BRB No. 09-0395 BLA

WANDA STEWART (Widow of HARRY STEWART)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 01/28/2010
PEABODY COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order–Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (04-BLA-5814) of Administrative Law Judge Joseph E. Kane rendered 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).[1] This case is before the Board for the second

[1] Claimant is the surviving spouse of the deceased miner, who died on January 24, 1997. Director's Exhibit 7. Claimant filed her claim for survivor's benefits on December 4, 2002. Director's Exhibit 3. The miner had filed a lifetime claim on June 10, 1982, that was finally denied on April 20, 1988. *Stewart v. Peabody Coal Co.*, BRB No. 85-2137 BLA (Apr. 20, 1988)(unpub.); Director's Exhibit 1.

time. In his initial decision, the administrative law judge credited the miner with thirty-two years of coal mine employment, as stipulated by the parties.[2] The administrative law judge found that claimant established that the miner had simple clinical and legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) and emphysema, due to coal mine dust exposure pursuant to 20 C.F.R. §§718.202(a)(2), (4), and further established that the miner's pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that claimant established that the miner died due to clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a), 718.205(c) because they were based on an evidentiary ruling that the opinions of Drs. Oesterling and Perper could not constitute autopsy reports, because the opinions were based solely on a review of the autopsy slides. *Stewart v. Peabody Coal Co.*, BRB No. 06-0668 BLA (June 29, 2007)(unpub.). The Board held that the administrative law judge's ruling was undermined by the Board's subsequent decision in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-40 (2007)(*en banc*), which allowed the opinions of Drs. Oesterling and Perper, based upon a review of the autopsy slides, to be considered as autopsy reports. *Id.*, slip op. at 3-4. Consequently, the case was remanded to the administrative law judge with instructions to redetermine the admissibility of the medical opinions, and then to reweigh the medical opinion evidence. *Id.*

On remand, the administrative law judge admitted the opinion of Dr. Oesterling as one of employer's medical reports and as its affirmative autopsy report, and admitted Dr.

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[2] The record indicates that the miner's coal mine employment was in Kentucky and Ohio. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Naeye's opinion as employer's autopsy rebuttal report.[4] The administrative law judge found that claimant established that the miner had clinical pneumoconiosis that arose out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), but did not establish that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[5] The administrative law judge further found that claimant did not establish that the miner's clinical pneumoconiosis hastened his death pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's admission of Dr. Naeye's opinion, and the administrative law judge's findings that claimant did not establish that the miner had legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), or that he died due to legal or clinical pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). Employer responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to

[4] The administrative law judge admitted Dr. Rosenberg's opinion as employer's second medical report, and excluded Dr. Renn's opinion as an excess third medical report. The administrative law judge's exclusion of Dr. Renn's opinion is unchallenged on appeal. Thus, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The administrative law judge admitted the opinions of Drs. Haggenjos and Kander, as claimant's affirmative medical reports, Dr. Perper's opinion as claimant's affirmative autopsy report, and Dr. Dolor's opinion as claimant's autopsy rebuttal report, as designated by claimant. *See* Claimant's Response to Employer's Response to November 12, 2008 Order, dated December 19, 2008, at 2; Revised Brief on Behalf of Claimant, dated December 5, 2008, at 10.

[5] The administrative law judge's findings that claimant established that the miner had clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), and that it arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) are unchallenged on appeal. These findings are therefore affirmed. *See Skrack*, 6 BLR at 1-711.

pneumoconiosis. *See* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (3), or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Admission of Dr. Naeye's Opinion

On remand, because Dr. Naeye's opinion constituted a combined medical and autopsy report, and employer had already submitted two medical reports, the administrative law judge advised employer to "[l]imit Dr. Naeye's report to a review and discussion of the pathological evidence, either by submitting a revised report, or allowing the administrative law judge to attempt to consider the report solely based on its pathological findings." November 12, 2008 Order at 5; Decision and Order-Denial of Benefits at 3 n.3. Employer designated Dr. Naeye's opinion as rebuttal to Dr. Perper's opinion, alternatively stating that it would "forego reliance" on Dr. Naeye's opinion, if the administrative law judge found that Dr. Naeye's opinion was inadmissible. Employer's Response to November 12, 2008 Order at 2-4. The administrative law judge admitted Dr. Naeye's opinion as an autopsy rebuttal report, considering only those portions pertaining to the autopsy findings. Decision and Order-Denial of Benefits at 4.

Claimant argues that the administrative law judge erred in admitting Dr. Naeye's opinion, initially contending that employer chose to "forego reliance" on it. Claimant also contends that the administrative law judge improperly designated Dr. Naeye's report as an autopsy rebuttal report, rather than requiring employer to designate its evidence. Finally, claimant asserts that the administrative law judge's actions denied claimant the opportunity to respond to Dr. Naeye's report. We disagree.

The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). As employer clarifies in its response brief, employer properly designated Dr. Naeye's report as "rebuttal" to Dr. Perper's report, and then conditionally chose to "forego reliance" on it, only if it were not found to be admissible. Moreover, claimant's contention that she was denied the opportunity to respond to Dr. Naeye's report is belied by the timing of the evidence submission and the administrative law judge's evidentiary

ruling concerning Dr. Naeye's report.[6] We hold that the administrative law judge committed no abuse of discretion in admitting Dr. Naeye's report as an autopsy rebuttal report. *See Clark*, 12 BLR at 1-153; Decision and Order-Denial of Benefits at 4 n.6.

Legal Pneumoconiosis

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of record, and the physicians' qualifications. Dr. Kander, who is Board-certified in Internal Medicine and Cardiovascular Disease; Dr. Haggenjos, who is Board-certified in Osteopathic Medicine; and Dr. Perper, who is Board-certified in Anatomical and Clinical Pathology, all opined that the miner's emphysema was caused, in part, by his coal dust exposure. Director's Exhibits 24 at 3, 16; 25 at 2, 13, 27. By contrast, Drs. Naeye and Oesterling, who are both Board-certified in Anatomical and Clinical Pathology, attributed the miner's emphysema to his smoking, as did Dr. Rosenberg, who is Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibits 19 at 3-7; 23 at 3; Employer's Exhibits 1 at 9; 9 at 52-53, 59; 10 at 19, 24.

The administrative law judge found that the opinions of Drs. Kander, Haggenjos, and Perper were not sufficient to establish legal pneumoconiosis because they did not adequately explain their opinions that the miner's emphysema was due to his coal dust exposure. Decision and Order-Denial of Benefits at 19-20. The administrative law judge found that the opinions of Drs. Naeye, Oesterling, and Rosenberg were not well-reasoned because they were generalized and based on assumptions inconsistent with the Department of Labor's (DOL's) scientific findings. Decision and Order-Denial of Benefits at 15-19. Consequently, the administrative law judge found that claimant did not establish that the miner had legal pneumoconiosis pursuant to Section 718.202(a).

Claimant argues that the administrative law judge erred in discounting the opinions of Drs. Kander, Haggenjos, and Perper. Employer argues, in its response brief,

[6] Dr. Perper responded to Dr. Naeye's initial report, and subsequently, Dr. Naeye responded to Dr. Perper's report. At the hearing on January 19, 2005, evidentiary concerns were raised about the admissibility of Dr. Naeye's reports. Hearing Transcript at 6, 15-16, 28. Thus, the record reflects that claimant had at least from the date of Dr. Naeye's second report on October 8, 2003, to the date of the hearing in 2005 to have Dr. Perper respond to Dr. Naeye's second report, but never did. Moreover, the record does not reflect that claimant ever requested, before the administrative law judge, an opportunity for Dr. Perper to respond to Dr. Naeye's opinion, if Dr. Naeye's opinion were admitted. *See* Claimant's Response to Employer's Response to November 12, 2008 Order, dated December 19, 2008.

that the administrative law judge erred in discrediting the opinions of Drs. Naeye, Oesterling, and Rosenberg.[7] We first address claimant's arguments. Specifically, claimant asserts that the administrative law judge erred in discounting, on remand, the opinions of Drs. Kander and Haggenjos, as inadequately explained, when the administrative law judge previously found their opinions well-reasoned and documented. Contrary to claimant's argument, in light of the Board's remand instructions to "reassess all relevant evidence and resolve the conflicts," the administrative law judge permissibly reevaluated the medical evidence, and acted within his discretion in finding that the opinions of Drs. Kander and Haggenjos were inadequately explained.[8] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; *Stewart*, slip op. at 4-5; Decision and Order-Denial of Benefits at 19; Director's Exhibits 24 at 2, 16; 25 at 2. Moreover, contrary to claimant's contention, the administrative law judge permissibly declined to accord determinative weight to Dr. Kander's opinion, as that of the treating doctor, because Dr. Kander was not a pulmonologist, and his opinion was not explained. *Williams*, 338 F.3d at 513, 22 BLR at 2-647; 20 C.F.R. §718.104(d)(5); Director's Exhibit 24 at 2, 16. The United States Court of Appeals for the Sixth Circuit has stated that the treating physician's opinion "get[s] the deference [it] deserve[s] based on [its] power to persuade" and the court has instructed

[7] No cross-appeal is required of employer, contrary to claimant's assertion, as its argument, in its response brief, that the administrative law judge erred in discrediting the opinions of its doctors, if valid, would result in a denial of benefits to claimant, and supports the administrative law judge's ultimate conclusion. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-67 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991)(*en banc*); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983); Employer's Brief at 24-27; Claimant's Brief at 11.

[8] In his report dated August 5, 1997, Dr. Kander had "no doubt" that the miner's coal dust exposure caused his emphysema, but the doctor did not explain why. Director's Exhibit 24 at 16. In a subsequent report dated September 22, 2003, Dr. Kander stated that the miner's coal dust exposure contributed to his lung disease, as seen on autopsy, but, as the administrative law judge found, did not explain how the autopsy findings establish that the miner's emphysema was due to coal dust exposure. Decision and Order-Denial of Benefit at 19; Director's Exhibit 24 at 2. Dr. Haggenjos, in a one page report dated September 26, 2003, stated that the miner's severe chronic obstructive pulmonary disease (COPD) was caused by his coal dust exposure, based on examinations, and chest x-rays and autopsy showing emphysema, but did not explain how those findings led him to conclude that the miner's emphysema was due to coal dust exposure. Director's Exhibit 25 at 2.

that "a treating physician without the right pulmonary certifications should have his opinions appropriately discounted." *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

With respect to Dr. Perper's opinion, however, we agree with claimant's argument that the administrative law judge applied too narrow a definition of "autopsy report" in deciding that he could consider only Dr. Perper's pathology findings, and not the social or employment history that Dr. Perper reported. In evaluating Dr. Perper's opinion, the administrative law judge stated:

> As I have done with Dr. Naeye's report, I must limit my consideration of Dr. Perper's report to his pathological findings. This precludes consideration of the Miner's social or employment history and reduces Dr. Perper's legal pneumoconiosis assessment to his observation that centrilobular emphysema was present on autopsy and his citation of scientific literature supporting a link between centrilobular emphysema and silica or coal dust. This is insufficient to meet Claimant[']s burden of proof on this issue.

Decision and Order at 19-20. The administrative law judge's limiting of Dr. Perper's autopsy report to the pathological findings, without the social (smoking) and employment (coal mine employment) histories, is too restrictive a view of what constitutes an autopsy report. Decision and Order-Denial of Benefits at 19-20. In holding that an autopsy report included a physician's review of the autopsy slides, the Board, in *Keener*, did not intend to have the pathologist merely review the body of the miner or the autopsy slides, without accounting for the miner's coal mine employment and smoking histories. *See Keener*, 23 BLR at 1-239-40. In the instant case, the autopsy prosector was supplied with a clinical summary, containing similar factual background information. Thus, while it was appropriate for the administrative law judge to limit Dr. Perper's discussion and analysis of the clinical medical evidence as such, it was not appropriate to restrict Dr. Perper from taking into account basic background information, such as the miner's smoking and coal mine employment histories, to inform his opinion as to the proper interpretation of the autopsy slides.[9]

[9] In response to the question of whether the miner's emphysema arose out of his coal mine employment, Dr. Perper reasoned that the type of emphysema that the miner had, centrilobular emphysema, is a "known complication of smoking," acknowledging that the miner was a "heavy smoker for many years." Director's Exhibit 25 at 27. Dr. Perper also stated, "However, as abundantly substantiated in reliable scientific literature in last decades, centrilobular emphysema is also a direct result of exposure to mixed coalmine [dust] containing silica and coal workers' pneumoconiosis." *Id.* Dr. Perper continued, "while it is legitimate to recognize in general the role of smoking in producing

Consequently, as the administrative law judge improperly failed to consider the full basis of Dr. Perper's diagnosis of legal pneumoconiosis, we vacate the administrative law judge's weighing of Dr. Perper's opinion, and remand this case to the administrative law judge for reconsideration of Dr. Perper's opinion in light of the physician's reporting of the miner's smoking and coal mine employment histories. Thus, with regard to claimant's arguments at legal pneumoconiosis, we affirm the administrative law judge's discounting of the opinions of Drs. Kander and Haggenjos, but vacate the administrative law judge's treatment of Dr. Perper's opinion.

We next address employer's arguments. Employer argues that the administrative law judge erred in discounting the opinions of Drs. Naeye, Rosenberg, and Oesterling, on the ground that their opinions are inconsistent with DOL's findings regarding the prevailing medical literature discussed in the preamble to the revised regulations. We disagree.

Contrary to employer's argument, in addition to discounting Dr. Naeye's opinion as inconsistent with studies credited by DOL, the administrative law judge permissibly found that Dr. Naeye's analysis was little more than a generalization that legal pneumoconiosis would be unlikely in any case, followed by his conclusion that legal pneumoconiosis was not present in this case. *See Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-51 (1985); *see also Fuller v. Gibraltar Corp.*, 6 BLR 1-1292 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Decision and Order-Denial of Benefits at 15; Director's Exhibit 23.

The administrative law judge next considered Dr. Rosenberg's opinion, that coal dust exposure could not be a cause of the miner's emphysema because it was not in the portion of the lung where the coal macule and focal emphysema would develop, and it was not associated with any macules or nodules. Contrary to employer's contention, the administrative law judge reasonably rejected Dr. Rosenberg's opinion because it required the miner's emphysema to occur with clinical pneumoconiosis before it could constitute emphysema due to coal dust exposure, or legal pneumoconiosis. 20 C.F.R.

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centrilobular emphysema, it is equally legitimate to recognize the significant role of exposure to coal mine dust and coal workers' pneumoconiosis, and there is no logical reason to exclude it." *Id.* Dr. Perper further stated that, "In the case of [the miner], his very long occupational period of exposure to mixed coal dust containing silica reinforces the causal relationship between his coal workers' pneumoconiosis and his centriacinar (centrilobular) emphysema." *Id.*

§718.201(a)(1), (2); 65 Fed. Reg. at 79,939; Decision and Order-Denial of Benefits at 17; Employer's Exhibit 10 at 25-26.

As to other statements made by Dr. Rosenberg, the administrative law judge recognized that while Dr. Rosenberg's opinion was not hostile to the Act, it was contrary to studies credited by DOL in the course of DOL's legislative rulemaking. The administrative law judge permissibly gave deference to DOL's crediting of these studies. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O. v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA (June 24, 2009). Specifically, the administrative law judge permissibly discounted Dr. Rosenberg's statement, that the miner's obstruction was due to smoking, and not coal dust exposure, because the severity of the miner's obstruction could be due to coal dust exposure only if the miner had complicated pneumoconiosis, as inconsistent with the medical evidence underlying the revised regulations that "decrements in lung function are severe enough to be disabling in some miners whether or not pneumoconiosis is present."[10] 65 Fed. Reg. at 79,943; Decision and Order-Denial of Benefits at 18-19; Employer's Exhibit 1 at 8-9. Similarly, the administrative law judge reasonably discounted Dr. Rosenberg's opinion, that the miner's centrilobular emphysema is not due to coal dust exposure, because centrilobular emphysema is not associated with coal dust exposure,[11] because studies credited by DOL found to the contrary.[12] 65 Fed. Reg. at 79,941-79,942; Decision and Order-Denial of Benefits at 17-18; Employer's Exhibit 10 at 29-31. The administrative law judge also rationally found that Dr. Rosenberg's above opinion failed to take into account that claimant need prove only that the miner's emphysema was due, at least in part, to his coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-122 (6th Cir. 2000).

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[10] This statement was taken from NIOSH's review of scientific evidence. The Department of Labor (DOL) based its change in the regulatory definition of pneumoconiosis on the NIOSH review.

[11] Dr. Rosenberg stated that centrilobular emphysema does not occur "just from working in the mines." Employer's Exhibit 10 at 29. Dr. Rosenberg also stated that, "toxicologic principles" do not associate coal dust exposure with centrilobular emphysema. *Id.*, at 29-30. Dr. Rosenberg relied on medical articles that advanced emphysema is not caused by coal dust exposure. *Id.*, at 31.

[12] Dr. Rosenberg cited the studies credited by DOL in its rulemaking process, but did not address all of the studies reviewed by NIOSH or explain how his conclusion was scientifically superior to that reached by NIOSH and DOL.

We agree, however, with employer's contention that the administrative law judge erred in finding that Dr. Oesterling's opinion, that the miner's emphysema was not due to coal dust exposure because there were no coal deposits associated with the miner's emphysema on autopsy, conflated the definitions of clinical and legal pneumoconiosis. The administrative law judge reasoned that Dr. Oesterling's above opinion suggested that emphysema due to coal dust exposure occurs only with clinical pneumoconiosis, and ran counter to the DOL finding that emphysema due to coal dust exposure may occur in the absence of clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1), (2); 65 Fed. Reg. at 79,939; Decision and Order-Denial of Benefits at 16-17; Employer's Exhibit 9 at 52. Contrary to the administrative law judge's finding, Dr. Oesterling was not excluding legal pneumoconiosis because the pathologist did not diagnose the presence of the coal macules associated with clinical pneumoconiosis. Rather, Dr. Oesterling did not diagnose legal pneumoconiosis because the pathologist found only emphysema that was not surrounded by coal dust deposits. Employer's Exhibit 9 at 63. Consequently, we vacate the administrative law judge's treatment of the opinion of Dr. Oesterling, but affirm the administrative law judge's determination to discount the opinions of Drs. Naeye and Rosenberg. On remand, the administrative law judge must reweigh the opinions of Drs. Oesterling and Perper to determine if claimant has established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Death Due to Legal Pneumoconiosis

Because we vacate the administrative law judge's finding that claimant established legal pneumoconiosis pursuant to Section 718.202(a)(4), we also vacate his determination that claimant did not establish that the miner's death was due to legal pneumoconiosis pursuant to Section 718.205(c). If reached on remand, the administrative law judge must reconsider this issue in light of the proper legal standard. *Griffith*, 49 F.3d at 186, 19 BLR at 2-116; *Brown*, 996 F.2d at 817, 17 BLR at 2-140. If the administrative law judge, on remand, finds the existence of legal pneumoconiosis established, he has the discretion to accord less weight to the death causation opinions of those physicians who did not diagnose legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989).

Death Due to Clinical Pneumoconiosis

The administrative law judge considered the opinions of Drs. Kander, Haggenjos, Perper, Naeye, Oesterling, and Rosenberg, and found that claimant did not establish that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge rationally discounted the opinions of Drs. Kander and

Haggenjos, that clinical pneumoconiosis was a factor in the miner's death, because they were unexplained.[13] *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-22 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988); Decision and Order-Denial of Benefits at 21-22; Director's Exhibits 7; 24 at 8; 25 at 2. Additionally, the administrative law judge rationally found that Dr. Rosenberg's opinion, that the miner's mild clinical pneumoconiosis did not contribute to his death, was not an "independent" opinion, since it relied on the autopsy findings of Drs. Naeye and Oesterling, that the miner's clinical pneumoconiosis was mild, over the finding of Dr. Perper, that the miner's clinical pneumoconiosis was significant. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order-Denial of Benefits at 22; Director's Exhibits 19 at 6; 23 at 3; 25 at 28-29; Employer's Exhibit 1 at 7-8.

Weighing the remaining opinions of Drs. Naeye and Oesterling, that the miner's clinical pneumoconiosis did not cause his death, against the contrary opinion of Dr. Perper, the administrative law judge found that all three opinions were well-reasoned, and thus entitled to probative weight. The administrative law judge ultimately concluded that claimant failed to establish that the miner's death was due to clinical pneumoconiosis pursuant to Section 718.205(c), because the administrative law judge could not find a reason for crediting Dr. Perper's opinion over those of Drs. Naeye and Oesterling.

It is the administrative law judge's duty to resolve the conflicts in the medical evidence. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988). We, therefore, agree with claimant that the administrative law judge erred in failing to resolve the conflict in the evidence with regard to the opinions of Drs. Naeye, Oesterling, and Perper. Consequently, we vacate the administrative law judge's finding that death due to clinical pneumoconiosis was not established pursuant to 20 C.F.R. §718.205(c), and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must resolve the conflict in the evidence, taking into account the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-35, 2-37 (7th Cir. 2007); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

[13] Dr. Kander's unexplained opinion, that the miner's death was due to clinical pneumoconiosis, is found on the death certificate. *See* Director's Exhibit 7. The death certificate identifies severe chronic obstructive disease as the immediate cause of death, with coal miners' pneumoconiosis as an underlying cause, and as severe coronary artery disease as another significant condition contributing to the cause of death. *Id.*

Accordingly, the administrative law judge's Decision and Order-Denial of 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge