BRB No. 09-0410 BLA

PATTY PRUETT (Widow of HOLLIE PRUETT) Claimant-Respondent v. CHISHOLM 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: 02/24/2010 DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (07-BLA-5324) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) awarding benefits 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). The administrative law judge credited the miner with at least 12 years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R.

Part 718. The administrative law judge found that the evidence established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b). The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Further, the administrative law judge found that the evidence established the presence of complicated pneumoconiosis at Section 718.304(b), thereby establishing invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Employer also challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Lastly, employer challenges the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Neither claimant[1] nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

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 applicable law.[2] 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, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[3]

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[1] Claimant is the widow of the miner, who died on August 19, 2005. Director's Exhibit 8. She filed her survivor's claim on February 13, 2006. Director's Exhibit 2.

[2] The record indicates that the miner was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 3, 6. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Section 718.205(c) provides that death will be considered to be due to

See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Initially, we will address employer's contention that the administrative law judge erred in finding that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Specifically, employer argues that the administrative law judge erred in weighing the autopsy evidence at 20 C.F.R. §718.304(b). Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether a

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pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) 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).

claimant has established invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

At Section 718.304(b), the administrative law judge considered the autopsy reports of Drs. Dennis and Oesterling and the reports of Drs. Perper and Rosenberg, based on their review of pathology slides and autopsy evidence. In his autopsy report, Dr. Dennis diagnosed "[p]ulmonary congestion with moderate fibrosis and anthracosilicosis with macule formation greater than 2 cms to 2.5 cms in diameter with features compatible with progressive massive fibrosis, moderate to severe." Director's Exhibit 9. In his report, based on a microscopic examination of the autopsy slides, Dr. Perper diagnosed "[c]omplicated coal worker's pneumoconiosis, with a few macronodules exceeding 2.0 cm on background of simple coal workers' pneumoconiosis of the macular, micronodular and interstitial fibrosis type." Claimant's Exhibit 4 at 14. By contrast, in his autopsy report, Dr. Oesterling opined that "[n]one of the interstitial sections show (sic) any evidence of coalescence of micronodules and thus the slides in no way reflect the diagnosis of progressive massive fibrosis." Director's Exhibit 12. In his report, based on a review of medical evidence, Dr. Rosenberg opined that "[w]hen all the above information is looked at in total, [the miner] had a minimal degree of simple [coal workers' pneumoconiosis], without [progressive massive fibrosis]." Employer's Exhibit 1 at 5.

The administrative law judge gave less weight to Dr. Rosenberg's opinion than to the opinions of Drs. Dennis, Perper, and Oesterling because he found that, unlike Drs. Dennis, Perper, and Oesterling, Dr. Rosenberg was not Board-certified in pathology. The administrative law judge then gave greater weight to the opinions of Drs. Dennis and Perper than to Dr. Oesterling's contrary opinion because he found that they were better reasoned. The administrative law judge therefore found that the autopsy evidence established the presence of complicated pneumoconiosis.

Employer asserts that the administrative law judge erred in discrediting Dr. Rosenberg's opinion because Dr. Rosenberg is not a pathologist. Specifically, employer argues that the administrative law judge erred in failing to consider that Dr. Rosenberg is Board-certified in pulmonary disease. Employer maintains that "[s]ince complicated pneumoconiosis is a pulmonary disease with specific characteristics, the doctor's expertise cannot be tossed aside without an explanation." Employer's Brief at 22.

As discussed, *supra*, in considering the opinions of Drs. Dennis, Perper, Oesterling, and Rosenberg at Section 718.304(b), the administrative law judge noted that Drs. Dennis, Perper, and Oesterling were Board-certified in pathology, but that Dr.

Rosenberg, while Board-certified in internal medicine, did not have any qualifications in pathology. The administrative law judge then found that "because of the lack of qualifications in pathology, Dr. Rosenberg only reviewed medical and autopsy opinions of record, but not the autopsy slides." Decision and Order at 21. The administrative law judge also stated that "Drs. Dennis, Perper and Oesterling, on the other hand, reviewed all 23 autopsy slides." *Id*. Hence, the administrative law judge gave less weight to Dr. Rosenberg's opinion regarding the autopsy evidence at Section 718.304(b) because Dr. Rosenberg is not Board-certified in pathology.

Section 718.106(a) provides that an autopsy report must include a microscopic description of the lungs or visualized portion of a lung. 20 C.F.R. §718.106(a). A physician's pathological competence is, therefore, a relevant factor in evaluating an opinion regarding autopsy evidence at Section 718.304(b). *See generally Worhach v. Director, OWCP*, 17 BLR 1-105 (1993)(recognizing that an administrative law judge may consider factors relevant to the level of a physician's radiological competence in evaluating the weight of the x-ray evidence at Section 718.202(a)(1)). In this case, the administrative law judge acted within his discretion in giving less weight to Dr. Rosenberg's opinion than to the opinions of Drs. Dennis, Perper, and Oesterling at Section 718.304(b) because, unlike Drs. Dennis, Perper, and Oesterling, Dr. Rosenberg is not Board-certified in pathology. Thus, we reject employer's assertion that the administrative law judge erred in giving less weight to Dr. Rosenberg's opinion at Section 718.304(b).

Employer also argues that the administrative law judge erred in failing to "require proof of equivalency when he assessed the medical opinions." Employer's Brief at 19-20. Employer maintains that "the [administrative law judge] relied on 'the more conservative 2 cm standard…described thoroughly in case law' to supply the equivalency determination that was missing from the doctors' opinion." *Id*. at 21.

Dr. Dennis diagnosed "[p]ulmonary congestion with moderate fibrosis and anthracosilicosis with macule formation greater than 2 cms to 2.5 cms in diameter with features compatible with progressive massive fibrosis, moderate to severe." Director's Exhibit 9. Dr. Dennis further opined that "[the miner] had significant pulmonary disease at the time of death with marked progressive massive fibrosis accentuated by emphysematous changes along with pulmonary embolous." *Id*. Dr. Perper similarly opined:

> [The miner] revealed complicated coal workers' pneumoconiosis with lesions exceeding 2.0 cm on a background of macular, micronodular and interstitial fibrosis type of coal workers' pneumoconiosis. The autopsy findings substantiated the presence of severe coal workers' pneumoconiosis with compact fibro-anthracosis and hyaline-silicotic-anthracosis totally and

> consistent with lesions of complicated coal workers' pneumoconiosis (Progressive Massive Fibrosis) on the background of macular, micronodular, macronodular as well as severe interstitial type coal workers' pneumoconiosis and (in part) associated centrilobular emphysema.

Claimant's Exhibit 4.

In considering the opinions of Drs. Dennis, Perper, and Oesterling at Section 718.304(b), the administrative law judge stated:

> To establish equivalency, the undersigned is hesitant to follow Dr. Perper's view that one would expect a 1 cm lesion found during an autopsy to show up as a 1 cm lesion on an x-ray. However, the more conservative 2 cm standard has been described thoroughly in case law and will be accepted as establishing equivalency in this case. Each of the three pathologists [Drs. Dennis, Perper, and Oesterling] noted lesions of 2 cm or greater in his report of the autopsy slides. Drs. Dennis and Perper agree that these lesions establish progressive massive fibrosis and complicated pneumoconiosis.

Decision and Order at 21.

Unlike Section 718.304(c), which requires that the diagnosed chronic dust disease of the lung be a condition that could reasonably be expected to yield the results described by the criteria set forth in prongs (a) or (b) of the pertinent regulation, Section 718.304(b) requires only that the chronic lung disease diagnosed by biopsy or autopsy yield massive lesions in the lung. *Compare* 20 C.F.R. §718.304(b) *with* 20 C.F.R. §718.304(c). Additionally, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has not adopted the equivalency requirement enunciated by the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).[4] We

[4] In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

decline to apply *Scarbro* to cases outside of the Fourth Circuit. Consequently, we reject employer's assertion that the administrative law judge erred in failing to "require proof of equivalency when he assessed the medical opinions." Employer's Brief at 19-20. Furthermore, because Drs. Dennis and Perper diagnosed progressive massive fibrosis, which equates to a diagnosis of massive lesions resulting from pneumoconiosis,[5] *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), we hold that any error by the administrative law judge in relying on the 2 centimeter equivalency standard to find that the opinions of Drs. Dennis and Perper established the presence of complicated pneumoconiosis at Section 718.304(b) was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer further argues that the administrative law judge erred in giving greater weight to the opinions of Drs. Dennis and Perper than to Dr. Oesterling's contrary opinion by substituting his opinion for that of the medical expert. As discussed, *supra*, the administrative law judge noted that Drs. Dennis, Perper, and Oesterling found lesions of 2 centimeters or greater, based on their examinations of the autopsy slides. The administrative law judge also noted that while Drs. Dennis and Perper agreed that the lesions established progressive massive fibrosis and complicated pneumoconiosis, Dr. Oesterling disagreed with them as to the severity of the miner's pneumoconiosis. In finding that the opinions of Drs. Dennis and Perper were more reasoned than Dr. Oesterling's contrary opinion, the administrative law judge stated:

> [Dr. Oesterling] based his finding of no complicated pneumoconiosis on the idea that the lesions that Dr. Dennis described would not show up on a chest x-ray because of their location in the lung. However, this does not discredit Dr. Perper's expectation that the 2 cm or greater lesions found during autopsy would show at least 1 cm in diameter opacity *if* captured on an x-ray. Dr. Oesterling also opines that complicated pneumoconiosis cannot be diagnosed because the lesions on the slides do not show a density of greater than 4 mm. The Act does not require a showing of the opacity's density to establish complicated pneumoconiosis.

Decision and Order at 21.

The administrative law judge exercises broad discretion in assessing the persuasiveness and reasoning of a medical opinion. *Fife v. Director, OWCP*, 888 F.2d

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[5] The Department of Labor has stated that the term "progressive massive fibrosis" is generally considered to be equivalent to the term "complicated pneumoconiosis." 65 Fed. Reg. 79,951 (Dec. 20, 2000).

365, 13 BLR 2-109 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In this case, the administrative law judge acted within his discretion in finding that the opinions of Drs. Dennis and Perper were better reasoned than Dr. Oesterling's opinion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, we reject employer's assertion that the administrative law judge erred in finding that the opinions of Drs. Dennis and Perper outweighed Dr. Oesterling's contrary opinion. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b).

Employer additionally argues that the administrative law judge erred in failing to weigh all of the evidence in each of the categories at Section 718.304 together. Specifically, employer argues that "although the [administrative law judge] recognized that the x-ray evidence failed to establish the existence of complicated pneumoconiosis, he overlooked that fact when it came to weighing the rest of the evidence in the record." Employer's Brief at 19.

The pertinent regulation at Section 718.304 requires the administrative law judge to first evaluate the evidence in each category and then weigh together the categories at Sections 718.304(a), (b), and (c), prior to invocation. *See* 20 C.F.R. §718.304(a), (b), (c); *Melnick*, 16 BLR at 1-33. Here, after finding that the autopsy evidence established the presence of complicated pneumoconiosis at Section 718.304(b), the administrative law judge stated:

> I am permitted to accord greater weight to autopsy evidence than x-ray evidence in establishing the existence of pneumoconiosis. [*Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), citing *Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).] The pathologic evidence established that the [m]iner suffered from simple pneumoconiosis as a background for massive lesions which would produce opacities greater than one centimeter on x-ray and qualify as statutory complicated pneumoconiosis. Therefore, I find that the [c]laimant, under Section 718.304, has established by a preponderance of the evidence that the [m]iner had complicated pneumoconiosis at the time of his death.

Decision and Order at 21.

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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge accurately stated that "none of the five x-ray readings of record established the presence of complicated pneumoconiosis." Decision and Order at 17. However, the administrative law judge gave greater weight to the autopsy evidence than to the x-ray evidence in finding that claimant established the presence of complicated pneumoconiosis at Section 718.304. However, the administrative law judge did not explain why he found that the autopsy evidence outweighed the x-ray evidence. *Wojtowicz*, 12 BLR at 1-165. Thus, we hold that the administrative law judge erred in giving greater weight to the autopsy evidence than to the x-ray evidence at Section 718.304.[6] Consequently, we vacate the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 and remand the case for further consideration of the evidence in accordance with the APA. *Melnick*, 16 BLR at 1-33.

Next, we address employer's contention that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record consists of the reports of Drs. Baker, Perper, and Rosenberg. Dr. Baker opined that the miner had coal workers' pneumoconiosis, and minimal hypoxemia and bronchitis related to coal dust exposure and cigarette smoking. Claimant's Exhibit 1. Dr. Perper opined that the miner had coal workers' pneumoconiosis and centrilobular emphysema, finding that "[w]hile it is legitimate to recognize in general the role of smoking in producing centrilobular emphysema, it is equally legitimate to recognize the significant role of exposure to coal dust and coal workers' pneumoconiosis, and there is no logical reason to exclude it." Claimant's Exhibit 4 at 20. Dr. Rosenberg opined that the miner had a minimal degree of simple coal workers' pneumoconiosis, panlobular emphysema related to smoking, and no chronic lung disease related to coal dust exposure. Employer's Exhibit 1.

After considering the accuracy of their occupational and smoking histories, as well as the credentials of the physicians, the administrative law judge found that the opinions of Drs. Baker, Rosenberg, and Perper were well-reasoned and well-documented. Hence, the administrative law judge gave equal weight to the opinions of Drs. Baker, Rosenberg,

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[6] The administrative law judge stated that "[t]here is no evidence in the record that falls under Section 718.304(c)." Decision and Order at 17.

and Perper. Nevertheless, the administrative law judge stated, "[s]ince Drs. Baker and Perper agree that the [m]iner's respiratory diseases were caused by coal dust exposure and all three medical opinions also suggest that the [m]iner had at least simple clinical coal workers' pneumoconiosis, I find that the criteria in Section 718.202(a)(4) has (sic) been met." Decision and Order at 23.

Employer asserts that the administrative law judge erred in finding that the miner had legal pneumoconiosis because all of the doctors recognized that he had clinical pneumoconiosis. Specifically, employer argues that "a finding of clinical pneumoconiosis under [S]ection 718.202(a)(1) is not a finding of 'legal' pneumoconiosis under [Section 718.202(a)(4)]." Employer's Brief at 23. Contrary to employer's assertion, the administrative law judge did not indicate that clinical pneumoconiosis was a factor in his legal pneumoconiosis evaluation of the medical opinion evidence at Section 718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Here, the administrative law judge found that the medical opinion evidence established both clinical and legal pneumoconiosis at Section 718.202(a)(4). Thus, we reject employer's assertion that the administrative law judge erred in finding that the miner had legal pneumoconiosis because all of the doctors recognized that he had clinical pneumoconiosis.

Employer also argues that the administrative law judge erred in relying on the numerical superiority of the witnesses. Employer maintains that "numerical superiority of witnesses is not a permissible tie-breaker." Employer's Brief at 23. Contrary to employer's assertion, the administrative law judge did not rely solely on the numerical superiority of the physicians who opined that the miner had legal pneumoconiosis. As discussed, *supra*, the administrative law judge considered the qualifications of all the physicians. The administrative law judge found that "all three are well credentialed (sic) for making determinations regarding pneumoconiosis; Drs. Baker and Rosenberg are Board-Certified in Internal Medicine and Pulmonary Disease, as well as being NIOSH certified B-readers, and Dr. Perper is a triple Board-Certified Pathologist." Decision and Order at 22. The administrative law judge also found that "Dr. Rosenberg is Board-Certified in Occupational Medicine." *Id.* In addition, the administrative law judge found that the opinions of Drs. Baker, Perper, and Rosenberg were well-reasoned and well-documented. Thus, the administrative law judge properly considered both the qualitative nature and the quantitative nature of the medical opinion evidence with respect to the issue of legal pneumoconiosis. Consequently, we reject employer's assertion that the administrative law judge erred in relying on the numerical superiority of the witnesses.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer further contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The record consists of the death certificate signed by Dr. Sutherland, the autopsy report of Dr. Dennis, and the reports of Drs. Baker, Perper, Oesterling, and Rosenberg. In the death certificate, Dr. Sutherland listed chronic obstructive pulmonary disease and pneumoconiosis as underlying causes of the miner's death. Director's Exhibit 8. Dr. Dennis opined that "[the miner] had significant pulmonary disease at the time of death with marked progressive massive fibrosis accentuated by emphysematous changes along with pulmonary embolous" and that "[the miner] died a hypoxic death." Director's Exhibit 9. Dr. Baker opined that the miner had coal workers' pneumoconiosis, minimal hypoxemia and bronchitis related to coal dust exposure and cigarette smoking, and that all of these diseases fully contributed to his minimal pulmonary or respiratory impairment. Claimant's Exhibit 1. Dr. Perper opined that the miner's coal workers' pneumoconiosis was a major cause and a hastening factor of his death. Claimant's Exhibit 4. By contrast, Dr. Oesterling opined that "[the miner's] limited pleural based micronodular coalworkers' (sic) pneumoconiosis with focal interstitial coalworkers' (sic) pneumoconiosis was not a factor in producing any of the processes which lead to [his] death nor did they in any way compromise his respiratory abilities during his lifetime." Employer's Exhibit 12. Similarly, Dr. Rosenberg opined that the miner's death was not related to coal mine dust exposure. Employer's Exhibit 1.

At Section 718.205(c), the administrative law judge noted that each of the physicians who rendered an opinion regarding the cause of the miner's death had impressive credentials. Nevertheless, the administrative law judge gave greater weight to the opinions of Drs. Sutherland, Dennis, and Perper than to the contrary opinions of Drs. Oesterling and Rosenberg because he found that the opinions of Drs. Sutherland, Dennis, and Perper were better supported by the other evidence of record, such as hospital and treatment notes. The administrative law judge also found that Dr. Baker's opinion supported a finding that the miner's pneumoconiosis hastened his death. Further, the administrative law judge found that Dr. Dennis had an advantage over the reviewing pathologists because he was the autopsy prosector. The administrative law judge therefore found that "the [c]laimant has established by a preponderance of the evidence that pneumoconiosis was a substantially contributing cause which hastened the death of the miner." Decision and Order at 26.

Employer argues that the administrative law judge erred in relying on the death certificate to find that pneumoconiosis contributed to the miner's death because it was unexplained. Employer further asserts that the treatment records of Drs. Sutherland and

Patel do not supply the missing explanation by Dr. Sutherland in the death certificate for the underlying cause of the miner's death, as they do not reflect treatment for pneumoconiosis. Citing *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), employer maintains that the administrative law judge's reliance on Dr. Sutherland's finding "boils down to an impermissible preference for the doctor's treatment that is not justified in this record or in the law." Employer's Brief at 25.

In considering the death certificate at Section 718.205(c), the administrative law judge initially determined that it was insufficient, standing alone, to carry claimant's burden that the miner's death was due to pneumoconiosis because Dr. Sutherland did not provide a basis for his findings. Nevertheless, the administrative law judge subsequently considered and weighed Dr. Sutherland's findings in the death certificate with the treatment notes of Dr. Sutherland and Dr. Patel because he found that "Dr. Sutherland had personal knowledge of the [m]iner such that he could properly make an assessment as to the medical conditions which caused or hastened the miner's death."[7] Decision and Order at 24. In a report dated September 24, 2004, Dr. Patel noted that the miner's medical history was positive for coal workers' pneumoconiosis and chronic obstructive pulmonary disease and that the miner was on nebulized bronchodilators for several years. Claimant's Exhibit 6. However, as argued by employer, Dr. Sutherland did not indicate that he treated the miner for *pneumoconiosis*. *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); Claimant's Exhibit 5. Moreover, the record does not contain any additional testimony by Dr. Sutherland regarding the cause of the miner's death. *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Thus, the administrative law judge erred in failing to explain why he found that Dr. Sutherland possessed the relevant qualifications or personal knowledge about the miner's condition to opine that pneumoconiosis was the underlying cause of his death. *Wojtowicz*, 12 BLR at 1-165.

Employer also argues that the administrative law judge erred in relying on Dr. Dennis's death causation opinion because "[Dr. Dennis] did not attribute any hypoxia to [the miner's] pneumoconiosis or coal mine employment." Employer's Brief at 26. The administrative law judge stated that "Dr. Dennis, the autopsy prosector, opined that the miner's death was directly attributable to massive fibrosis, a pulmonary embolus, and hypoxia." Decision and Order at 24. In his autopsy report, Dr. Dennis opined that the miner died a hypoxic death. Director's Exhibit 9. Although Dr. Dennis opined that the

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[7] The administrative law judge stated that "Dr. Sutherland was the attending physician during the miner's last hospitalization, and treated the miner for almost ten years before the miner's death." Decision and Order at 24. The administrative law judge additionally stated that "[Dr. Sutherland] also referred the [m]iner to Dr. Patel for treatment of his respiratory disorders." *Id*.

miner had significant pulmonary disease at the time of his death, the doctor did not specifically opine that the miner's hypoxic death was caused, contributed to, or hastened by pneumoconiosis or a chronic lung disease related to coal dust exposure. *Id*.; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1984). Thus, the administrative law judge erred in failing to explain why he found that Dr. Dennis's opinion was sufficient to establish that the miner's pneumoconiosis contributed to his death. *Wojtowicz*, 12 BLR at 1-165.

Employer additionally argues that the administrative law judge erred in giving greater weight to Dr. Dennis's death causation opinion because he found that Dr. Dennis conducted the autopsy of the miner. In weighing the conflicting medical evidence at Section 718.205(c), the administrative law judge stated, "I also conclude that since Dr. Dennis conducted the autopsy of the miner, that he had an advantage over the other reviewing pathologists of record in determining the cause of death since he reviewed the heart and lungs in their entirety." Decision and Order at 26. However, the administrative law judge did not explain why he found that the fact that Dr. Dennis viewed the miner's heart and lungs in their entirety as the autopsy prosector gave him an advantage over the reviewing pathologists. *Wojtowicz*, 12 BLR at 1-165.

Employer further argues that the administrative law judge erred in relying on Dr. Baker's opinion in support of his finding that the miner's pneumoconiosis hastened his death. The administrative law judge stated that "Dr. Baker's evaluation at CX 1 also support (sic) a finding that the [m]iner's death was hastened by pneumoconiosis by stating that the [m]iner's pneumoconiosis, hypoxia, and bronchitis were caused by coal dust exposure." Decision and Order at 25-26. As noted by the administrative law judge, Dr. Baker's opinion was based on a 2001 evaluation of the miner, which was four years before the miner's death. Dr. Baker, therefore, did not render an opinion with regard to the cause of the miner's death. Thus, because the administrative law judge did not adequately explain why he found that Dr. Baker's opinion supported a finding that the miner's pneumoconiosis hastened his death, the administrative law judge erred in weighing Dr. Baker's opinion at Section 718.205(c).

Finally, employer argues that the administrative law judge erred in finding that Dr. Perper's opinion outweighed the contrary opinions of Drs. Oesterling and Rosenberg. The administrative law judge stated that "the opinions of the doctors who held that pneumoconiosis caused the [m]iner's death have greater support in the other evidence of record." Decision and Order at 25. The administrative law judge then stated that "[t]he treatment and hospitalization records at CX 6 noted that the [m]iner had pneumoconiosis and was on bronchodilators to treat the symptoms." *Id*. However, the administrative law judge did not adequately explain why he found that the treating notes supported the opinions of doctors who found that pneumoconiosis caused, contributed to, or hastened the miner's death. *Wojtowicz*, 12 BLR at 1-165. Consequently, the administrative law judge erred in giving greater weight to the opinions of Drs. Sutherland, Dennis, and

Perper than to the contrary opinions of Drs. Oesterling and Rosenberg because he found that the opinions of Drs. Sutherland, Dennis, and Perper were better supported by the hospital and treatment notes.

In view of the foregoing, we vacate the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) and remand the case for further consideration of the evidence in accordance with the APA.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's Decision and Order awarding benefits and to remand the case for reconsideration. I would instead affirm the administrative law judge's Decision and Order awarding benefits because his finding that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 is supported by substantial evidence. The majority affirmed the administrative law judge's finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). However, the majority vacated the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 and remanded the case for further consideration of the evidence. Specifically, the majority believes that the administrative

law judge did not explain why he found that the autopsy evidence outweighed the x-ray evidence. I disagree.

In considering the autopsy evidence at Section 718.202(a)(2), the administrative law judge, citing *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985), noted that "[t]he Board has held that autopsy evidence is the most reliable evidence of the existence of pneumoconiosis." Decision and Order at 7. At Section 718.304(a), the administrative law judge found that the x-ray evidence did not establish the presence of complicated pneumoconiosis. However, at Section 718.304(b), the administrative law judge found that the autopsy evidence established the presence of complicated pneumoconiosis. The administrative law judge then noted that he was permitted to give greater weight to autopsy evidence than to x-ray evidence, citing *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). The administrative law judge therefore found that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304.

Thus, contrary to the majority's view, the administrative law judge clearly explained why he properly gave greater weight to the autopsy evidence than to the x-ray evidence at Section 718.304, *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), finding that autopsy evidence is more reliable than x-ray evidence, *Terlip*, 8 BLR at 1-364. Consequently, I would affirm the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304.

In conclusion, therefore, I would affirm the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b), based on his consideration of the autopsy evidence. In addition, I would affirm the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304 because the administrative law judge properly gave greater weight to the autopsy evidence than to the x-ray evidence. Further, I would affirm the administrative law judge's finding that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b).

Finally, because I would affirm the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, I need not address the administrative law judge's finding at 20 C.F.R. §718.205(c).

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BETTY JEAN HALL
Administrative Appeals Judge