Pulmonary Disease, explained that when one of the miner's lungs collapsed, COPD due partly to coal mine dust hastened his death by causing the miner's remaining lung to be so diseased that he could not survive the collapsed lung. Claimant's Exhibit 2 at 15-16. The opinion of Dr. Rasmussen, as supported by that of Dr. Sherman, explains how pneumoconiosis hastened the miner's death. *Sparks*, 213 F.3d at 192-93, 22 BLR at 2-262-64. Substantial evidence supports the administrative law judge's findings, which are in accordance with law. Accordingly, we affirm the administrative law judge's finding that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c).[4]

[4] Employer alleges that the administrative law judge mischaracterized a dispute between Drs. Branscomb and Sherman regarding whether coal dust exposure causes typical COPD, and erred in her analysis of the opinions of Drs. Azzo and Cardona. Employer's Brief at 22, 24-25. We need not address these points, as we have affirmed the administrative law judge's alternate grounds for weighing the evidence and have thus affirmed her decision to accord greatest weight to Dr. Rasmussen's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge