BRB No. 06-0320 BLA

JEAN SHUMAKER (Widow of GEORGE SHUMAKER) Claimant-Respondent v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/27/2007 DECISION and ORDER

Appeal of the Decision and Order On Third Remand – Award of Living Miner Benefits; and Decision and Order On Second Remand – Award of Survivor Benefits, Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order On Third Remand – Award of Living Miner Benefits; and Decision and Order On Second Remand – Award of Survivor Benefits (96-BLA-1532) of Administrative Law Judge Thomas F. Phalen, Jr. rendered on claims 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 fourth time. The lengthy procedural history is as follows. The miner filed a claim for benefits on May 3, 1994, which was awarded by the district director. Director's Exhibits 1, 27. At employer's request, the matter was forwarded to the Office of Administrative Law Judges for a formal hearing. Prior to the scheduled hearing, the miner died on June 8, 1995, and his widow filed a survivor's claim on July 6, 1995. Director's Exhibit 33. These claims were consolidated by the district director and presented to the administrative law judge for a decision on the record. In a Decision and Order dated February 24, 1997, the administrative law judge credited the miner with twenty-one years of coal mine employment; he determined that the miner had coal workers' pneumoconiosis and that the miner had been totally disabled by his disease. The administrative law judge further found that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim.

On appeal, the Board vacated the administrative law judge's award of benefits in both claims and remanded the case for further consideration of the relevant evidence at 20 C.F.R. §§718.202(a)(1),(2),(4), 718.204(b),(c),(2),(4)(2000)[1] and 718.205(c). *Shumaker v. Peabody Coal Co.*, BRB No. 97-0896 BLA (Mar. 27, 1998) (unpub.). In a Decision and Order On Third Remand issued on April 1, 1998, the administrative law judge granted benefits in the survivor's claim, but denied benefits in the miner's claim. Both parties appealed. In the miner's claim, the Board affirmed the administrative law

[1] The Department of Labor 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).

The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c)(2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b)(2000), is now found at 20 C.F.R. §718.204(c).

judge's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and also affirmed, as unchallenged, the administrative law judge's finding that the miner was totally disabled by a pulmonary or respiratory impairment. *Shumaker v. Peabody Coal Co. [Shumaker 1]*, BRB Nos. 99-0262 BLA and 99-0262 BLA-A (Aug. 16, 2000) (unpub.), slip op. at 4, 2. The Board vacated, however, the denial of benefits in the miner's claim, and instructed the administrative law judge on remand to reconsider Dr. Knight's opinion, that coal mine employment was the primary cause of the miner's chronic obstructive pulmonary disease, relevant to the issue of disability causation at 20 C.F.R. §718.204(b)(2000). *Shumaker II*, slip op. at 5. With regard to the survivor's claim, the Board affirmed the award of benefits, holding that the administrative law judge properly exercised his discretion in crediting the opinion of the miner's treating physician, Dr. Haggenjos, as establishing that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Shumaker II*, slip op. at 5-6.

Employer appealed the Board's decision in the survivor's claim to the United States Court of Appeals for the Sixth Circuit.[2] While employer's appeal was pending, the Sixth Circuit issued *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), wherein the court addressed the weight that may properly be accorded a treating physician's opinion, and the proper standard for determining whether a miner's death was hastened by pneumoconiosis. Employer requested the Sixth Circuit to remand the survivor's claim to the Board for further consideration under *Williams*. Before the Sixth Circuit acted on employer's motion, the administrative law judge issued a Decision and Order on June 19, 2003 awarding benefits in the miner's claim. Employer appealed this decision to the Board and asked the Board to suspend briefing until the circuit court ruled on its motion to remand the survivor's claim. Before the Board could respond, the court granted employer's motion and remanded the survivor's claim to the Board for further consideration. The Board subsequently consolidated the two cases for briefing purposes only. *Shumaker v. Peabody Coal Co.*, BRB Nos. 99-0262 BLA and 03-0697 BLA (Mar. 12, 2004) (Order) (unpub.).

On July 23, 2004, the Board issued a decision, which vacated the award of benefits in both the miner's claim and the survivor's claim. *Shumaker v. Peabody Coal Co. [Shumaker III]*, BRB Nos. 99-0262 BLA and 03-0697 BLA (July 23, 2004) (unpub.). The Board specifically vacated the administrative law judge's finding under the amended regulation at 20 C.F.R. §718.204(c) that the miner's disability was caused by

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's last year of coal mine employment took place in the Commonwealth of Kentucky. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

pneumoconiosis, and directed the administrative law judge on remand to render a definitive determination as to the length of the miner's smoking history, and then to reconsider the medical opinion evidence at Section 718.204(c) in light of his finding. *Shumaker* III, slip op. at 4-5. The Board also instructed the administrative law judge to determine whether the physicians' diagnoses relevant to the issue of causation at Section 718.204(c) were supported by the underlying documentation and adequately explained. *Shumaker* III, slip op. at 5. In addition, the Board also instructed the administrative law judge to reconsider the probative value of Dr. Rosenberg's opinion that the miner's respiratory impairment was attributable to smoking and not coal dust exposure. *Id*. With respect to the survivor's claim, the Board instructed the administrative law judge to reweigh the medical opinion evidence at Section 718.205(c), and to assess Dr. Haggenjos's opinion in accordance with the standards set forth in *Williams*, 338 F.3d at 501, 22 BLR at 2-625,[3] as that case provides guidance on the appropriate consideration of a treating physician's opinion, and the proper standard to apply in considering whether a claimant has established his or her burden of proof at Section 718.205(c). *See Shumaker* III, slip op. at 6, *citing Williams*, 338 F.3d at 501, 22 BLR at 2-625.

In his third remand decision,[4] the administrative law judge first addressed the miner's smoking history. He specifically found that the weight of the evidence supported a finding that the miner smoked from thirty-one to thirty-eight years at the rate of one pack per day. The administrative law judge found that Dr. Knight's diagnosis that the miner was totally disabled due in part to his coal dust exposure was entitled to greater weight than the contrary opinion of employer's expert, Dr. Rosenberg, who diagnosed that the miner's respiratory impairment was due entirely to smoking. The administrative law judge also credited Dr. Haggenjos's opinion that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in the miner's claim and the survivor's claim.

On appeal, employer argues that the administrative law judge erred by not specifically considering whether claimant established the existence of *legal* pneumoconiosis prior to weighing the evidence relevant to disability causation. Employer maintains that the administrative law judge failed to follow the Board's

[3] In *Williams*, the Sixth Circuit held that there is no rule requiring deference to the opinion of a treating physician in black lung claims, and that "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 503, 22 BLR 2-625, 647 (6th Cir. 2003).

[4] The administrative law judge's Decision and Order On Third Remand – Award of Living Miner Benefits; and Decision and Order On Second Remand – Award of Survivor Benefits will be referenced herein as "Decision and Order On Third Remand."

directive to determine whether the physicians' opinions were documented and reasoned. Employer further asserts that the administrative law judge erred in finding that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and in finding that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the administrative law judge satisfactorily addressed the issue of legal pneumoconiosis because he subsumed his discussion as to the etiology of the miner's chronic obstructive pulmonary disease into his analysis of disability causation at Section 718.204(c). The Director, however, declined to address the remaining issues raised in employer's appeal. In reply to the Director's arguments, employer asserts that, even if the administrative law judge made "effective findings" of legal pneumoconiosis, his decisions fail to comport with the requirements of the Administrative Procedure Act. Employer requests that the Board reverse the administrative law judge's award of benefits in both claims, or vacate his decision and remand both claims for reconsideration.

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).

The Miner's Claim:

The administrative law judge awarded benefits in the miner's claim after crediting Dr. Knight's opinion that the miner's disabling chronic obstructive pulmonary disease was due primarily to coal mine employment, over the contrary opinion of Dr. Rosenberg that the miner's chronic obstructive pulmonary disease was due entirely to smoking. Initially, we reject employer's assertion that the administrative law judge erred in crediting Dr. Knight's opinion on causation at Section 718.204(c), without first making a specific determination as to whether the miner had legal pneumoconiosis under Section 718.202(a)(4), which would require weighing Dr. Knight's opinion against Dr. Rosenberg's opinion. Employer's Brief in Support of Petition for Review (Employer's Brief) at 18. The Director correctly observes, "employer's argument is a red herring." Director's Letter/Brief at 2. Employer does not dispute that the miner's chronic obstructive pulmonary disease was disabling, the disputed issue was the cause of the chronic obstructive pulmonary disease. The Director persuasively argues: "In determining the cause of the miner's disability, the [administrative law judge] weighed [the conflicting opinions of Dr. Knight and Dr. Rosenberg regarding the etiology of the miner's respiratory condition] in essentially the same manner [as] he would have done if he had made a determination of the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4)." Director's Letter/Brief at 2. Hence, employer has failed to demonstrate

that it suffered any undue prejudice from the administrative law judge's discussion of these medical opinions.

Employer further argues that the administrative law judge erred in determining the miner's smoking history. Employer's Brief at 16. We disagree. In resolving the conflict in the smoking history evidence,[5] the administrative law judge permissibly focused his attention on the smoking histories obtained by the examining physicians, noting that the maximum length of claimant's smoking history, as reported by Dr. Schowengerdt in 1987, was thirty years, and that the minimum length reported by Dr. Knight and Dr. Grodner in 1994 was thirty years. Decision and Order On Third Remand at 4. Because there was no evidence that the miner quit smoking prior to his death in 1995, the administrative law judge permissibly determined that the miner smoked "somewhere between [thirty-one to thirty-eight years]." *Id*. As to the rate of the miner's smoking habit, the administrative law judge noted that six out of nine physicians of record reported that the miner smoked one pack per day. *Id*. Therefore, the administrative law judge found that a preponderance of the evidence supported a finding that the miner smoked one pack per day for thirty-one to thirty-eight years. Decision and Order On Third Remand at 4. We affirm the administrative law judge's determination regarding the length and extent of miner's smoking history, as it is rational and supported by substantial evidence. *See Fagg v. Amax Coal Co*., 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

[5] The administrative law judge outlined all of the smoking histories reported by the physicians of record. He noted that Dr. Knell reported the miner's smoking history as one and one-half packs of cigarettes per day in December 1986, while Dr. Schowengerdt reported on February 2, 1987 that the miner had smoked two packs per day for thirty years. Decision and Order On Third Remand at 4. The administrative law judge noted, however, that Dr. Schowengerdt later revised the miner's smoking history in reports dated May 18, 1995 and June 8, 1995, stating that the miner had smoked only *one pack* of cigarettes per day for thirty years. *Id*. The administrative law judge further noted that, on May 19, 1994, Dr. Knight reported that the miner had smoked one and one-half packs per day for thirty years, while Dr. Grodener reported, in December 1994, that the miner smoked only one pack of cigarettes per day for thirty years. *Id*. Lastly, the administrative law judge noted that, while Dr. Rosenberg had prepared a consultative report reviewing the range of smoking histories recorded by the examining and treating physicians, Dr. Rosenberg ultimately based his opinion on Dr. Schowengerdt's initial report, attributing the miner's respiratory disability to his smoking history of *two pack*s per day for thirty years. Decision and Order On Third Remand at 4.

We also reject employer's contention that the administrative law judge erred in weighing the medical opinion evidence based on his determination of the miner's smoking history. Employer argues that the administrative law judge improperly rejected Dr. Rosenberg's opinion because he found that Dr. Rosenberg had relied on a greatly inflated smoking history, while ignoring that Dr. Knight also relied on an inaccurate smoking history, which underestimated the rate and length of time that the miner smoked. Employer's Brief at 17. Contrary to employer's argument, the administrative law judge specifically noted that "while Dr. Knight reported [one-half] pack of cigarette consumption per day [in his May 19, 1994 report], in his subsequent report [when asked by the Department of Labor to clarify his opinion] he considered [the miner's] condition based on a one pack per day smoking history[,]" consistent with the administrative law judge's one pack per day determination. Decision and Order On Third Remand at 4. Moreover, the administrative law judge specifically found that the difference between the thirty year smoking habit as reported by Dr. Knight and a determination of thirty-one to thirty-eight years of smoking was too insignificant to undermine the probative value of Dr. Knight's opinion. Decision and Order On Third Remand at 9.

In contrast, the administrative law judge noted that only Dr. Rosenberg relied on the maximum smoking history reported by Dr. Schowengerdt of two packs per day for thirty years, which represented a "[twenty-two year] inflation of [the miner's] smoking history." Decision and Order On Third Remand at 10. Based on his determination regarding the amount and duration of the miner's smoking habit, the administrative law judge permissibly concluded that Dr. Rosenberg's opinion was less probative as to the etiology of the miner's chronic obstructive pulmonary impairment or disability since the doctor relied on a significantly over-inflated smoking history in reaching his conclusion that the miner's condition was due entirely to smoking.[6] *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

On remand, the administrative law judge reconsidered Dr. Knight's opinion in light of the pulmonary function testing and the determination of the miner's smoking history and stated: "I find that Dr. Knight set forth clinical observations and findings, and his reasoning is supported by adequate data, thus, he has provided a well-reasoned and well-documented opinion that is entitled to probative weight." Decision and Order On Third Remand at 9. Although employer is dissatisfied with the reasoning of Dr. Knight's report, the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has consistently held that it is for the

[6] The administrative law judge correctly stated that the reports by Drs. Schowengerdt, Mumma, Grodener and Haggenjos do not address the etiology of the miner's respiratory impairment. Director's Exhibits 25, 26, 35, 41; Decision and Order On Third Remand at 10.

administrative law judge as fact-finder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility matter.'" *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002), *quoting Peabody Coal Company v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 330 (6th Cir. 2002), *cert. denie*d, 537 U.S. 1147 (2004), *quoting Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 103 (6th Cir. 1983). We follow the Sixth Circuit's example of strict adherence to statutory authority: "[T]his court is required to defer to the [administrative law judge's] assessment of the physicians' credibility." S*ee Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 553 (6th Cir. 2002), *citing Groves*, 277 F.3d at 836, 22 BLR at 2-330. Thus, we affirm the administrative law judge's determination to credit Dr. Knight's opinion that the miner's disabling chronic obstructive pulmonary disease was due primarily to his twenty-one years of coal mine employment.

Lastly, because the administrative law judge has properly discussed the record evidence, and reached conclusions of law and findings of fact that were within his discretion, we consider his opinion to be in compliance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97, 101 (2000) (*en banc*). Consequently, we affirm the administrative law judge's finding that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and thus, we affirm the administrative law judge's award of benefits in the miner's claim.

The Survivor's Claim:

Employer challenges the award of benefits in the survivor's claim, asserting that the administrative law judge determined to credit Dr. Haggenjos's opinion that pneumoconiosis contributed to the miner's death at 20 C.F.R. §718.205(c), based solely on his status as a treating physician. Employer contends that Dr. Haggenjos's opinion is no different than the opinion of the treating physician rejected by the Sixth Circuit in *Williams*. Employer's Brief at 21-22. Employer further contends that the administrative law judge erred in rejecting Dr. Rosenberg's opinion that the miner's death was due to lung cancer and was unrelated to his coal mine employment. Employer's Brief at 23.

Review of the record supports the administrative law judge's determination to credit Dr. Haggenjos's opinion that pneumoconiosis hastened the miner's death. The administrative law judge explained:

> Turning to Dr. Haggenjos' opinion as to the cause of death, in the December 15, 1995 letter, he stated that [the miner] died due to complications from his pneumoconiosis. ([Director's Exhibit] 46).

> Specifically, he explained that after surgery, [the miner] was not able to recuperate due to the fact that his pneumoconiosis severely limited his ability to aerate his vital organs, namely his heart. I note that this statement is consistent with the causes of death noted on the death certificate, ([Director's Exhibit] 34), and the account of [the miner's] death as reported by the attending physician. ([Director's Exhibit] 35;8-9). I find that Dr. Haggenjos' opinion as to the cause of death, supported by his well-reasoned and documented opinion as to the existence of clinical pneumoconiosis, is also well-reasoned and well-documented, and accord it probative weight.

Decision and Order On Third Remand at 14.

Contrary to employer's argument, the instant case is not analogous to *Williams*, 338 F.3d at 501, 22 BLR at 2-625. A careful reading of *Williams* reveals that the Sixth Circuit considered the administrative law judge's award of benefits to be based on nothing more than speculation. The only evidence in *Williams* that the miner died due to pneumoconiosis came from the treating physician who opined that pneumoconiosis *probably* hastened the miner's death. The court stated that the doctor "hypothesized" that pneumoconiosis hastened the miner's demise, explaining that the miner's "'lack of oxygen [and] his retained carbon dioxide all played an effect on all parts of the body.'" *Williams*, 338 F.3d at 505, 22 BLR at 2-634, n.6 (citation omitted).[7]

The differences between *Williams* and the instant case are significant. In *Williams*, the administrative law judge relied upon the physician's status as a treating physician to credit an opinion that was both uncertain and conclusory. The *Williams* doctor was only able to conclude "within a reasonable degree of medical *probability*"

[7] Furthermore, a fair reading of the court's decision reveals that the court questioned whether the miner in *Williams* even had pneumoconiosis. Because the court determined that the finding of death due to pneumoconiosis was not supported by substantial evidence, it did not find it necessary to rule on the administrative law judge's determination that claimant had established the existence of pneumoconiosis. Nevertheless, the court reviewed the evidence, finding no credible evidence of clinical pneumoconiosis and only one credible opinion of legal pneumoconiosis which came from a physician Board-certified in anesthesiology and pain management. *Williams*, 338 F.3d at 513-514, 22 BLR at 2-647-649. That opinion was contradicted by the opinions of two Board-certified pulmonologists whom the Sixth Circuit obviously found more credible. *Williams*, 338 F.3d at 516, 22 BLR at 2-652.

that pneumoconiosis hastened the miner's death. *Williams*, 338 F.3d at 517, 22 BLR at 2-654 (emphasis added).

In contrast, Dr. Haggenjos's opinion was expressed with a reasonable degree of medical *certainty*:

> [The miner] had had a long course of pneumoconiosis which has been established by physical examination and Dr. Schowengerdt's biopsy reports from the lung. The anthrasilicosis was observed on multiple slides.
>
> Unfortunately, his death was due to complications of his pneumoconiosis. After surgery, he was not able to recoup as his pneumoconiosis severely limited his ability to aerate his vital organs (i.e., heart).
>
> I medically believe [the miner] had pneumoconiosis and complications of this disorder caused his demise.

Director's Exhibit 37.

Moreover, unlike the doctor in *Williams*, Dr. Haggenjos did not base his opinion on mere speculation. *Williams*, 338 F.3d at 517, 22 BLR at 2-654. The notes of the attending physician, Dr. Schowengerdt, show that immediately following the surgery to remove the cancer in his lung, the miner was initially doing well, but his condition suddenly deteriorated and he developed severe hypoxemia, which continued over a two hour period, requiring four periods of full code CPR to treat an acute myocardial infarction. Director's Exhibit 35 at 8-9. The doctors feared it would develop into anoxic encephalopathy, lack of oxygen to the entire brain, typically resulting in brain damage. *Id*. When family members were informed, they authorized discontinuation of life support systems. *Id*.

Unlike the doctor in *Williams*, Dr. Haggenjos did not vaguely hypothesize that "lack of oxygen… played an effect on all parts of his body." *Williams*, 338 F.3d at 517, 22 BLR at 2-655. Dr. Haggenjos read that the miner's myocardial infarction was precipitated by severe hypoxia. Director's Exhibits 35 at 8-9. As the administrative law judge observed, Dr. Haggenjos reasonably analyzed the attending physician's account of the miner's death as showing that it was expedited by his inability to provide adequate oxygen to the heart. Decision and Order On Third Remand at 14. Because Dr.

Haggenjos had solid evidence on multiple slides showing that the miner had clinical pneumoconiosis, he concluded that this inability was due in part to pneumoconiosis.[8]

The administrative law judge's determination to credit Dr. Haggenjos's opinion that pneumoconiosis contributed to the miner's death, as supported by the attending physician's note and death certificate, fully accords with the Sixth Circuit's teaching in *Williams*. *See Williams*, 338 F.3d at 518, 22 BLR at 2-655. Both reason and the record support Dr. Haggenjos's explanation of the specific process whereby pneumoconiosis contributed to the miner's death. Accordingly, the administrative law judge properly determined that Dr. Haggenjos's opinion was well-documented and well-reasoned. Decision and Order On Third Remand at 14.

Contrary to employer's assertion, the administrative law judge was not inconsistent when he found that Dr. Haggenjos's opinion was supported by Dr. Schowengerdt's notes, even though the administrative law judge held that Dr. Schowendgerdt's report did not establish death due pneumoconiosis. Decision and Order On Third Remand at 14, 11-12. Dr. Schowengerdt's report did not address the issue of whether pneumoconiosis contributed to the miner's death. Director's Exhibit 35. He described the circumstances surrounding the miner's death which Dr. Haggenjos then interpreted in light of his knowledge of the miner's pneumoconiosis. Director's Exhibits 35, 46. Dr. Schowengerdt's report provides the documentation to Dr. Haggenjos's opinion that the miner's pneumoconiosis contributed to this death.

Nor did the administrative law judge err in finding the death certificate supportive of Dr. Haggenjos's opinion. Director's Exhibit 34; Decision and Order On Third Remand at 14. The administrative law judge recognized that the death certificate was not a reasoned medical opinion, Decision and Order On Third Remand at 13; nevertheless, he properly determined that the death certificate reflected the medical judgment of Dr. Schowengerdt that pneumoconiosis contributed to the miner's death and, therefore, it had probative value, albeit limited.

Employer's contention that the administrative law judge mechanically credited Dr. Haggenjos's opinion as that of the treating physician is belied by the record. The administrative law judge properly considered the criteria of Section 718.104(d) in determining whether additional weight should be accorded to Dr. Haggenjos's opinion as

[8] Furthermore, unlike *Williams*, the finding of pneumoconiosis in the instant case is not questionable.

that of the treating physician.[9] The administrative law judge found that Dr. Haggenjos had treated the miner "repeatedly" for his respiratory condition, seeing the miner "on at least 60 occasions between November 1985 and December 1994[,]" which treatment consisted of a regimen of medication and referrals to the hospital or consulting physicians. Decision and Order On Third Remand at 14. The record supports the administrative law judge's conclusion that Dr. Haggenjos's opinion should be accorded superior weight based on his status as the miner's treating physician. *Id*. Yet the administrative law judge emphasized, "I have only accorded his reports probative weight based strictly on the persuasiveness of his opinions." *Id*. Unlike the treating physician in *Williams*, Dr. Haggenjos did not simply assume that the miner had pneumoconiosis, or speculate how pneumoconiosis *probably* contributed to death. Rather, he analyzed the evidence and explained the process whereby pneumoconiosis contributed to death. Thus, the administrative law judge properly credited Dr. Haggenjos's opinion.

Employer's final argument, that the administrative law judge erred in according greater weight to Dr. Haggenjos's opinion than to Dr. Rosenberg's opinion, is without merit. Dr. Rosenberg's opinion, that pneumoconiosis did not contribute to the miner's death, was clearly premised on his understanding that the miner did not have pneumoconiosis, clinical or legal, although the administrative law judge had found that the x-ray evidence established the existence of clinical pneumoconiosis, Decision and Order On Remand (April 1, 1998) at 4, 13-14, and the Board has affirmed that determination, *Shumaker II*, slip op. at 4. Given the administrative law judge's rejection of the premise of Dr. Rosenberg's opinion, he could not reasonably credit it. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 104 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231 (1994); *Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 1042, 17 BLR 2-16, 24 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 63 (6th Cir. 1989). Hence, the administrative law judge was correct in rejecting Dr. Rosenberg's opinion.

Because the administrative law judge considered Dr. Haggenjos's opinion to be credible, documented and reasoned, and sufficient to support claimant's burden of proof at 20 C.F.R. §718.205(c), we defer to those credibility findings. S*ee Napier*, 301 F.3d at 713, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512. We, therefore, affirm the administrative law judge's finding that pneumoconiosis hastened the miner's

[9] Section 718.104(d) provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of a treating physician: 1) Nature of relationship; 2) Duration of relationship; 3) Frequency of treatment; 4) Extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation also requires, however, that the administrative law judge consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

death pursuant to 20 C.F.R. §718.205(c). Consequently, we affirm the administrative law judge's award of benefits in the survivor's claim.

Accordingly, the Decision and Order On Third Remand – Award of Living Miner Benefits; and Decision and Order On Second Remand – Award of Survivor Benefits of the administrative law judge is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision. In evaluating the conflicting medical opinion evidence at 20 C.F.R. §718.204(c), the administrative law judge did not follow the Board's directive to specifically address whether Dr. Knight's opinion was documented and reasoned. Rather, the administrative law judge made a finding as to the miner's smoking history, and then recited his prior findings with respect to the weight of the evidence as set forth in his June 19, 1993 decision and order. Therefore, I would vacate the administrative law judge's finding at Section 718.204(c) and remand the miner's claim for further consideration.

With regard to the survivor's claim, the administrative law judge credited Dr. Haggenjos's opinion that the miner's death was hastened by pneumoconiosis, finding that his opinion was "consistent with the [m]iner's death certificate and the attending physician's report." Decision and Order On Third Remand at 14. This requires further explanation. The administrative law judge specifically noted that the death certificate listing "black lung" as an underlying cause of death was insufficient to carry claimant's burden of proof since the author of the death certificate, Dr. Schowengerdt, failed to explain why that diagnosis was included. Decision and Order On Third Remand at 11-12, *see* Director's Exhibit 34. Moreover, Dr. Schowengerdt was the attending physician at the time of the miner's death, and his "attending physician's report[,]" which the administrative law judge found to be corroborative of Dr. Haggenjos's opinion, states

only that the miner died following his lobectomy due to a pulmonary embolus that caused a post-operative myocardial infarction. Director's Exhibit 35. Furthermore, when asked by the Department of Labor to give his reasoned opinion as to whether the miner's death was due to pneumoconiosis, he replied, "You will also note that his specimen was consistent with at least a mixed dust pneumoconiosis. If [a] more specific diagnosis [is] required, further study of his specimen would be needed." *Id.* Dr. Schowengerdt's opinion falls short of buttressing Dr. Haggenjos's opinion, specifically because Dr. Schowengerdt does not address the cause of the miner's death, other than his notation on the death certificate, which has not been explained. At best, Dr. Schowendgerdt's opinion is supportive of a finding that the miner has clinical pneumoconiosis, but that is not the relevant inquiry at Section 718.205(c). The fact that Dr. Schowengerdt may agree with Dr. Haggenjos that the miner had clinical pneumoconiosis prior to his death, does not relieve claimant of her burden of proving that pneumoconiosis hastened the miner's death.

Contrary to my colleagues, I am less inclined to dismiss the similarity between the diagnosis of the doctor in *Williams* and the opinion of Dr. Haggenjos, as each doctor "attempted to connect the pulmonary embolism to [the miner's] mining history by surmising that, although the pulmonary embolus directly caused the miner's death, pneumoconiosis hastened his demise because the miner's 'lack of oxygen…played an effect on all parts of his body.'" *Eastover Mining Co. v. Williams*, 338 F.3d 501, 517, 22 BLR 2-625, 655 (6th Cir. 2003). I decline to affirm the administrative law judge's reliance on Dr. Haggenjos's opinion to award survivor's benefits simply because it was expressed within a reasonable degree of medical certainty. The administrative law judge has not given proper consideration as to whether Dr. Haggenjos's opinion is legally sufficient to support claimant's burden of proof because it describes how pneumoconiosis hastened the miner's death through a "specifically defined process that reduces the miner's life by an estimable time." *See Williams*, 338 F.3d at 518, 22 BLR at 2-655.

Therefore, because the administrative law judge has failed to adequately address Dr. Haggenjos's opinion in light of the standard set forth in *Williams*, for determining whether a miner's death has been hastened by pneumoconiosis, I would vacate his award of benefits under 20 C.F.R. §718.205(c), and remand the survivor's claim for further consideration.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge