BRB No. 07-0389 BLA

M.W. (Widow of R.W.) Claimant-Respondent v. ANDERSON AND ANDERSON and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND/ BRICKSTREET Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2008 DECISION and ORDER

Appeal of the Decision and Order of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; 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, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (06-BLA-5686) of Administrative Law Judge Alan L. Bergstrom awarding benefits on a 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 involves a survivor's claim filed on December 3, 2004.[1] After crediting the miner with at least twenty-nine years of coal mine employment, the administrative law judge applied the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of pneumoconiosis arising out of coal mine employment. 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). Accordingly, the administrative law judge awarded benefits.

On appeal, employer[2] argues that the administrative law judge erred in excluding deposition testimony pursuant to the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer also contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant[3] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, contending that the administrative law judge erred in excluding employer's evidence from the record.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable

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[1] The miner initially filed a claim for benefits on October 7, 1983. In a Decision and Order dated October 5, 1998, Administrative Law Judge Sheldon R. Lipson denied benefits. There is no indication that the miner took any further action in regard to his 1983 claim. The miner filed a duplicate claim on June 9, 1998. In a Decision and Order dated October 4, 2000, Administrative Law Judge Richard A. Morgan awarded benefits. Administrative Law Judge's Exhibit 3.

[2] The carrier, West Virginia Coal Workers' Pneumoconiosis Fund/Brickstreet, is pursuing this appeal on behalf of employer.

[3] Claimant is the surviving spouse of the deceased miner, who died on October 25, 2004. Director's Exhibit 8.

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).

Evidentiary Limitations

Employer argues that the administrative law judge erred in excluding Dr. White's deposition testimony from the record pursuant to 20 C.F.R. §725.414. The evidentiary limitations set forth at 20 C.F.R. §725.414 apply to the instant survivor's claim. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). Section 725.414 limits claimant and employer to "no more than two medical reports" in support of their respective affirmative cases. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Claimant submitted Dr. White's September 27, 2005 report in support of her affirmative case. Director's Exhibit 24; Claimant's Exhibit 1. Employer submitted Dr. Spagnolo's August 12, 2006 report and Dr. Rosenberg's August 21, 2006 report in support of its affirmative case. Employer's Exhibits 1, 3, 10.

The regulations also place evidentiary limitations on the amount of testimony that a party may offer into evidence. Section 725.414(c) provides, in relevant part, that:

> A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this section. *A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of §725.456 of this part.*

20 C.F.R. §725.414(c) (emphasis added).

Employer offered the deposition testimony of three physicians, Drs. Spagnolo, Rosenberg, and White. *See* Employer's Exhibits 7-10.

> In his decision, the administrative law judge stated:
> In this case, the Employer submitted an Evidence Summary Form in which it offered two medical reports as evidence, one by Dr. Spagnolo and the other by Dr. Rosenberg. (EX 1, 3). The Employer also listed the deposition testimony of Drs. Spagnolo and Rosenberg as evidence. (EX 8,

> 9). These exhibits are all within the evidentiary limitations of 20 C.F.R. §725.414 because the testimony is from physicians who prepared medical reports offered as part of the Employer's affirmative case. Therefore, the portions of each of these exhibits that go to issues other than the issue of whether the Decedent suffered from pneumoconiosis arising out of coal mine employment were properly admitted into the record at the hearing.
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> However, the Employer also listed a third deposition on its Evidence Summary Form, that of Dr. White, the Decedent's treating physician. Because the Employer has already submitted the testimony of two physicians providing medical reports as part of its affirmative case, this third deposition is in excess of the evidentiary limitations of 20 C.F.R. §725.414(c) and is only admissible upon a showing of good cause by the Employer. [T]he Employer had ample opportunity to make a showing of good cause to admit the excess evidence, since it clearly designated excess testimony in the Evidence Summary Form submitted to this Court. (EX 10). Nevertheless, the Employer did not attempt to show good cause to admit excess testimony at any point in the proceedings. Although admitted at the hearing, this Administrative Law Judge now finds Dr. White's deposition testimony inadmissible as exceeding the evidentiary limitations of 20 C.F.R. §725.414(c), and it will not be considered as part of the record.

Decision and Order at 8 (footnote omitted).[4]

Employer argues that the administrative law judge's exclusion of Dr. White's

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[4] The administrative law judge noted that:

> Although Dr. White did prepare a medical report admitted into evidence, his report was offered as part of the Claimant's affirmative case, not the Employer's. The Regulations do not provide for rebuttal evidence in the form of testimony, nor can Dr. White's testimony be considered rehabilitative evidence. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Further, the Regulations do not provide that a treating physician may testify by virtue of the fact that his treatment records are admitted into evidence. *Gilbert v. Consolidation Coal Co.*, BRB Nos. 04-0672 BLA and 04-0672 BLA-A (May 31, 2005) (unpub.). Thus, there is no other category under which to designate this excess evidence so as to make it admissible without a showing of good cause.

Decision and Order at 8 n.9.

deposition testimony deprived employer of its due process rights, *i.e.*, the right to cross-examine adverse witnesses. However, under the facts of this case, we agree with the Director that we need not reach this issue. As the Director accurately notes, the Board has held that the evidentiary limitations of 20 C.F.R. §§725.414 and 725.310(b)[5] apply together in modification proceedings on a claim. *Rose v. Buffalo Mining Co.*, 23 BLR 1-221 (2007). Consequently, the Board has held that:

> [W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, *plus the party may also submit the additional medical evidence allowed by 20 C.F.R. §725.310(b).*

Rose, 23 BLR at 1-228 (emphasis added).

In this case, claimant filed a request for modification of the district director's denial of benefits. Consequently, employer was allowed, pursuant to Section 725.310(b), to submit one additional medical report. 20 C.F.R. §725.310(b). Thus, Dr. White's deposition testimony is admissible as employer's third medical report, the additional medical report authorized by Section 725.310(b). *See* 20 C.F.R. §§725.414(c), 725.310(b). The administrative law judge, therefore, erred in excluding it.

The Board cannot conclude that the administrative law judge's exclusion of Dr. White's deposition testimony was harmless. The Board is not authorized to determine the weight of the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we vacate the administrative law judge's Decision and Order and remand the case to the administrative law judge so that the parties can resubmit and redesignate their evidence under 20 C.F.R. §§725.414 and 725.310(b). The administrative law judge should then rule on the admissibility of each piece of evidence, and reconsider the merits of claimant's 2004 survivor's claim.

Section 718.205(c)

In the interest of judicial economy, we will address employer's contentions of error regarding the administrative law judge's finding that the evidence established that

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[5] Section 725.310(b) provides, in relevant part, that in modification proceedings, each party may submit "one additional medical report in support of its affirmative case…." 20 C.F.R. §725.310(b).

the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). 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).[6] *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 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

The administrative law judge found that the miner's death certificate and Dr. White's opinion established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge found that the opinions of Drs. Spagnolo and Rosenberg, that the miner's death was not due to pneumoconiosis, were entitled to diminished weight because both physicians opined that the miner did not suffer from pneumoconiosis.

Employer argues that the administrative law judge erred in finding that the miner's death certificate supported a finding that the miner's death was due to pneumoconiosis. We agree. Dr. Thompson completed the miner's death certificate. Dr. Thompson

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

attributed the miner's death to respiratory failure due to a spontaneous pneumothorax due to "COPD."[7] Director's Exhibit 8. Dr. Thompson, however, provided no explanation for his findings on the miner's death certificate.[8] The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a physician's statement that pneumoconiosis hastened a miner's death, without any additional support or explanation of that conclusion, is insufficient as a basis for such a finding. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-264 (4th Cir. 2000). Although the administrative law judge noted that Dr. Thompson is Board-certified in Internal Medicine and was the miner's attending physician during his last hospitalization, the administrative law judge did not address the reasoning underlying Dr. Thompson's death certificate findings. Because Dr. Thompson provided no basis for his findings on the miner's death certificate, we hold that the miner's death certificate is insufficient, standing alone, to carry claimant's burden of proof. *See Sparks*, 213 F.3d at 192, 22 BLR at 2-264; *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *see also Addison v. Director, OWCP*, 11 BLR 1-68 (1988).

Employer also argues that the administrative law judge erred in his consideration of Dr. White's opinion. In a report dated September 27, 2005, Dr. White, the miner's treating physician, opined that:

> [The miner] was followed by me for a number of years for coal workers' pneumoconiosis as well as chronic obstructive pulmonary disease. Although I did not attend him during his terminal hospitalization last year at Montgomery Regional Hospital, his death certificate states that he died due to respiratory failure which is a consequence of spontaneous pneumothorax. I do not believe that this pneumothorax was due to his chronic obstructive pulmonary disease as alleged by Dr. Thompson but is more likely due to his coal workers' pneumoconiosis. It should be noted that his coal workers' pneumoconiosis was very severe and undoubtedly contributed to his respiratory failure independent of the pneumothorax. Thus, I feel that his coal workers' pneumoconiosis directly contributed to

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[7] Dr. Thompson also completed a Death Summary on October 26, 2004. Director's Exhibit 10. Although Dr. Thompson listed chronic obstructive pulmonary disease and coal workers' pneumoconiosis among his final diagnoses, he did not address the cause of the miner's death in the Death Summary. *Id.*

[8] Although Dr. Thompson diagnosed pneumoconiosis and COPD in treatment records and a Death Summary, *see* Director's Exhibit 10, Dr. Thompson failed to provide any explanation for how the miner's COPD contributed to his death.

and certainly hastened [the miner's] death.

Director's Exhibit 24.

In his consideration of Dr. White's opinion, the administrative law judge found that:

> There is a flaw in Dr. White's opinion letter….which is that he does not set forth documentation to support his opinion that the [miner's] death was hastened by coal workers' pneumoconiosis. After review of the death certificate, he merely concludes that the [miner's] spontaneous pneumothorax was likely caused by his coal workers' pneumoconiosis and that, since the [miner] had severe coal workers' pneumoconiosis, it contributed to the [miner's] respiratory failure independent of the spontaneous pneumothorax and hastened his death. (DX 24) Nevertheless, in light of the other relevant evidence in the record, including Dr. White's numerous treatment records and his qualifications, his opinion is entitled to probative weight as to whether the [miner's] death was hastened by pneumoconiosis.

Decision and Order at 28.

Although the administrative law judge acknowledged deficiencies in Dr. White's opinion, the administrative law judge nevertheless found that Dr. White's opinion was entitled to probative weight based upon his status as the miner's treating physician. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the 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); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Corp. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Before according additional weight to Dr. White's opinion based upon his status as the miner's treating physician, the administrative law judge on remand should reconsider whether Dr. White's opinion is sufficiently reasoned, and then weigh Dr. White's opinion consistent with 20 C.F.R. §718.104(d), and with *Hicks* and *Akers*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's opinion insofar as it holds that Dr. White's deposition testimony is admissible as employer's third medical report, the additional medical report authorized by 20 C.F.R. §725.310(b). Consequently, I agree with the majority's decision to vacate the administrative law judge's Decision and Order and remand the case to the administrative law judge so that the parties may resubmit and redesignate their evidence under 20 C.F.R. §§725.414 and 725.310(b).[9] However, I respectfully disagree with my colleagues' determination that the administrative law judge erred in his consideration of the miner's death certificate pursuant to 20 C.F.R. §718.205(c), and in his analysis of Dr. White's opinion.

[9] The majority states that it is not necessary to decide whether Dr. White's report is admissible as cross-examination under 20 C.F.R. §725.414(c) because the report must be admitted pursuant to 20 C.F.R. §725.310(b). On remand, however, if employer seeks the admission of another medical report pursuant to Section 725.310(b), the administrative law judge may be forced to decide whether the deposition testimony is admissible under Section 725.414(c) as well as under Section 725.310(b). I agree with the Director and employer that it is admissible as cross-examination under Section 725.414(c).

In the case at bar, the administrative law judge stated that the award of benefits in the miner's claim had been supported by evidence establishing that the miner suffered from coal workers' pneumoconiosis, emphysema and COPD, all arising out of coal mine employment. Decision and Order at 26. The administrative law judge correctly observed that the doctrine of collateral estoppel now bars employer from re-litigating these issues, citing *Collins v. Pond Creek Mining Co*., 468 F.3d 213, 222, 23 BLR 2-393, 2-406 (4th Cir. 2006). *Id.* at 5-7. Hence, the administrative law judge concluded that the only issue before him was whether the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

To make that determination, the administrative law judge reviewed the relevant medical evidence. He considered the opinions proffered by employer from Drs. Spagnolo and Rosenberg, properly applying the teaching of the Fourth Circuit in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) to find that these opinions "carry little weight because both opined that the miner did not have legal or clinical pneumoconiosis and neither diagnosed a condition aggravated by coal dust or found symptoms related to coal dust exposure."[10] Decision and Order at 28. The administrative law judge also considered the opinions of Drs. Thompson and White who were treating physicians and offered differing opinions on the cause of death.

Dr. Thompson treated the miner from May 14, 2004 until his death on October 25, 2004. The records reflect that the doctor diagnosed the miner on his first visit with "COPD exacerbation and coal workers' pneumoconiosis." Decision and Order at 16. Dr. Thompson saw the miner frequently thereafter, diagnosing him on September 2, 2004 with end-stage COPD. *Id.* On October 14, 2004, during the miner's last hospitalization, Dr. Thompson diagnosed the miner with several conditions, including COPD exacerbation and coal workers' pneumoconiosis. *Id.* at 18. The doctor prescribed medication and treatments, including Levaquin for bronchitis and supplemental oxygen as needed. *Id*. On October 26, 2004 the day after the miner's death, Dr. Thompson prepared a three-page death summary which, as the administrative law judge observed, "detail[ed] the Decedent's treatment since the date of admission to the hospital." *Id.* at 19; Director's Exhibit 10. The administrative law judge summarized it as follows:

> The Decedent's final diagnoses were COPD exacerbation, spontaneous left-sided pneumothorax, left-sided pneumonia, coal workers' pneumoconiosis, and multifocal atrial tachycardia. Upon admission, the

[10] Employer does not dispute the administrative law judge's characterization of these opinions, but states, without reference to legal authority, they "should be given some weight." Employer's Brief at 13.

> Decedent was given Solu-Medrol, nebulizer treatments, supplemental oxygen, and Levaquin for bronchitis. He had a CT angiogram which revealed severe emphysematous changes, but no acute pulmonary embolism. The Decedent was subsequently switched from Solu-Medrol to Prednisone and inhalers. He suddenly became dyspneic and tachycardic with desaturation apparent. He was in increased respiratory distress, so he was transferred to ICU, where a chest x-ray revealed a spontaneous left-sided pneumothorax. A chest tube was placed on his left side and an arterial blood gas study afterward revealed a pH of 7.51, pCO2 of 48, and a pO2 of 60. He was placed back on Solu-Medrol. Dr. Thompson noted that "it was thought the patient likely ruptured a bleb causing the left-sided pneumothorax." A chest x-ray showed infiltrate in the left lung, which continued to worsen. The Decedent was kept on Ativan and morphine for comfort, but continued to deteriorate. He was pronounced dead at 10:15 a.m. on October 25, 2004.

Decision and Order at 19-20.[11]

The administrative law judge also considered the miner's death certificate which Dr. Thompson completed two days after the death summary. Director's Exhibit 8. The administrative law judge stated:

> Dr. Thompson listed the Decedent's immediate cause of death as "respiratory failure due to (or as a consequence of) spontaneous pneumothorax due to (or as a consequence of) COPD." There was no autopsy performed.

Decision and Order at 26. The administrative law judge analyzed all of the medical evidence and concluded that claimant had proved that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), based upon Dr. Thompson's identification of COPD "as the underlying cause of the Decedent's spontaneous pneumothorax and respiratory failure. .. . [since] [i]t has already been established that the decedent's COPD was coal mine employment related." Decision and Order at 29. The administrative law judge fully explained his decision to credit Dr. Thompson's opinion on causation, reflected in the death certificate:

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[11] Pneumothorax is a collapsed lung. "Secondary spontaneous pneumothoraces (SSP) occur in the presence of lung disease, primarily in the presence of chronic obstructive pulmonary disease (COPD)." "Pneumothorax" in EMedicine at WebMD (2006).

> Although a death certificate alone is unreliable as an assessment of the miner's condition, if the record shows the physician signing the certificate possessed relevant qualifications or personal knowledge of the miner, it can be accepted. *Smith v. Camco Mining, Inc*., 13 BLR 1-17 (1989); *Addison v. Director OWCP*, 11BLR 1-68 (1988). Dr. Thompson, Board-certified in Internal Medicine, was the attending physician during the Decedent's last hospitalization. (DX 10). Additionally, he treated the Decendent for his respiratory conditions seven times in the approximately five months before the Decendent's death. (DX 9.). Thus, he had personal knowledge of the Decedent such that he could make an assessment of the Decedent's cause of death.

Decision and Order at 29 n.20. The administrative law judge also considered Dr. Thompson's detailed account of the miner's last hospitalization when "acute bronchitis" required his admission.

I believe the majority is misguided in stating, "Because Dr. Thompson provided no basis for his finding on the miner's death certificate, we hold that the miner's death certificate is insufficient, standing alone, to carry claimant's burden of proof." It is clear from the above that the administrative law judge did not rely upon Dr. Thompson's statement on the death certificate in isolation, but considered it in the context of his treatment of the miner and his intimate familiarity with the course of the miner's condition during his final hospitalization. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-264 (4th Cir. 2000).

That the administrative law judge properly considered the death certificate in the case at bar is demonstrated by the Fourth Circuit's decision in *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). The Fourth Circuit held in *Richardson* that the administrative law judge erred in denying benefits in a survivor's claim because, *inter alia*: he failed to consider the death certificate which listed metatastic lung cancer and COPD as the causes of death; he failed to consider that the death certificate was completed by the physician who had treated the miner during his final two hospitalizations and who had authored the discharge report; and he failed to apply to the survivor's claim the determination in the miner's claim that the miner's COPD arose from coal mine employment. *Richardson*, 94 F.3d at 166-167, 21 BLR at 2-380-381. Although the death certificate in *Richardson* was obviously conclusory, the court held that failure to consider it was reversible error because it was authored by a physician with intimate knowledge of the miner's condition at the end of his life. The record in the instant case reflects that Dr. Thompson had similar knowledge of the miner's condition but the administrative law judge below properly considered the death

certificate in the context of Dr. Thompson's special knowledge of the miner. Although the Fourth Circuit remanded the case for the administrative law judge to determine, *inter alia*, the credibility of the death certificate, the court made plain that it considered the death certificate credible evidence when the court expressed puzzlement over the statement of the Department of Labor's expert that he found no evidence that COPD contributed to the miner's death. 94 F.3d at 168 n.5, 21 BLR at 2-381 n.5. In sum, both reason and law confirm that the administrative law judge properly considered the death certificate in the instant case.

Furthermore, it is noteworthy that employer does not argue that it was error for the administrative law judge to consider the death certificate, but that he did not consider it correctly, because he considered the COPD referenced by Dr. Thompson to be evidence of pneumoconiosis. Employer makes three arguments to support its contention that the administrative law judge erroneously related the miner's COPD to his coal mine employment. Employer states that the link between the two was not provided by Dr. Thompson, or by medical opinion evidence or by application of the doctrine of collateral estoppel. Employer elaborates on the last contention with the assertion that "the relationship of the miner's COPD to coal dust exposure is not an element of entitlement in the survivor's claim." Employer's Brief at 13.

Of course, the administrative law judge never suggested that the link between COPD and the miner's coal mine employment was provided by Dr. Thompson or by medical opinion evidence, but by application of the doctrine of collateral estoppel. Employer is mistaken in asserting that "the relationship of the miner's COPD to coal dust exposure is not an element of entitlement in the survivor's claim." A survivor is required to prove under Section 718.205(a)(1)(2) that the miner had pneumoconiosis which arose out of coal mine employment. By application of the doctrine of collateral estoppel these elements are established in the survivor's claim. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-394 (4th Cir. 2006); *accord, Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002).

If employer's contention is that collateral estoppel applies only to the legal conclusion that the miner established pneumoconiosis, arising out of coal mine employment and not to the facts which support that conclusion, employer is wrong, again. It is black letter law that "where a question of fact essential to the judgment is actually litigated and determined in the first proceeding . . . , the parties are bound by that determination in a subsequent proceeding even though the cause of action is different." *C.I.R. v. Sunnen*, 333 U.S. 591, 601 (1948). In the miner's claim, the fact that his COPD arose out of coal mine employment was essential to the judgment. Hence, the administrative law judge properly relied upon this fact to establish the link between the miner's COPD and his coal mine employment. *See Richardson v. Director*, 94 F.3d at 167, 21 BLR at 2-378. The Fourth Circuit declared in *Richardson*, that the determination

in the miner's claim that the miner's totally disabling COPD arose out of coal mine employment established that COPD, one of two causes listed on the death certificate, was legal pneumoconiosis.[12] *Id*. In the instant case, the administrative law judge properly applied the doctrine of collateral estoppel to find that the cause of the miner's death, COPD, arose in part out coal mine employment.

Finally, I believe the majority misreads the administrative law judge's decision when it states that the administrative law judge erred in his consideration of Dr. White's opinion. The administrative law judge found that Dr. White's letter, in which he asserts that the miner's pneumothorax was "more likely due to his coal workers' [sic] pneumoconiosis" than to COPD, lacked documentation. Nevertheless, the administrative law judge chose to credit Dr. White's opinion that pneumoconiosis hastened the miner's death because "other relevant evidence in the record, including Dr. White's numerous treatment records. . . ." provided abundant documentation. Decision and Order at 28. Accordingly, I believe the administrative law judge properly considered Dr. White's opinion in the context of the entire record and the record supports his analysis. On remand, the record will contain even more support for the administrative law judge's determination to credit Dr. White's opinion that pneumoconiosis hastened the miner's death, when the administrative law judge considers Dr. White's deposition testimony. Although employer is offering it to show that the doctor would withdraw the statement made in his letter that the "pneumothorax was more likely due to coal worker's [sic] pneumoconiosis," and that the doctor had never diagnosed coal workers' by x-ray, Employer's Exhibit 7 at 25, the doctor was adamant that the miner's pneumoconiosis was very severe and had contributed to his respiratory failure. *Id.* at 26, 33-34. The doctor observed that the miner had a long coal mine employment history and his smoking history was too insignificant to cause such severe disease. *Id.* at 26. The miner's coal mine employment and smoking, together, caused his "shortness of breath, his eventual oxygen dependence, and to some extent his respiratory failure. The pneumothorax would have put him over the line and made it to where he couldn't survive any longer." *Id.* at 32.

In sum, although I concur in the majority's decision to remand the case for the administrative law judge to consider Dr. White's deposition testimony, I would affirm the

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[12] *Richardson* was decided before *Collins* in which the Fourth Circuit held that the doctrine of collateral estoppel may apply to establish in a survivor's claim facts previously litigated in the miner's claim which are essential to the decision. The *Richardson* court decided that, because the miner's award was supported by stipulations of the Director, the Director was bound by those stipulations, and therefore it was unnecessary to decide whether the doctrine of collated estoppel applied.

administrative law judge's consideration of the death certificate and find no error in the administrative law judge's consideration of Dr. White's opinion.

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REGINA C. McGRANERY
Administrative Appeals Judge