BRB No. 08-0289 BLA

G.B. (Widow of J.B.) Claimant-Respondent v. HORN CONSTRUCTION COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/30/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn Stuart & Eskridge), Abingdon, Virginia for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (2003-BLA-6263) of Administrative Law Judge Thomas M. Burke issued on a survivor's claim filed on April 8, 2002,[1] pursuant to the provisions of Title IV of the Federal Coal Mine

[1] Claimant is the widow of the miner, J.B., who died on January 23, 2002. The miner was receiving benefits at the time of his death, based on a claim he had filed on July 16, 1993. Director's Exhibit 2. The complete procedural history of this case is set forth in the Board's prior decision which is incorporated herein. [*G.B.*]. *v. Horn Construction Co.*, BRB No. 04-0907 BLA, slip op. at 2 n.1 (Sept. 29, 2005) (unpub.).

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for a second time. The administrative law judge previously issued a Decision and Order Awarding Survivor's Benefits on August 4, 2004. The administrative law judge found that the evidence was sufficient to establish the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, and that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer appealed and the Board vacated the administrative law judge's findings at Section 718.202(a)(1), (4). [*G.B.*]. *v. Horn Construction Co.*, BRB No. 04-0907 BLA, slip op. at 5, 9 (Sept. 29, 2005) (unpub.). The Board specifically held that the administrative law judge erred in discounting Dr. Scatarige's negative reading of an August 9, 1993 x-ray. *Id*. 4-5. The Board also held that the administrative law judge erred in failing to consider whether Dr. Forehand provided a reasoned diagnosis that the miner suffered from legal pneumoconiosis.[2] *Id*. at 7. Because the Board vacated the administrative law judge's findings as to the existence of pneumoconiosis, the Board vacated the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *Id.* at 9. The Board further addressed employer's assertion that the administrative law judge erred in weighing the medical opinions as to whether pneumoconiosis hastened the miner's death and agreed with employer that the administrative law judge failed to properly explain the basis for his credibility determinations. The Board instructed the administrative law judge on remand: 1) to address the equivocal nature of Dr. Prill's opinion; 2) explain the basis for his determination that Dr. Prill had attributed the miner's compromised lung function to coal dust exposure; 3) reconsider the opinion of Dr. Fino; 4) explain why he found Dr. Prill's qualifications as an oncologist to be superior to Dr. Fino's qualifications as a Board-certified pulmonologist; 5) address whether Dr. Forehand's death causation statement

[2] Dr. Forehand examined the miner at the request of the Department of Labor (DOL) on August 24, 1999. Director's Exhibit 11. Dr. Forehand diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD). *Id*. In the etiology section of his DOL report, Dr. Forehand listed coal dust exposure and cigarette smoking. *Id*. The Board held that the administrative law judge erred in failing to consider that, because Dr. Forehand did not identify the causes of each of the diagnosed respiratory conditions separately, it was unclear from his report whether Dr. Forehand intended to relate both of the diagnosed respiratory conditions to coal dust exposure and smoking, or whether he intended to relate only the miner's coal workers' pneumoconiosis to coal dust exposure and the miner's COPD to smoking. [*G.B.*] *v. Horn Construction Co.*, BRB No. 04-0907 BLA, slip op. at. 7 n.6 (Sept. 29, 2005) (unpub.). The Board instructed the administrative law judge to reconsider whether Dr. Forehand's opinion was sufficient to support a finding that the miner had legal pneumoconiosis. *Id*. at 8.

was reasoned and documented; and 6) explain why he found Dr. Forehand's opinion to be more persuasive than Dr. Fino's opinion.[3] *Id*. at 9-11.

As an additional matter, the Board rejected employer's assertion that the administrative law judge erred in considering certain positive x-rays submitted in conjunction with the miner's claim since that evidence had not been designated by claimant as evidence in the survivor's claim pursuant to 20 C.F.R. §725.414.[4] [*G.B.*], BRB No. 04-0907 BLA slip. op. at 5-6 n.5. Thus, the Board vacated the administrative law judge's August 4, 2004 Decision and Order Awarding Survivor Benefits and remanded the case for further consideration.

On November 7, 2005, employer filed a request for reconsideration, asking the Board to reconsider its holding with respect to application of the evidentiary limitations. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief, asserting that, contrary to the Board's holding, the evidentiary limitations at Section 725.414 are mandatory and may not be waived by the parties. Accordingly, the Board granted employer's motion, reversed its prior determination with regard to Section 725.414, and directed the administrative law judge on remand to insure that the x-ray evidence complied with the evidentiary limitations. [*G.B.*] *v. Horn Construction Co.*, BRB No. 04-0907 BLA (July 26, 2006) (on recon.) (unpub.)

On remand, the administrative law judge issued an Order that directed claimant to designate those x-rays contained in the record that she relied upon in support of her

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[3] The Board affirmed the administrative law judge's decision to discredit as unreasoned the opinions of Drs. Pillai, Iosif, Prill and Weinaker. [*G.B.*]. *v. Horn Construction Co.*, BRB No. 04-0907 BLA, slip op. at 8 n.7 (Sept. 29, 2005) (unpub.).

[4] In accordance with a pre-hearing order to designate evidence, employer designated, as part of its affirmative case, two x-ray readings by Drs. Scatarige and Dr. Fino of an x-ray dated August 9, 1993, a medical report by Dr. Fino, and the deposition testimony of Dr. Prill. *See* Administrative Law Judge Order (Sept. 11, 2003); Director's Exhibit 31; Employer's Exhibits 1, 2. Claimant did not file an evidence summary form. At the hearing held on December 9, 2003, claimant proffered treatment records from Drs. Pillai and Weinaker, which were admitted into the record as Claimant's Exhibits 1 and 2. The record contains two prior claims filed by the miner, which include: a positive reading for pneumoconiosis by Dr. Bassali of an x-ray dated January 15, 1985, and three positive readings of an August 9, 1993 x-ray by Drs. Milner, Gaziano, and Shahan. Director's Exhibits 1, 2. In his August 4, 2004 Decision and Order Awarding Survivor's Benefits, the administrative law judge considered all of the record evidence, not just the evidence designated by the parties.

affirmative case. Administrative Law Judge Order (Oct. 19, 2007). Employer was also given additional time to designate any x-rays contained in the record as rebuttal evidence. *Id*. In response to the administrative law judge's October 19, 2007 Order, claimant designated, as her affirmative case evidence, Dr. Bassali's positive reading of a January 15, 1985 x-ray and Dr. Milner's positive reading of an August 9, 1993 x-ray. As rebuttal evidence, claimant designated two positive readings by Drs. Gaziano and Shahan of the August 9, 1993 x-ray. Director's Exhibits 2, 11, 31. By letter dated November 21, 2007, employer objected to the admission of all of claimant's designated x-ray evidence. Employer asserted that it was prejudiced by claimant's failure to timely designate x-ray evidence in support of her affirmative case, in accordance with the administrative law judge's pre-hearing order. Employer requested that Dr. Bassali's positive reading of the January 15, 1985 x-ray be excluded from the record in the survivor's claim because employer was unable to obtain the x-ray for re-reading. Although the administrative law judge had directed the parties to designate evidence from the existing record, employer proffered as rebuttal evidence, a negative reading by Dr. Scott of the August 9, 1993 x-ray, which had not previously been of record.[5]

In his Decision and Order on Remand, the administrative law judge accepted claimant's designation of evidence, denied employer's request to exclude Dr. Bassali's January 15, 1985 x-ray reading, and did not admit Dr. Scott's reading. The administrative law judge then weighed the evidence and found that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1), (4), and that the miner's death was hastened by clinical pneumoconiosis pursuant to Section 718.205(c). Accordingly, benefits were awarded.

Employer appeals, alleging that the administrative law judge erred in allowing claimant to untimely designate her evidence, erred in refusing to exclude Dr. Bassali's x-ray reading from the record, and erred in failing to admit Dr. Scott's reading. Employer also challenges the administrative law judge's findings at Sections 718.202(a)(1), (4), and 718.205(c). Claimant has not responded to employer's appeal. The Director has declined to file a brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order On Remand must be affirmed if it is rational, supported by

[5] Employer indicated Dr. Scott's negative x-ray reading was in its possession at the time of the hearing but that there was no basis to proffer that reading as rebuttal evidence. Employer's Letter (Nov. 21, 2007) at 2.

substantial evidence, and in accordance with applicable law.[6] 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 asserts that the administrative law judge erred in allowing claimant to "belatedly designate [her] evidence after the record had closed." Employer's Brief at 13. Employer alternatively argues that even if the administrative law judge did not err in allowing claimant to designate her evidence on remand, then it was error for the administrative law judge to not consider employer's rebuttal evidence.[7] *Id.* Contrary to employer's assertion, the Board has indicated that the exclusion of evidence based upon a party's failure to strictly comply with requirements established by the regulations or the administrative law judge is disfavored. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting). Because the administrative law judge has discretion in the conduct of the hearing and procedural matters, we affirm his decision to allow claimant to designate her evidence on remand. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-346 (4th Cir. 2006); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 62-63 (2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Notwithstanding, we agree with employer that the administrative law judge erred by not admitting Dr. Scott's rebuttal reading of the August 1993 x-ray into the record. The administrative law judge rejected employer's assertion that claimant's failure to timely designate her evidence prohibited employer from also timely submitting its rebuttal evidence. The administrative law judge specifically stated:

> Any alleged harm caused by the failure of [c]laimant to designate could have been remedied by the [e]mployer by logically evaluating the evidence

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[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[7] The revised regulation at 20 C.F.R. §725.414 provides that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit one piece of evidence in rebuttal of each piece of evidence submitted in the opposing party's case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit one piece of rehabilitative evidence. *Id.*

> submitted. There were only four positive interpretations of record, [one of] an x-ray taken in 1985 and three interpretations of an x-ray taken in 1993. As the [e]mployer submitted readings of the 1993 x-ray as its affirmative evidence, only readings of the 1993 x-ray could have been submitted as rebuttal by the [c]laimant. Thus, it is only logical that the [c]laimant would submit the 1985 x-ray as affirmative evidence and designate one of the 1993 readings as affirmative, leaving the other two x-rays as rebuttal. Even assuming an alternative designation of evidence[,] the [e]mployer was still entitled to submit an x-ray interpretation in rebuttal to the Department of Labor (DOL) x-ray. As the DOL x-ray was from the 1993 exam, the [e]mployer could have submitted its additional reading by Dr. Scott, which it now seeks to have admitted, at the time of the hearing. In essence, [e]mployer is now seeking to remedy its failure to submit the full [gamut] of evidence available at the hearing . . . [but e]ven without a formal designation of evidence, the [e]mployer knew, or should have known, how the evidence would be designated, and its argument is without merit.

Decision and Order on Remand at 4.

The administrative law judge's rationale for excluding Dr. Scott's rebuttal reading is flawed. Contrary to the administrative law judge's finding, there is no scenario by which employer could have proffered, in accordance with Section 725.414, Dr. Scott's rebuttal x-ray reading at the hearing. Because claimant did not submit affirmative x-ray evidence, there was nothing for employer to rebut. Although the administrative law judge found that employer could have submitted Dr. Scott's reading at the hearing as rebuttal to the 1993 "DOL x-ray" this finding was in error. Decision and Order on Remand at 4. Because the 1993 DOL examination evidence was obtained in conjunction with the miner's claim, and evidence in the miner's prior claim does not automatically become part of the record in the survivor's claim, unless designated by one of the parties, employer was not entitled to a rebuttal reading of the 1993 x-ray until this evidence was admitted as part of the record. *See* 20 C.F.R. §725.309.

In published comments regarding the implementation of the revised regulations, the Department of Labor stated with respect to the good cause exception and a party's submission of rebuttal evidence that:

> The Department does not believe that the regulation or this preamble can explicitly anticipate every conceivable situation that may arise in the adjudication of claims. *Instead, the Department fully expects that administrative law judges will be able to fashion a remedy in all cases that . . . permits the party opposing entitlement to develop such rebuttal evidence as is necessary to ensure a full and fair adjudication of the claim.*

65 Fed. Reg. 79,993 (Dec. 20, 2000) (emphasis added). Based on the facts of this case, we conclude that the administrative law judge's evidentiary rulings have deprived employer of a full and fair adjudication of the claim.[8] *See Souch v. Califano*, 599 F.2d 577 (4th Cir. 1979); *see also North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Coughlan v. Director, OWCP*, 757 F.2d 966, 7 BLR 2-177 (8th Cir. 1985). We therefore vacate the administrative law judge's award of benefits and remand this case with instructions that the administrative law judge admit Dr. Scott's rebuttal reading of the August 9, 1993 x-ray into the record. *See generally* 20 C.F.R. §725.456(b)(2); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 21 (4th Cir. 1991) (Allowing employer the opportunity to submit evidence in response to the evidence developed on remand cures any procedural defects in regard to the presentation of employer's case).

Additionally, we agree with employer that the administrative law judge erred in finding that it had waived the right to object to the admission of Dr. Bassali's positive reading of the January 15, 1985 x-ray, on the ground that the film was not available for re-reading. Contrary to the administrative law judge's finding, because claimant did not designate Dr. Bassali's x-ray reading, there was no reason for employer to raise an objection to that evidence at the hearing. We agree with employer that the administrative law judge erred in penalizing employer for failing to raise an objection to the admission of evidence in the record that had not been designated by claimant pursuant to Section 725.414. Thus, because the administrative law judge erred in finding that employer waived its right to object to the admission of Dr. Bassali's reading, the administrative law judge has failed to give proper consideration to employer's assertion that the January 15, 1985 x-ray was not made available to employer for re-reading. *See* 20 C.F.R. §718.102(d). Employer's objection, therefore, must be addressed by the administrative law judge on remand.

Because the administrative law judge erred in failing to admit Dr. Scott's negative x-ray reading into the record, and did not adequately address whether Dr. Bassali's reading was properly admitted into the record, we vacate the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis based on a preponderance of the positive x-ray evidence pursuant to Section 718.202(a)(1). Additionally, because the administrative law judge gave greater weight to Dr. Forehand's

[8] The elements of a full and fair hearing include the opportunity to present a claim or defense by way of argument, proof and cross-examination of witnesses with knowledge of the evidence to be presented at the hearing, the witnesses to be heard, and the contentions of the opposing party. *See* 5 U.S.C. §556(d); *Laughlin v. Director, OWCP*, 1 BLR 1-488, 1-493 (1978).

diagnosis of clinical pneumoconiosis at Section 718.202(a)(4), because the administrative law judge found that Dr. Forehand's opinion was better supported by the preponderance of the positive x-ray readings than Dr. Fino's contrary opinion, we vacate the administrative law judge's findings regarding the medical opinion evidence at Section 718.202(a)(4). Furthermore, because we vacate the administrative law judge's finding that the miner had clinical pneumoconiosis, we vacate the administrative law judge's finding that the miner's death was hastened by clinical pneumoconiosis pursuant to Section 718.205(c).[9]

Merits of Entitlement in the Survivor's Claim

In the interest of judicial economy, we address employer's arguments that the administrative law judge erred in his consideration of the evidence at Section 718.205(c), as to whether the miner's pneumoconiosis affected his treatment options for lung cancer.[10] A brief review of the medical evidence is required.

Dr. Forehand examined the miner on August 24, 1993 and diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD) based on the miner's coal dust exposure and smoking history. Director's Exhibit 2. He opined that the miner was totally disabled from a respiratory standpoint from returning to his last coal mine job. *Id*. In September 2001, a CT scan of the chest revealed that the miner had widespread cancer of the left lung. Director's Exhibit 10. The miner was treated by Dr. Prill, an oncologist, and subsequently died on January 31, 2002, after it was discovered that the cancer had spread to the brain. Director's Exhibit 12. In a letter dated February 15, 2002, Dr. Prill indicated that she had been asked by the family to prepare a statement addressing whether the miner's cancer was due to his black lung disease. *Id*. Dr. Prill remarked that, "I cannot definitively state this but certainly his smoking history was remote, having quit some thirty-five years prior to the development of his tumor." *Id*. She noted that the miner was initially evaluated for the possibility of a lung resection but

[9] Because this survivor's claim was filed after January 1, 1982, claimant must establish the existence of pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. *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).

[10] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

"due to his history of black lung disease and his overall poor pulmonary status, this was not pursued and instead he underwent radiation therapy." *Id*. Dr. Prill concluded that "[b]ecause of his limited lung capacity, I do believe that he was limited in his ability to tolerate treatments and probably had an earlier demise than what we would normally see in individuals without lung disease in addition to cancer." *Id*.

In a deposition conducted on November 20, 2002, Dr. Prill explained that by the time the miner was referred to her, it was discovered that the cancer had already spread to other vital organs, which meant that treatment by surgery to cure the cancer was no longer an option, and the goal became palliative care. Director's Exhibit 31. When asked whether the miner would have passed away at the same time regardless of whether he had black lung disease, Dr. Prill responded that "[h]ad the miner been in better physical shape, we could have provided additional therapy [such as chemotherapy] that may have prolonged his time, somewhat, but it would not have cured him." *Id*. at 17. Dr. Prill clarified that the miner had provided her with a history of black lung and that this diagnosis had not been provided to her by any other physician. *Id*. On cross-examination, when asked whether she could state with a reasonable amount of medical certainty that chemotherapy would have prolonged the miner's life had he not suffered from pneumoconiosis, Dr. Prill responded, "[a]bsolutely not." *Id*.

The record also includes a letter prepared by Dr. Forehand on March 21, 2002, after the miner's death. Director's Exhibit 14. Dr. Forehand noted that the miner had been diagnosed with lung cancer since the time of his August 24, 1993 examination. *Id*. Dr. Forehand then wrote a two sentence statement regarding the miner's death:

> Because of his underlying respiratory impairment stemming from his coal workers' pneumoconiosis, [the miner] was unable to undergo treatments recommended by his oncologist, which hastened his death. Therefore coal workers' pneumoconiosis contributed to [the miner's] death.

Id.

Dr. Fino prepared a report on January 27, 2003, based on his review of the miner's treatment records, Dr. Forehand's 1993 examination report, Dr. Forehand's March 21, 2002 letter, and the deposition testimony of Dr. Prill. Employer's Exhibit 1. Dr. Fino opined that the miner did not suffer from a coal dust-related respiratory condition during his lifetime. *Id*. However, Dr. Fino stated that even if he assumed that the miner had pneumoconiosis, there was no relationship between the miner's coal dust exposure and his development of lung cancer. *Id*. Dr. Fino also stated:

> Some physicians opined that [the miner's] underlying pulmonary condition prohibited him from receiving the appropriate treatment for his lung cancer. However, I have reviewed the deposition transcript [by] his treating

> oncologist and she clearly states that his treatment was dictated by both the extent of his tumor and his severe malnutrition. Since his tumor had spread outside of his lung by the time he sought medical intervention, he was never a surgical candidate. Chemotherapy was not an option because he was so malnourished as a result of his tumor. Radiation therapy was given for palliation – not to be curative.

Dr. Fino concluded that the miner died due to lung cancer secondary to smoking. He further opined that pneumoconiosis did not hasten the miner's death. *Id.*

The Board directed the administrative law judge on remand to determine the weight to accord Dr. Prill's opinion, taking into consideration that her conclusions were equivocal, and the fact that, while Dr. Prill opined that the miner was unable to receive surgery and chemotherapy due to his poor pulmonary status," Dr. Prill did not directly identify the miner's "pulmonary status" as being attributable to pneumoconiosis. [*G.B.*], BRB No. 04-0907 BLA slip. op. at 12-13. On remand, the administrative law judge found that "Dr. Prill's opinion is not equivocal, but reflects the uncertainty of the medical field in which she practices." Decision and Order on Remand at 9. The administrative law judge specifically relied on Dr. Prill's opinion to find that the miner's death was hastened by pneumoconiosis, noting that the miner was "unable to receive cancer treatments that would have been available to him had he not had pneumoconiosis." *Id.*

Employer asserts that the administrative law judge erred in failing to recognize that Dr. Prill's opinion is equivocal, and that the administrative law judge misconstrued Dr. Prill's statements to be that pneumoconiosis prevented the miner from receiving her recommended oncology treatments. We agree. Although the administrative law judge concedes that Dr. Prill does not state that the miner's lung impairment is caused by pneumoconiosis, the administrative law judge nonetheless found that, because Dr. Prill "does not attribute what she calls 'poor lung function' to any other source," and she does not specifically attribute it to cancer, then it is reasonable to conclude that Dr. Prill is of the opinion that the miner's poor lung function was caused by clinical pneumoconiosis. Decision and Order on Remand at 8. The administrative law judge's inference, however, is neither rational nor supported by substantial evidence. *See generally Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Because Dr. Prill did not attribute the miner's poor lung function to either clinical pneumoconiosis or coal dust exposure, there is no basis for the administrative law judge to conclude that Dr. Prill's opinion is legally sufficient to establish that the miner suffered from a respiratory condition caused by clinical pneumoconiosis, which precluded the miner from receiving proper treatment for his cancer, and thereby hastened his death. *See generally Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Kertesz v. Crescent Hills Coal Co.*, 8 BLR 1-112 (1985).

Furthermore, we agree with employer that the administrative law judge erred in giving little weight to Dr. Fino's opinion at Section 718.205(c) because he found that "beyond summarizing Dr. Prill's testimony as stating that the miner's treatment was dictated by the size of his tumor and by [the miner's] malnutrition . . . [Dr. Fino] fails to render his own opinion on the issue of the miner's limited cancer treatment options." Decision and Order on Remand at 8. Contrary to the administrative law judge's finding, although Dr. Fino summarized Dr. Prill's testimony, Dr. Fino opined that it showed only that the miner's oncology treatment was dictated by the extent of his cancer and not because the miner suffered a disabling respiratory condition. Employer's Exhibit 1. Dr. Fino specifically concluded, based on his review of all of the evidence provided to him, that the miner's death was neither caused, contributed to, nor hastened by pneumoconiosis. As such, Dr. Fino's opinion should be properly weighed by the administrative law judge on remand pursuant to Section 718.205(c).

Additionally, there is merit to employer's assertion that the administrative law judge applied an inconsistent standard when assessing the credibility of the medical opinions. The administrative law judge found that Dr. Fino's opinion was not well reasoned based on his determination that Dr. Fino did not provide an independent opinion as to whether pneumoconiosis limited the miner's cancer treatment options. However, in assessing the weight to accord Dr. Forehand's opinion at Section 718.205(c), the administrative law judge performed no such analysis. We agree with employer that the administrative law judge erred in failing to address the evidentiary basis for Dr. Forehand's statement that the miner's underlying pulmonary impairment prevented oncology treatments.[11] Moreover, the administrative law judge has not addressed whether Dr. Forehand's opinion is less credible than Dr. Fino's opinion, since Dr. Fino had the opportunity to review Dr. Prill's deposition testimony while Dr. Forehand did not. Employer's Brief at 21. Thus, we instruct the administrative law judge on remand to reweigh the opinions of Drs. Forehand and Fino as to whether the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c).

To summarize, we vacate the administrative law judge's award of benefits and remand this case for further consideration. We instruct the administrative law judge to apply the evidentiary limitations to the x-ray evidence pursuant to Section 725.414, admit Dr. Scott's x-ray reading, consider whether Dr. Bassali's reading must be excluded, and

[11] Employer asserts that the sole basis for Dr. Forehand's death causation opinion is his review of Dr. Prill's February 15, 2002 letter, which is not credible in light of Dr. Forehand's deposition testimony. Employer's Brief at 21. Employer further notes that Dr. Forehand has not provided an opinion that the miner's underlying pulmonary impairment is due to clinical pneumoconiosis. *Id*.

then reweigh the x-ray evidence to determine whether claimant has established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[12] If necessary, the administrative law judge must also determine whether claimant has satisfied her burden to establish that the miner's death was hastened by pneumoconiosis pursuant to Section 718.205(c). *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). Because the administrative law judge has specifically determined that the miner did not have legal pneumoconiosis in the form of COPD due to coal dust exposure, the administrative law judge may only award benefits if the reasoned and documented medical evidence establishes that clinical pneumoconiosis hastened the miner's death. In resolving the conflict in the medical opinions of Drs. Forehand and Fino, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions pursuant to Section 718.205(c). *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

[12] In his initial Decision and Order Awarding Survivor's Benefits, the administrative law judge found that the doctrine of collateral estoppel was inapplicable because the issue of whether the existence of pneumoconiosis was established in this survivor's claim was not identical to the one previously litigated in the living miner's claim. Decision and Order at 2 n.2, citing *Collins v. Pond Creek Mining Co.*, 22 BLR 1-229 (2003). However, subsequent to the issuance of the administrative law judge's Decision and Order, the Fourth Circuit issued *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 222, 23 BLR 2-393, 2-406 (4th Cir. 2006), which held that the Board erred in permitting the employer to relitigate, in the survivor's claim for benefits, the issue of whether the miner had suffered from pneumoconiosis. On remand, in light of *Collins*, the administrative law judge should address whether the doctrine of collateral estoppel is applicable to preclude employer from challenging, in the survivor's claim, that the miner suffered from pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge