BRB No. 09-0279 BLA

MILDRED BURNS (Widow of THOMAS BURNS) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/28/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Jeffrey S. Goldberg (Deborah Greenfield, Acting Deputy Solicitor; 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 – Awarding Benefits (2004-BLA-00050 and 2004-BLA-05354) of Administrative Law Judge Stephen L. Purcell (the

administrative law judge) with respect to a miner's duplicate claim[1] and an initial survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for a second time.[2] In its previous decision, issued March 27, 2007, the Board held that the administrative law judge made flawed evidentiary rulings in the survivor's claim, depriving employer of the opportunity to designate its affirmative and rebuttal evidence. Therefore, the Board vacated the award of survivor's benefits and remanded the case to the administrative law judge for reconsideration of the admissibility of proffered evidence, as well as whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

As to the miner's claim, the Board affirmed the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), but vacated the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i). The Board instructed the administrative law judge to reconsider his weighing of the pulmonary function studies of record and to weigh all relevant evidence regarding total disability together. Further, in light of the remand for evidentiary issues in the survivor's claim, the Board vacated the administrative law judge's findings at 20 C.F.R. §718.204(c), since any relevant new evidence submitted in the survivor's claim could be considered in the miner's claim. The Board also instructed the administrative law judge to determine whether the miner's entitlement to benefits is precluded because the miner was disabled by a preexisting nonpulmonary or nonrespiratory condition or disease. *See Burns v. Consolidation Coal Co*., BRB No. 06-0456 BLA (Mar. 27, 2007) (unpub.).

On remand, with respect to the miner's duplicate claim, the administrative law judge initially determined that claimant established a material change in conditions as required by 20 C.F.R. §725.309 (2000), based on employer's concession that the miner suffered from pneumoconiosis arising out of coal mine employment. Upon consideration of the miner's claim on the merits, the administrative law judge further determined that the miner was totally disabled due to coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). With respect to the survivor's claim, the administrative law judge found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R.

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[1] The miner's current claim is a "duplicate claim" as defined by 20 C.F.R. §725.309(d)(2000), as it was filed one year after the denial of his initial claim and prior to January 19, 2001, the effective date of the amended regulations.

[2] The complete procedural history of this case, set forth in the Board's prior decision in *Burns v. Consolidation Coal Co*., BRB No. 06-0456 BLA (Mar. 27, 2007) (unpub.), is incorporated herein by reference.

§718.205(c). Accordingly, the administrative law judge awarded benefits in the miner's and survivor's claims.

Employer asserts that the administrative law judge did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.204(b)(2)(iv), (c) and 718.205(c). Further, employer argues that the administrative law judge failed to properly apply the standard set forth in *Peabody Coal Company v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), regarding total disability causation. Employer also argues that the administrative law judge erred in excluding Dr. Oesterling's deposition from consideration in the survivor's claim. In addition, employer contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), by issuing a Decision and Order on Remand that was substantially similar to his previous Decision and Order.

Claimant[3] responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, asserting that the administrative law judge properly excluded Dr. Oesterling's deposition testimony from the record under 20 C.F.R. §725.414(a)(3)(ii). Employer, in reply, requests that the Board admit Dr. Oesterling's report in the survivor's claim pursuant to the APA or, in the alternative, remand the case to permit employer to designate Dr. Oesterling's report as one of its medical reports at 20 C.F.R. §725.414. Employer also asks that the administrative law judge's findings at 20 C.F.R. §§718.204(b)(2)(iv), (c), 718.205(c) be vacated and that the case be remanded to a different administrative law judge for review.[4]

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,

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[3] Claimant is the spouse of the deceased miner, who died on June 7, 2002. Claimant died on January 18, 2006. *See* Claimant's Counsel's letter dated March 8, 2006. The miner's and survivor's claims are being pursued by the daughter of claimant and the miner. *Burns*, slip op. at 3 n.4.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) and the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), but that claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304 and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is in accordance with applicable law.[5] 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 in a living miner's claim, 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' 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), (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); *see Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). 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*, 11 BLR at 1-29.

I. Procedural Issue

The administrative law judge issued an order directing employer to designate its affirmative autopsy and medical report evidence and rebuttal autopsy evidence in the survivor's claim.[6] Order dated November 15, 2007. In response, employer designated, as affirmative evidence, the medical reports of Drs. Tuteur and Fino and the amended

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[5] The record reflects that the miner's coal mine employment was in Illinois. Director's Exhibit 2. 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*).

[6] The evidentiary limitations at 20 C.F.R. §725.414 only apply to the survivor's claim because the miner's claim was filed prior to the effective date of the amended regulations. *See* 20 C.F.R. §725.2(c).

autopsy report of Dr. Naeye. Employer's Exhibits C, E, H. As rebuttal evidence, employer designated Dr. Oesterling's February 4, 2004 report and his deposition testimony. Employer's Exhibits J, I. The administrative law judge subsequently issued an Order in which he ruled that Dr. Oesterling's deposition testimony was not admissible as part of the rebuttal autopsy report under 20 C.F.R. §725.414 because the regulations only permit the admission of the deposition testimony of a physician who prepared a medical report. Order dated January 7, 2008, *citing Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 1995)(unpub.); *Gilbert v. Consolidation Coal Co.*, BRB Nos. 04-0672 BLA and 04-0672 BLA-A (May 31, 2005)(unpub.).

Employer argues that the administrative law judge's reliance on *Tapley* and *Gilbert* was incorrect because the facts in those cases are distinguishable and because employer only submitted the deposition testimony of one physician, Dr. Oesterling. In addition, employer asserts that the deposition testimony should be admitted under the APA, which grants the right to introduce oral or documentary evidence unless it is irrelevant, immaterial, or unduly repetitious. Employer requests that if the Board excludes Dr. Oesterling's deposition testimony, the case be remanded for employer to designate Dr. Oesterling's autopsy report as one of its medical reports under 20 C.F.R. §725.414.

Employer's allegations of error are without merit. Pursuant to 20 C.F.R. §725.414(c), "[d]eposition testimony is a medical report, whether the doctor discusses autopsy results, examination findings, or reviews the medical record" and, therefore, is subject to the evidentiary limitations at 20 C.F.R. §725.414(a). 20 C.F.R. §725.414(c); *see also* 20 C.F.R. §725.457(c)(2). Because deposition testimony is considered a medical report, Dr. Oesterling's testimony does not constitute part of his autopsy report. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007). Therefore, the administrative law judge properly determined that admission of Dr. Oesterling's deposition would exceed the number of medical reports that employer is allowed to submit pursuant to 20 C.F.R. §725.414(a)(3).[7] *Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d 384, 20 BLR 2-348 (7th Cir. 1996); *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002). We also deny employer's request for a remand to designate Dr. Oesterling's report and deposition as one of its affirmative medical reports, as employer failed to request redesignation of its evidence at the earliest opportunity, following the administrative law judge's January 7, 2008 Order excluding this evidence.

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[7] Employer has not argued that Dr. Oesterling's deposition be allowed into the record under the good cause exception at 20 C.F.R. §725.456(b)(1).

II. <u>The Miner's Claim</u>

A. The Administrative Law Judge's Findings

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c), the administrative law judge considered the medical opinions of Drs. Perper, Cohen, Tuteur, Westerfield, Crouch, Naeye, Caffrey, Oesterling, Repsher and Fino. The administrative law judge determined that the opinions in which Drs. Perper and Cohen stated that coal mine employment caused or contributed to the miner's total disability were the most persuasive. Decision and Order on Remand at 42. Noting the bases for their opinions and the studies cited to support their conclusions, the administrative law judge also found that the opinions of Drs. Perper and Cohen were well documented and well reasoned and entitled to substantial weight. *Id*. at 42-43.

The administrative law judge stated that he was not persuaded by Dr. Tuteur's opinion, that the miner's disabling impairment was due to his advanced coronary artery disease and previous car accident because: the miner's treating cardiologist and pulmonologist refute Dr. Tuteur's conclusion; there was no evidence of the miner having a restrictive impairment, or any impairment from the car accident that would have manifested itself as a restrictive disease; and, contrary to the prevailing view in the medical community, Dr. Tuteur "does not accept the proposition that centrilobular emphysema may be associated with exposure to coal dust." Decision and Order on Remand at 44-45. The administrative law judge concluded "I find the opinions of Drs. Perper and Cohen entitled to great weight inasmuch as they are well documented, better reasoned, and more persuasive than the contrary opinion of Dr. Tuteur." *Id*. at 46.

The administrative law judge gave less weight to Dr. Westerfield's opinion because, unlike the majority of the physicians, he did not find that the miner had emphysema or any other form of chronic obstructive pulmonary disease (COPD). Decision and Order on Remand at 46-47. In addition, the administrative law judge determined that Dr. Westerfield omitted pertinent information about the miner, including the impact of his forty years of coal mine employment, recent positive x-ray interpretations, and evidence showing restrictive and obstructive defects. *Id*. at 46. The administrative law judge also gave less weight to the opinion of Dr. Crouch, who opined that the miner's coal workers' pneumoconiosis was not severe enough to have caused a significant pulmonary impairment, because she only cited cigarette smoking as the primary risk factor for the miner's emphysema and attributed the miner's decline to his cardiac surgery and car accident trauma. *Id*. at 50.

The administrative law judge noted that while Dr. Naeye stated that centrilobular emphysema progresses "once established," even if an individual stops smoking, Dr. Naeye did not identify when the miner's emphysema was "established." Decision and

Order on Remand at 49. In addition, the administrative law judge found that Dr. Naeye failed to explain why smoking was a dominant cause of the miner's emphysema when there was a lapse of thirty years between smoking cessation and evidence of a pulmonary impairment. The administrative law judge also noted that Dr. Naeye's view conflicted with the opinions of Drs. Perper and Cohen, who indicated that damage to the lungs caused by smoking typically does not progress once smoking has ceased. *Id.* Further, the administrative law judge determined that, like Dr. Tuteur, Dr. Naeye "substantially downplay[ed]" the significance of coal dust exposure in the development of emphysema. *Id.*

The administrative law judge found Dr. Caffrey's opinion to be internally inconsistent and poorly documented because he attributed the miner's disability to cardiac and respiratory disease, but later stated that it did not appear that the miner's bronchitis or emphysema were debilitating problems. Decision and Order on Remand at 51. The administrative law judge further noted Dr. Caffrey's assertion that the miner's emphysema may have been due to simple coal workers' pneumoconiosis and his later statement that the miner's cardiac problems and diabetes mellitus could have caused the miner's pulmonary impairment. *Id.* The administrative law judge concluded that Dr. Caffrey's opinion regarding total disability causation was "equivocal, poorly reasoned, [and] contradicted by the better reasoned and documented opinions of Drs. Perper and Cohen, and entitled to little weight." *Id.*

The administrative law judge also accorded less weight to Dr. Oesterling's opinion, that the miner's emphysema was caused by his smoking, because it was based, in part, on an erroneous smoking history of forty years when the administrative law judge noted that the evidence showed that the miner only had a twelve pack-year smoking history. Decision and Order on Remand at 52-53. The administrative law judge further discounted Dr. Oesterling's opinion because he, like Drs. Tuteur and Naeye, determined that claimant's COPD was due solely to smoking, rather than coal dust exposure. *Id.* at 53.

The administrative law judge gave diminished weight to Dr. Repsher's opinion, that the average impairment from COPD due to coal mine dust is so insignificant that it is not discernible in an individual miner, because he found that it, "like the opinions of [e]mployer's other experts, [is] clearly inconsistent with the prevailing view in the medical community as described in the studies cited in the Department's Final Rule." Decision and Order on Remand at 54, *citing* 65 Fed. Reg. at 79,939 (Dec. 20, 2000). Further, the administrative law judge found that Dr. Fino's opinion regarding total disability causation was of "little value" because he failed to provide any rationale or cite any objective test results to support his conclusion that coal workers' pneumoconiosis did not contribute to the miner's disability. *Id.* at 55.

On remand, the administrative law judge also concluded that, under *Vigna*,[8] the miner is not precluded from a finding that he was totally disabled due to pneumoconiosis, as claimant's total disability due to pneumoconiosis predated any evidence of disability due to cardiac surgery or car accident trauma. Decision and Order on Remand at 58. Further, the administrative law judge determined, based on *Midland Coal Company. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004), that the fact that the miner might be disabled due to a condition unrelated to pneumoconiosis did not bar an award of benefits so long as the other elements of entitlement were proven. *Id*. The administrative law judge concluded that "weighing like and unlike evidence together, I find that the weight of the medical evidence supports the conclusion that the [m]iner's pulmonary impairment was, prior to his death, totally disabling and that his pneumoconiosis was a contributing cause with respect to his disability." *Id*. at 57.

B. Arguments on Appeal

Employer argues that the administrative law judge erred in crediting the opinions of Drs. Perper and Cohen over the opinions of Drs. Tuteur, Westerfield, Crouch, Naeye, Oesterling, Repsher and Fino.[9] Further, employer notes that the administrative law judge did not address the relevance of the physicians' qualifications in giving weight to their opinions, or consider whether their reports were based on a review of the records or an examination of claimant. Regarding Drs. Tuteur, Westerfield, Crouch, Naeye, Oesterling, Repsher, and Fino, employer argues that the administrative law judge substituted his own opinion for that of the physicians, shifted the burden of proof to the employer, based on an erroneous interpretation of the physicians' opinions and the Department of Labor's explanation of the amended regulations, selectively analyzed evidence, and relied on unsupported evidence. Employer also asserts that the administrative law judge erred in his *Vigna* analysis because he failed to consider relevant evidence, including the dates of incidents, in concluding that the miner's pulmonary impairment due to pneumoconiosis predated any other evidence of disability from other means.

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[8] In *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), the Seventh Circuit held that a claimant's preexisting condition precluded an award of benefits under Part 718.

[9] While the administrative law judge also considered Dr. Caffrey's opinion, we affirm the administrative law judge's finding that it was entitled to less weight because, as employer conceded, it was equivocal. *See Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988); Decision and Order on Remand at 51; Employer's Brief at 31.

After consideration of employer's arguments, the administrative law judge's decision, and the evidence of record, we affirm the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv), (c), as they are rational and supported by substantial evidence. The majority of employer's arguments relate to the administrative law judge's weighing of the medical opinion evidence. However, the Seventh Circuit has held that it is the duty of the administrative law judge to weigh the evidence, draw inferences and determine credibility. *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988). The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988)(*en banc*).

Accordingly, we reject employer's allegations that the administrative law judge erred in failing to find that Drs. Perper and Cohen did not give enough weight to the effects of the miner's car accident, cardiac condition and surgeries, and improperly determined that the miner exhibited a disabling pulmonary condition prior to these occurrences. In summarizing these opinions, the administrative law judge noted correctly that Drs. Perper and Cohen evaluated the potential impact of these incidents on the miner's pulmonary impairment.[10] The record supports their determination that the miner exhibited an impairment prior to the car accident or cardiac surgeries.[11] Director's Exhibit 68; Claimant's Exhibits 5, 7, 8. In addition, contrary to employer's assertions, Dr. Cohen cited medical literature in support of the position that coal dust exposure can cause an obstructive condition, stated that chest trauma from the accident and cardiac

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[10] In his report, Dr. Perper noted the miner's car accident and surgeries and concluded that this trauma could not have caused the severe and profuse nodular lesions of coal workers' pneumoconiosis. Director's Exhibit 68. Dr. Perper also stated that the miner's pulmonary impairment manifested prior to these events. *Id*. In addition, Dr. Cohen noted that the miner's shortness of breath, occurring as early as 1985, could not be explained by his car accident and that any impairment from such an accident, or from the miner's heart disease, would be restrictive while the miner's impairment was obstructive in nature. Claimant's Exhibits 5, 7.

[11] Dr. Perper indicated that the miner began experiencing shortness of breath following his retirement from coal mining in November 1985, prior to his 1989 car accident and his cardiac surgeries. Director's Exhibit 68. Dr. Perper also referred to the fact that there was a positive x-ray reading for pneumoconiosis as early as November 4, 1986. *Id*. Dr. Cohen stated that, since the medical records related to the miner's car accident are not in the record and none of the physicians reviewed such records, there is no support for the notion that the miner's resulting injuries even produced a pulmonary impairment. Claimant's Exhibit 5. Dr. Tuteur noted that the miner began experiencing shortness of breath in 1985, following his retirement from coal mine employment. Director's Exhibit 26.

surgeries would cause a restrictive impairment, and concluded that there is no history of occupational exposure, other than his coal mine employment, that would cause the miner's obstructive lung disease. *See* Claimant's Exhibit 5. Therefore, the administrative law judge, in his role as fact-finder, permissibly accorded more weight to the opinions of Drs. Perper and Cohen, because he found them to be well documented and better reasoned than the contrary opinions of the other physicians. *Burns*, 855 F.2d at 501; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*).

Further, when summarizing the medical evidence at the beginning of his Decision and Order on Remand, the administrative law judge noted the physicians' qualifications and identified which physicians examined the miner. *See* Decision and Order on Remand at 11-27. While employer is correct that a physician's qualifications are relevant in assessing the probative value of his or her opinion, in the current case, the physicians have similar qualifications[12] and there is no requirement that the administrative law judge give added weight to the opinions of treating or examining physicians. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Collins v. J & L Steel*, 21 BLR 1-182 (1999).

Moreover, the administrative law judge rationally credited Dr. Cohen's conclusion that any pulmonary impairment from the miner's 1989 car accident would have been restrictive, as it was well supported by the evidence of record. *See Clark*, 12 BLR at 1-155; Decision and Order on Remand at 44. Although Dr. Tuteur attributed the miner's pulmonary impairment to his car accident and cardiac surgeries, he concluded that the miner did not have a restrictive impairment. *See* Director's Exhibit 26; Employer's Exhibit 21A. In addition, contrary to employer's argument, the administrative law judge did not impermissibly substitute his opinion for that of Dr. Tuteur when he concluded that Dr. Tuteur suggested that he "does not accept the proposition that centrilobular emphysema may be associated with exposure to coal dust." *See* Decision and Order on Remand at 45. Rather, the administrative law judge permissibly reached this conclusion by relying on Dr. Tuteur's statement that "[c]entrilobular emphysema tends to be a destructive phenomenon either due to necrotizing pneumonias and/or chronic inhalation of tobacco smoke." Employer's Exhibit 21A. As a result, the administrative law judge acted within his discretion in discounting Dr. Tuteur's opinion because his conclusions conflicted with the medical literature relied upon by the Department of Labor when

[12] Drs. Naeye, Caffrey, and Oesterling are Board-certified in anatomical and clinical pathology. Employer's Exhibits 12-14. Similarly, Dr. Perper is Board-certified in anatomical and surgical pathology. Director's Exhibit 68. Dr. Crouch is also a Board-certified pathologist. Employer's Exhibit 21B. Drs. Tuteur, Westerfield, Cohen, Repsher, and Fino are Board-certified in pulmonary disease and internal medicine. Claimant's Exhibit 5; Employer's Exhibits 3, 15, 17-18.

revising the regulations and which was in existence at the time the miner's claim was filed. *Freeman United Coal Mining v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *Burns*, 855 F.2d at 501; *see also* 65 Fed. Reg. 79,920, 79,939, 79,941-42 (Dec. 20, 2000). Further, the administrative law judge also acted within his discretion in discounting Dr. Repsher's opinion regarding the cause of the miner's pulmonary impairment for the reasons he relied upon to discount the similar findings of Dr. Tuteur.[13] *Summers*, 272 F.3d at 484 n.7, 22 BLR at 2-281 n.7; *Burns*, 855 F.2d at 501; Decision and Order on Remand at 54.

Regarding Dr. Westerfield's opinion, the administrative law judge permissibly gave it less weight because his report does not reflect that he considered the entire medical record, including the potential impact of the miner's forty year coal mine employment history, recent positive x-ray interpretations, and evidence showing both restrictive and obstructive lung defects. *Clark*, 12 BLR at 1-155. In addition, the administrative law judge acted within his discretion in finding Dr. Westerfield's opinion, that the miner's pulmonary problems are related to his 1989 car accident, to be speculative because the treatment records related to the accident are not in the record and there is no evidence that Dr. Westerfield reviewed these records in forming his opinion. *Burns*, 855 F.2d at 501; *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc on recon.*).

We also find no merit in employer's assertion that the administrative law judge selectively analyzed the record to reach a desired outcome regarding the miner's smoking history. Rather, the administrative law judge considered the relevant evidence, including the testimony of the miner's wife and daughter, and set forth his reasons for finding that the miner had a twelve pack-year smoking history. *See Burns*, 855 F.2d at 501; Decision and Order on Remand at 52-53. The administrative law judge found that Drs. Tuteur, Moses, and Migone found a smoking history of ten years or less and that Dr. Sanjabi found a smoking history of between seven and seventeen years. Decision and Order on Remand at 52. The administrative law judge gave the greatest weight to the testimony of the miner's wife and daughter, that the miner started smoking after entering the Navy in December 1941 and quit in December of 1953, because claimant recalled that she and her husband stopped smoking at the same time. *Id*. at 53. Accordingly, the administrative law judge rationally accorded less weight to Dr. Oesterling's opinion because he relied on

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[13] The administrative law judge rationally found, that Dr. Repsher's statement, that "the average impairment [from chronic obstructive pulmonary disease caused by coal dust exposure] is so small as to not be discernible in an individual miner," was against the "prevailing view in the medical community," as evidenced by the studies cited in the comments to the regulations. Employer's Exhibit 17 at 15; Decision and Order on Remand at 54; *see* 65 Fed. Reg. at 79,939 (Dec. 20, 2000).

a forty pack-year smoking history as a basis for concluding that the miner's emphysema was due to cigarette smoking and not coal dust exposure. *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co*., 13 BLR 1-52 (1988).

The administrative law judge also permissibly discounted Dr. Naeye's opinion because he failed to explain how smoking played a primary role in the development of the miner's emphysema when there was at least a thirty year gap between the miner's cessation of smoking and evidence of a pulmonary impairment, especially given the opinions of Drs. Perper and Cohen, that damage due to smoking typically does not progress once smoking ceases, and given that the miner continued to be exposed to coal dust during the same time period. *Summers*, 272 F.3d at 483, 22 BLR at 2-280; *Clark*, 12 BLR at 1-155. In addition, contrary to employer's allegations, the administrative law judge did not substitute his judgment for that of Dr. Naeye, but permissibly discounted Dr. Naeye's opinion because it conflicts with the prevailing medical literature providing that coal dust inhalation can cause obstructive diseases like emphysema and COPD. *Summers*, 272 F.3d at 484 n.7, 22 BLR at 2-281 n.7; *Burns*, 855 F.2d at 501; *see also* 65 Fed. Reg. 79,920, 79,939, 79,941-42 (Dec. 20, 2000).

Further, the administrative law judge acted within his discretion in giving less weight to Dr. Crouch's opinion because she diagnosed an obstructive impairment and attributed it to the miner's car accident and cardiac surgery, contrary to Dr. Cohen's view that these incidents would have caused a restrictive impairment. *See Clark*, 12 BLR at 1-155; Employer's Exhibit 21B. The administrative law judge also permissibly assigned little weight to Dr. Fino's opinion because, contrary to employer's assertions, he failed to provide any rationale for his conclusion that the miner's total disability was not related to coal workers' pneumoconiosis. *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 54-55; Employer's Exhibit 18.

In addition, the administrative law judge rationally concluded, in compliance with *Vigna*, that the miner's entitlement to benefits is not precluded by a preexisting totally disabling impairment, based on his crediting of the opinions of Drs. Perper and Cohen, who determined that the miner's pulmonary impairment due to pneumoconiosis existed prior to his accident and cardiac surgeries. *Burns*, 855 F.2d at 501. Accordingly, we affirm the administrative law judge's determination that claimant proved, by a preponderance of the evidence, that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). Therefore, we affirm the award of benefits in the miner's claim.

Because we have affirmed the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv), (c), we also reject employer's request that the administrative law judge's decision be vacated and remanded to a different administrative law judge due to concerns about a failure to comply with the APA. We further reject employer's

assertions that the administrative law judge's failure to alter his analysis in response to the newly submitted documents "is clear evidence of bias and a results-oriented decision." Employer's Brief at 15. In the current case, the administrative law judge followed the Board's instructions on remand and complied with the APA in setting forth his findings of fact and law, including the underlying rationale. *Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

III. Survivor's Claim

A. The Administrative Law Judge's Findings

In determining whether the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge considered the miner's death certificate and reports by Drs. O'Neill, Perper, Cohen, Naeye, Oesterling, Tuteur, and Fino. The administrative law judge noted that on the miner's death certificate, Dr. Migone, a treating physician, listed pneumoconiosis as a condition contributing to the miner's immediate cause of death. Decision and Order on Remand at 58; Director's Exhibit 38. The administrative law judge also summarized the autopsy report prepared by Dr. O'Neill, the prosector, noting that he listed "coal worker's pneumoconiosis, pneumonic consolidation in the right lower lobe, marked pleural adhesions bilaterally, findings consistent with [a] clinical history of severe COPD, and a . . . chest scar consistent with [a] clinical history of aortic valve replacement." *Id.*

The administrative law judge found that Dr. Naeye's autopsy report was entitled to less weight because Dr. Naeye did not offer an opinion as to the cause of the miner's death, but only stated that the lesions in the miner's lungs were insufficient to cause or hasten the miner's death. Decision and Order on Remand at 58. Further, the administrative law judge discounted the rebuttal autopsy report, in which Dr. Oesterling indicated that the miner's mild coal workers' pneumoconiosis did not contribute to his death, because Dr. Oesterling relied on an inaccurate smoking history. *Id.* at 59. In addition, the administrative law judge reiterated his findings with respect to the miner's claim and concluded that the opinions of Drs. Tuteur and Fino were less persuasive because both Drs. Tuteur and Fino failed to explain how the miner's "limited and remote smoking history, which ended in 1953" was a primary cause of the miner's pulmonary impairment, since the impairment manifested "long after" he stopped smoking and several years after his coal mine employment ended. *Id.* at 61-62.

In contrast, the administrative law judge found that Drs. Perper and Cohen recognized that prolonged exposure to coal dust can, and in this case did, result in the miner having pneumoconiosis, which substantially contributed to his death. Decision and Order on Remand at 61. The administrative law judge determined that the opinions of Drs. Perper and Cohen are consistent with the opinions of Dr. Crabtree, the miner's

treating pulmonary specialist; Dr. Moses, the miner's treating cardiologist; Dr. Migone and Dr. O'Neill. *Id*. The administrative law judge stated that "the weight of the medical evidence supports the conclusion that the miner's pneumoconiosis was a substantially contributing cause of his death." *Id*. at 62. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

B. Arguments on Appeal

In challenging the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), employer raises arguments similar to those asserted regarding total disability causation at 20 C.F.R. §718.204(b)(2)(iv), (c). Employer again argues that the administrative law judge failed to consider the physician's qualifications and erred in assigning more weight to the opinions of Drs. Cohen and Perper, which were unsupported by the medical treatment records. As to the opinions of Drs. Tuteur, Naeye, Oesterling, and Fino, employer notes that the administrative law judge discounted them for the same reasons that he assigned them less weight in relation to total disability causation at 20 C.F.R. §718.204(b)(2)(iv), (c).

We affirm the administrative law judge's findings at 20 C.F.R. §718.205(c), as the administrative law judge, in a proper exercise of his role as fact-finder, permissibly weighed the medical evidence and made rational credibility determinations. *Burns*, 855 F.2d at 501. Again, contrary to employer's contentions, the administrative law judge considered the qualifications of the physicians when discussing their opinions. *See* Decision and Order on Remand at 10-27. However, given that the physicians were similarly qualified, the administrative law judge permissibly declined to assign additional weight on that basis. *Burns*, 855 F.2d at 501.

Moreover, the administrative law judge rationally determined that the opinions of Drs. Perper and Cohen were better documented and reasoned because they were supported by the medical evidence of record, contained citations to medical studies, and were consistent with the opinions of the prosector and the miner's treating physicians. *Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992); *Burns*, 855 F.2d at 501; *Clark*, 12 BLR at 1-155. As a result, we affirm the administrative law judge's finding that claimant established death causation at 20 C.F.R. §718.205(c) and the award of benefits in the survivor's claim.

Finally, as in the miner's claim, based on our affirmance of the administrative law judge's finding at 20 C.F.R. §718.205(c), we reject employer's request that the administrative law judge's decision be vacated and remanded to a different administrative law judge, due the administrative law judge's alleged failure to comply with the APA. The administrative law judge followed the Board's instructions on remand and complied with the APA. *Hall*, 12 BLR at 1-82. Thus, employer again has not made a clear showing of bias in the present case. *See Cochran*, 16 BLR at 1-107.

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits in both the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge