BRB No. 08-0744 BLA

T.M.V. (Widow of R.V.) Claimant-Respondent v. CONSOLIDATION COAL COMPANY/BEATRICE POCAHONTAS COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2009 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-BLA-05638) of Administrative Law Judge William S. Colwell with respect to 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). Claimant filed her application for survivor's benefits on December 4, 2003.[1] Director's Exhibit 2. In a Proposed Decision and Order issued on July 27, 2004, the district director determined that claimant was not entitled to benefits, as the evidence was insufficient to establish that the miner had pneumoconiosis arising out of coal mine employment or that his death was due to pneumoconiosis. Director's Exhibit 18. Claimant filed a second application for survivor's benefits on August 27, 2004, which the district director treated as a request for modification pursuant to 20 C.F.R. §725.310, and denied on November 17, 2004. Director's Exhibits 21, 22. In correspondence dated November 7, 2005, claimant again requested modification. Director's Exhibit 24. The district director granted claimant's request, finding that the evidence established that the miner was suffering from complicated pneumoconiosis at the time of his death. Director's Exhibit 26. Employer requested a hearing, which was conducted by the administrative law judge on February 6, 2007.

In his Decision and Order, the administrative law judge credited the miner with thirty-three years of coal mine employment and determined, based upon employer's concession in its post-hearing brief that the miner had pneumoconiosis, that claimant established a mistake in a determination of fact pursuant to Section 725.310. With respect to the merits of the survivor's claim, the administrative law judge found that the evidence was sufficient to establish that the miner was suffering from complicated pneumoconiosis. The administrative law judge further determined, therefore, that claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304 and awarded benefits accordingly.

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[1] Claimant, T.M.V., is the widow of the miner, who died on October 15, 2003. Director's Exhibit 2. The miner filed a claim on January 30, 1985, which was denied by Administrative Law Judge John H. Bedford in a Decision and Order dated January 14, 1988, on the ground that the miner failed to establish that he was totally disabled. Living Miner's Director Exhibit 35. The miner was subsequently awarded benefits during his lifetime on a claim filed on November 5, 1992. Living Miner's Director's Exhibit 1. In an Order issued on January 5, 1994, Administrative Law Judge Julius A. Johnson acknowledged the withdrawal of controversion filed by Beatrice Garden Pocahontas and remanded the case to the district director for an award of benefits.

Employer argues on appeal that the administrative law judge erred in failing to find, pursuant to 20 C.F.R. §718.205(c)(4), that the miner's death due to a self-inflicted gunshot wound precluded an award of benefits under Part 718. Employer also contends that the administrative law judge should have excluded Dr. Naeye's pathology report from consideration under Section 718.304(b), as claimant did not exchange this evidence with employer. Employer further asserts that the administrative law judge erred in determining that the evidence of record was sufficient to establish that the miner had complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in which he maintains that employer's argument that an award of survivor's benefits is precluded under Section 718.205(c)(4) is without merit.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits 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 pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death is considered to be due to pneumoconiosis if 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 the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last twenty-seven years of coal mine employment were in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

I. The Availability of the Irrebuttable Presumption

Employer first argues that the administrative law judge should have found that an award of survivor's benefits is precluded by Section 718.205(c)(4), which provides, in relevant part, that "survivors are not eligible for benefits where the miner's death was caused by a traumatic injury . . . unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death." 20 C.F.R. §718.205(c)(4). In the present case, Dr. Segen, who completed the death certificate, and Dr. Wanger, who performed a limited autopsy, both identified the cause of the miner's death as a gunshot wound to the chest.[3] Director's Exhibits 7, 8. Dr. Segen classified the miner's death as a suicide and both physicians noted a history of depression. *Id*.

The administrative law judge stated that because the miner's death was caused by a traumatic injury, claimant was required to prove that pneumoconiosis was a substantially contributing cause of the miner's death. Decision and Order at 17. The administrative law judge further determined, however, that the biopsy evidence was sufficient to establish that the miner had complicated pneumoconiosis that arose out of coal mine employment. *Id*. at 20. The administrative law judge therefore found that claimant satisfied her burden of proof by invoking the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304. *Id*. at 17, 20, *citing Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999) (miner's death from self-inflicted gunshot wound would not preclude survivor's benefits if he were found to have suffered from complicated pneumoconiosis).

Employer contends that, pursuant to Section 718.205(c)(4), even if the evidence establishes the existence of complicated pneumoconiosis, the administrative law judge erred in finding that the miner's death was due to pneumoconiosis, as the miner died from a self-inflicted gunshot wound. Employer states that to hold otherwise "is irrational, against public policy, and could not have been intended by Congress." Employer's Brief at 7. In support of its position, employer maintains that the holding of the United States Court of Appeals for the Sixth Circuit in *Gray* was dicta and should not be applied in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Employer also refers to workers' compensation provisions in Virginia, Sixth Circuit case law, and the Board's decisions in *Sumner v. Blue Diamond Coal Co.*, 12

[3] Dr. Wanger conducted only a gross examination of the miner's respiratory system. Director's Exhibit 8.

BLR 1-74 (1988) and *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990) and cases arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*[4]

The Director asserts in response that employer is incorrect in arguing that an award of survivor's benefits in this case is contrary to the Act and the intent of Congress. The Director maintains that the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304 is applicable in any survivor's claim in which the claimant proves that the miner had complicated pneumoconiosis. In support of his position, the Director cites the decision of the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976), in which the Court stated:

> The effect of . . . the presumption of death due to pneumoconiosis is to grant benefits to survivors of any miner who during his lifetime had complicated pneumoconiosis arising out of employment in the mines regardless of whether the miner's death was caused by pneumoconiosis.
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> [T]he benefits authorized by §411(c)(3)'s presumption[, as implemented by 20 C.F.R. §718.304,] of death due to pneumoconiosis were intended not simply as compensation for damages due to the miner's *death*, but as deferred compensation for injury suffered during the miner's lifetime as a result of his illness itself. Thus, the Senate Report accompanying the 1972 amendments makes clear Congress' purpose to award benefits not only to widows whose husbands "(gave) their lives," but also to widows whose husbands "gave their health . . . in the service of the nation's critical needs."

Usery, 48 U.S. at 25, 3 BLR at 2-50, citing S. Rep. No. 743, 92d Cong., 2d Sess., at 8 (1972) (emphasis in original).

The Director also refers to the Fourth Circuit's decision in *U.S.X. v. Director, OWCP* [*Lambert*], 19 F.3d 1431 (Table), No. 93-1134, 18 BLR 2-210 (4th Cir. March 21, 1994) (unpub.), which involved a survivor's claim filed by the widow of a miner who had been killed in a tractor accident. In *Lambert*, the Fourth Circuit deferred to the Director's position that the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304 is available even if the miner's death was caused by a traumatic injury. The Fourth Circuit stated that the Supreme Court's holding in *Usery* established that the irrebuttable presumption of death due to pneumoconiosis reflects the intent of Congress

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[4] The Board's decision in *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990), is not relevant in this case, nor does it conflict with the Board's decision in *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988), as in *Haduck*, the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R. §718.304 was not invoked.

to award compensation to survivors of miners who had complicated pneumoconiosis, regardless of whether the complicated pneumoconiosis actually resulted in death. The Fourth Circuit affirmed, therefore, the Board's Decision and Order, holding that the widow "had only to prove that her husband suffered from complicated pneumoconiosis in order to establish entitlement." *Lambert*, 18 BLR at 2-214. The Fourth Circuit concluded by noting that the construction of Section 718.304 urged by the Director "is also most consistent with the plain language of the regulations," as the effect of adopting the contrary view "would be to create a plethora of possibilities where a presumption the regulations term 'irrebuttable' would become rebuttable." *Id*.

The Director's interpretation of a regulation that he is responsible for administering is entitled to deference unless it is plainly erroneous or at odds with the regulatory scheme. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Shuff*, 967 F.2d at 980, 16 BLR at 2-92; *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). In the present case, we defer to the Director's interpretation of Section 718.304, under which invocation of the irrebuttable presumption of death due to pneumoconiosis is allowed in cases in which the miner's death was caused by a traumatic injury. As indicated by the holdings of the Supreme Court and the Fourth Circuit, the Director's interpretation is reasonable, consistent with the plain language of the regulation and not clearly erroneous. *Usery*, 48 U.S. at 25, 3 BLR at 2-50; *Lambert*, 18 BLR at 2-214; *see also Sumner*, 12 BLR at 1-76 (irrebuttable presumption of death due to pneumoconiosis found in Section 718.304 is controlling despite fact that miner's death was caused by traumatic injury). Accordingly, we affirm the administrative law judge's determination that the irrebuttable presumption of death due to pneumoconiosis is available in the present case if the evidence of record is sufficient to establish the existence of complicated pneumoconiosis. *Chevron*, 467 U.S. at 843, 845; *Shuff*, 967 F.2d at 980, 16 BLR at 2-92; *Cadle*, 19 BLR at 1-62.

II. Exclusion of Dr. Naeye's Biopsy Report

At the hearing, employer objected to the admission of a number of claimant's exhibits, including Claimant's Exhibit 7, which contains the biopsy report in which Dr. Naeye diagnosed progressive massive fibrosis, based upon the presence of an anthracotic lesion that exceeded 2 centimeters in diameter. Hearing Transcript at 13, 17-22. Employer alleged that claimant had not exchanged this evidence with employer. *Id*. The administrative law judge sustained employer's objection with respect to all or parts of several of claimant's exhibits. Hearing Transcript at 17-22; Decision and Order at 2. Regarding Claimant's Exhibits 5-9 and 12, the administrative law judge gave claimant ten days to prove that she had sent this evidence to employer's counsel. Hearing Transcript at 25; Decision and Order at 2. The administrative law judge stated in his Decision and Order:

> I have not received any indication that [Claimant's Exhibits] 5, 6, 8 and 9 and 12 were properly sent to [e]mployer's law firm in a timely fashion. Accordingly, [Claimant's Exhibits] 5, 6, 8 and 9 and [Claimant's Exhibit] 12 are excluded. However, I will admit the pathological report by Dr. Naeye dated May 7, 1993, submitted for admission as [Claimant's Exhibit] 7. After review of the record and [c]laimant's Evidence Summary Form (ESF), mailed to the [e]mployer and this Court, I note that [c]laimant provided notice that this report would be submitted as biopsy evidence, which was [Director's Exhibit] 13 in the [m]iner's claim and identified as [Director's Exhibit] 7 on the ESF. I understand that the Department of Labor provided both parties a copy of the [m]iner's Director's Exhibits, but those are not to be considered with this claim unless a party provides timely notice to have any such exhibits considered by this Court. The ESF was dated January 17, 2007 and received by this office on January 23, 2007. I find that notice of this report was timely sent to the [e]mployer by the ESF and thus, [I] will consider it.

Decision and Order at 3 (internal citations omitted).

Employer argues that the administrative law judge improperly concluded that because employer had constructive notice of claimant's intent to proffer Dr. Naeye's report, this evidence was admissible. Employer maintains that the administrative law judge's finding is in error because claimant misidentified Dr. Naeye's report as Director's Exhibit 7 in the miner's claim, when it was actually Director's Exhibit 13. Employer also asserts that pursuant to 20 C.F.R. §725.456(b)(2)-(4), constructive notice of intent to proffer evidence is not sufficient. Employer further contends that the administrative law judge's decision to admit Dr. Naeye's report was arbitrary and capricious, as the administrative law judge sustained employer's objection to the admission of other exhibits that appear in the record of the miner's claim and were identified by claimant on her ESF. Lastly, employer argues that the administrative law judge failed to adhere to his own Notice of Hearing and Pre-Hearing Order, which required the parties to designate and serve all evidence forty days before the hearing.

In response, claimant states that the failure to use the correct exhibit number was a harmless clerical error in light of the fact that employer already had a copy of Dr. Naeye's report. Claimant also asserts that employer had ample opportunity to respond to Dr. Naeye's report because claimant's ESF was submitted twenty days before the hearing.

The administrative law judge is granted broad discretion in resolving procedural issues, including the admission of evidence into the record. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). A party seeking to overturn an

administrative law judge's resolution of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *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). We hold that in the present case, employer has met this burden, as employer's contention that the administrative law judge's finding was arbitrary, capricious and inconsistent with the requirements of the regulations has merit.

Employer is correct in maintaining that the administrative law judge applied a more lenient standard to Dr. Naeye's report than he applied to the Claimant's Exhibits that he excluded. Like Dr. Naeye's report, these exhibits were identified on claimant's ESF and were contained in the Director's Exhibits from the miner's claim, a copy of which both parties received.[5] The administrative law judge offered no explanation for this disparate treatment and, therefore, did not comply with the Administrative Procedure Act (APA), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In addition, the administrative law judge did not apply Section 725.456(b)(2), which provides, in relevant part, that "documentary material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is *sent* to all other parties at least 20 days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(2) (emphasis supplied); *see Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). There is no record evidence that claimant sent Dr. Naeye's report to employer within 20 days of the hearing and neither party contests this fact. Rather, the record indicates that claimant submitted the ESF on the twentieth day before the hearing and identified Dr. Naeye's report as biopsy evidence. Accordingly, we hold that, under the facts of this case, claimant did not comply with the terms of Section 725.456(b)(2).

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[5] Claimant's Exhibit 5 contained Dr. Dahhan's report of a pulmonary function study obtained on December 19, 1992. Claimant's Exhibit 6 is a blood gas study obtained by Dr. Baxter on March 18, 1985. Claimant's Exhibit 8 contained Dr. Renn's interpretation of an x-ray dated September 9, 1985. Claimant's Exhibit 9 is Dr. Fisher's reading of an x-ray obtained on April 7, 1986. Claimant's Exhibit 12 contains records from the pharmacy where the miner had his prescriptions filled. All of this evidence appears in the record from the miner's claims. Living Miner's Director's Exhibits 18, 35.

Similarly, the administrative law judge did not apply Section 725.456(b)(3), which provides, in relevant part, that "[i]f documentary evidence is not exchanged in accordance with paragraph (b)(2) of this section and the parties do not waive the 20-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence." 20 C.F.R. §725.456(b)(3); *see White v. Douglas Van Dyke Coal Co.*, 6 BLR 1-905 (1984). The administrative law judge did not explicitly consider whether claimant established good cause for failure to comply with the 20-day requirement. Instead, the administrative law judge determined that because claimant's ESF put employer on notice that Dr. Naeye's report would be proffered and employer had a copy, it was admissible. Decision and Order at 3.

Moreover, the administrative law judge did not apply Section 725.456(b)(4), which provides, in relevant part, that "[a] medical report which is not made available to the parties in accordance with paragraph (b)(2) of this section shall not be admitted into evidence in any case unless the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence." 20 C.F.R. §725.456(b)(4); *see Pendleton v. United States Steel Corp.*, 6 BLR 1-815 (1984). In this case, the administrative law judge rendered his finding regarding the admissibility of Dr. Naeye's report in his Decision and Order and, therefore, did not give employer the opportunity to respond to this evidence.

Because the administrative law judge's did not explain his decision to treat Dr. Naeye's report in a manner different from the Claimant's Exhibits that he excluded and did not properly apply Section 725.456(b)(2)-(4), we vacate his admission of Dr. Naeye's report and remand this case to the administrative law judge for reconsideration of this issue.[6] On remand, the administrative law judge must determine whether claimant

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[6] The cases that claimant has cited in support of affirming the administrative law judge's admission of Dr. Naeye's biopsy report are not persuasive. In *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988), the United States Court of Appeals for the Third Circuit held that a party who had actual knowledge of a claim was bound by the thirty-day time limit for filing a controversion, even if the party was not served with notice of the claim. *Pothering* is distinguishable from the present case, as unlike actual knowledge of a claim, having a copy of a medical report does not provide a party with the information necessary to protect its interests, i.e., notice that the opposing party seeks to admit the report in support of its affirmative case. In *Buttermore v. Duquesne Light Co.*, 7 BLR 1-604 (1984) (Ramsey, J., concurring and dissenting), *modified on recon.*, 9 BLR 1-36 (1985) (Smith, J., dissenting), in contrast to the present case, the employer was given the opportunity to respond to the late evidence and on reconsideration, the Board altered its holding that the administrative law judge implicitly

established good cause for her failure to comply with the twenty-day rule pursuant to Section 725.456(b)(3). If the administrative law judge finds that claimant has established good cause and admits Dr. Naeye's report, he must provide employer with an opportunity to respond to this evidence under Section 725.456(b)(4). The administrative law judge must set forth his findings on this issue in detail, including the underlying rationale, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

III. The Administrative Law Judge's Findings Under Section 718.304

Because we have vacated the administrative law judge's finding that Dr. Naeye's biopsy report was admissible, we also vacate his determination that the existence of complicated pneumoconiosis was established under Section 718.304, as the administrative law judge's finding was based, in part, upon Dr. Naeye's report. In order to promote judicial efficiency on remand, however, we will address employer's allegations of error regarding the administrative law judge's weighing of the evidence relevant to Section 718.304.

A. The Relevant Evidence

Pursuant to Section 718.304(a), (b), the administrative law judge initially determined that there was no x-ray evidence of complicated pneumoconiosis and that "[t]he autopsy evidence is of no help in this matter," because it was limited to a gross description of the respiratory system. Decision and Order at 17; Director's Exhibit 7. The administrative law judge then considered the biopsy reports of Drs. Bechtel, Naeye and Hansbarger under Section 718.304(b) and the medical reports of Drs. Forehand, Rosenberg, Spagnolo and Hippensteel under Section 718.304(c). Director's Exhibits 24, 29; Claimant's Exhibit 7.

Dr. Bechtel prepared a pathology report in conjunction with the removal of the upper lobe of the miner's right lung and a nodule from the middle lobe of the same lung

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made an adequate good cause finding under Section 725.456(b)(2). The decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Director, OWCP* [*Durbin*], 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999), is also inapposite. Contrary to claimant's statement, the court did not explicitly hold that the administrative law judge "improperly excluded an autopsy report . . . on grounds that no good cause was established for its late submission." Claimant's Response Brief at 13. The court's statement regarding the untimely report was dicta, as the court's holding, that the evidence that a physician relies upon in his opinion need not be of record, rendered the administrative law judge's finding regarding the admissibility of the autopsy report immaterial.

in April 1992. Dr. Bechtel noted the presence of a nodule measuring 4 centimeters by 3.5 centimeters by 3.5 centimeters in the right upper lobe. Director's Exhibit 24. Dr. Bechtel diagnosed complicated coal workers' pneumoconiosis in the right upper lobe with progressive massive fibrosis and infection of the cystic cavity by a fungal infection. *Id*. Dr. Bechtel stated, "[i]t is common for nodules of progressive massive fibrosis to develop cystic cavitation which may in turn become secondarily infected with fungal organisms." *Id*.

Dr. Naeye reviewed Dr. Bechtel's report, in addition to the tissue slides, and diagnosed coal workers' pneumoconiosis with progressive massive fibrosis, based on the presence of an anthracotic nodule exceeding 2 centimeters in diameter. Claimant's Exhibit 7.

Upon reviewing Dr. Bechtel's report and the tissue slides, Dr. Hansbarger indicated that he disagreed with Dr. Bechtel's diagnosis of complicated pneumoconiosis and believed that Dr. Bechtel had misidentified healing granulomata, related to the miner's fungal infection, as a lesion of complicated pneumoconiosis. Director's Exhibit 29. Dr. Hansbarger also diagnosed mild pulmonary anthracosilicosis of the coal workers' pneumoconiosis type and anthracosilicosis of the right bronchial lymph nodes. *Id*.

Dr. Forehand examined the miner on August 8, 1992 at the request of the Department of Labor (DOL) and treated the miner from 1996 until 2003. Claimant's Exhibits 2, 10. In the report of the DOL examination, Dr. Forehand indicated that the miner had coal workers' pneumoconiosis and was suffering from a totally disabling pulmonary impairment. Claimant's Exhibit 2. In treatment records relating to the miner, Dr. Forehand recorded diagnoses of both simple and complicated coal workers' pneumoconiosis. Claimant's Exhibit 10.

Dr. Rosenberg reviewed the medical evidence, including the biopsy reports of Drs. Bechtel and Hansbarger. Dr. Rosenberg determined that the miner had simple pneumoconiosis and that the results of his pulmonary function studies and blood gas studies did not support a diagnosis of complicated pneumoconiosis. Employer's Exhibits 3, 6. Dr. Rosenberg further indicated that he agreed with Dr. Hansbarger's opinion that Dr. Bechtel confused healing granulomata with the presence of progressive massive fibrosis. Employer's Exhibit 6.

Dr. Spagnolo reviewed the medical evidence, including the biopsy reports of Drs. Bechtel and Hansbarger. Dr. Spagnolo stated that the miner had minimal simple coal workers' pneumoconiosis and suffered from a very mild pulmonary impairment with significant reversibility. Employer's Exhibit 4. Dr. Spagnolo further indicated that the nodule removed from the upper lobe of the miner's right lung was found to be caused by a prior fungal infection. *Id*.

Dr. Hippensteel reviewed the same set of medical evidence as Dr. Spagnolo. He concluded that the miner had simple coal workers' pneumoconiosis and was capable of performing his last coal mine job. Employer's Exhibit 5. Dr. Hippensteel also stated that the fungal infection present in the miner's right lung could not co-exist with an area of complicated pneumoconiosis. *Id*.

B. The Administrative Law Judge's Findings

The administrative law judge considered this evidence and determined, pursuant to Section 718.304(b), that the large nodule described by Dr. Bechtel would measure more than 1 centimeter in diameter, if viewed on an x-ray. Decision and Order at 17-18, *citing Perry v. MYNU Coals, Inc.*, 469 F.3d 360, 23 BLR 2-376 (4th Cir. 2006); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). The administrative law judge reached this conclusion "because Dr. Naeye, using the pathologist's equivalency standard of at least 2 [centimeters] in diameter by autopsy or pathology, described the nodule as complicated pneumoconiosis and Dr. Hansbarger did not dispute the size." Decision and Order at 18; Director's Exhibit 29; Claimant's Exhibit 7.

In resolving the difference of opinion among Drs. Bechtel, Naeye and Hansbarger as to whether the large nodule actually represented complicated pneumoconiosis, the administrative law judge noted that all three physicians were Board-certified in anatomic and clinical pathology. Decision and Order at 18. The administrative law judge then stated:

> Although Dr. Hippensteel offered an explanation why a nodule of complicated pneumoconiosis should not permit the formation of an Aspergillus infection, his statement did not rule out the possibility of that happening, and, as Dr. Hippensteel did not view the biopsy slides, I defer to Dr. Bechtel's opinion on this matter. Furthermore, Dr. Hippensteel did not view the biopsy slides, but like Dr. Spagnolo . . . chose to defer to Dr. Hansbarger's opinion despite the contrary opinions of Drs. Bechtel and Naeye. I further find it unlikely that both Dr. Bechtel and Dr. Naeye, two [B]oard-certified pathologists, would both confuse a macule of complicated pneumoconiosis with a healing pulmonary granuloma. Dr. Hansbarger did not address whether a lesion of complicated pneumoconiosis could lead to a cystic cavitation that would allow for infection by a fungus. Dr. Bechtel, on the other hand, provided a logical explanation as to why the miner's lung tissue demonstrated the existence of both.

Decision and Order at 18-19.

The administrative law judge next weighed the medical opinions of Drs. Forehand, Rosenberg and Spagnolo. The administrative law judge gave "less weight" to Dr. Forehand's diagnosis of complicated pneumoconiosis because it was "based on the biopsy finding and was made in his progress notes only after he was apprised of the biopsy report." Decision and Order at 19. The administrative law judge also noted that Dr. Forehand indicated that the miner had never smoked, while the other physicians recorded an extensive smoking history. *Id*.

The administrative law judge determined that Dr. Rosenberg's opinion, that the miner did not have complicated pneumoconiosis, is well documented, but not well reasoned, because he relied upon normal pulmonary function study results and negative x-ray readings by Drs. Wheeler and Scott. Decision and Order at 19. The administrative law judge stated that "normal pulmonary function study values do not preclude a finding of complicated pneumoconiosis" and "because the portion of the miner's lung that contained the large opacities [was] removed from his body in 1992, Drs. Wheeler and Scott could not have seen them in the 2003 x-ray that they interpreted." *Id*.

Regarding Dr. Spagnolo's opinion, the administrative law judge found that his interpretation of the biopsy evidence was inaccurate because he did not acknowledge Dr. Bechtel's description of the large nodule as representative of complicated pneumoconiosis and a fungal infection. Decision and Order at 19. Thus, the administrative law judge gave Dr. Spagnolo's opinion less weight. *Id*. In light of his consideration of the relevant evidence, the administrative law judge stated:

> I place greatest weight on the opinions of Drs. Bechtel and Naeye and find that the biopsy evidence tends to establish the existence of complicated pneumoconiosis under [Section] 718.304(b) . . . .
>
> In weighing all the evidence under [Section] 718.304(a)-(c), I find the biopsy evidence to be the most probative. Accordingly, I conclude that [c]laimant has established that her husband suffered from complicated pneumoconiosis.

Id. at 20.

C. Employer's Arguments on Appeal

Employer alleges that the administrative law judge's finding must be vacated because when Dr. Naeye's report is excluded from consideration, the biopsy evidence is, at best, in equipoise. In support of this contention, employer states that Dr. Bechtel, "whose credentials are not of record," was the only physician who diagnosed complicated pneumoconiosis. Employer's Brief at 29. Employer further maintains that Dr. Hansbarger, "the better qualified pathologist," provided the more persuasive explanation

of why the changes seen in the miner's right lung were not consistent with complicated pneumoconiosis. Employer also alleges that the administrative law judge erred in failing to consider the lack of x-ray or autopsy evidence of complicated pneumoconiosis and the medical opinions detailing the absence of a pulmonary impairment.

Employer's contentions have merit, in part. Regarding the respective qualifications of Drs. Bechtel and Hansbarger, employer is correct in asserting that Dr. Bechtel's qualifications are not of record. Director's Exhibit 24. The administrative law judge stated that Dr. Bechtel was Board-certified in clinical and anatomic pathology, but did not identify the source of this information. Decision and Order at 11, 18. An administrative law judge may take judicial notice of a fact by reference in the administrative law judge's decision, *see* 29 C.F.R. §18.45, if substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). In the present case, however, because the administrative law judge did not identify where he obtained the information regarding Dr. Bechtel's qualifications, employer was not apprised of the source of the noticed fact. In addition, because employer first became aware of the administrative law judge's use of judicial notice in his Decision and Order, it did not have the opportunity to challenge the administrative law judge's action before the administrative law judge rendered findings based upon his assessment of the physicians' respective qualifications. Decision and Order at 19. On remand, therefore, the administrative law judge must reconsider his determination regarding the physicians' credentials and his determination that the biopsy evidence was sufficient to establish the existence of complicated pneumoconiosis under Section 718.304(b). *See Maddaleni*, 14 BLR at 1-139.

In addition, because the administrative law judge relied upon his finding at Section 718.304(b) to discredit the medical opinions of Drs. Rosenberg, Hippensteel and Spagnolo at Section 718.304(c), we vacate the administrative law judge's findings thereunder. Decision and Order at 18-19. On remand, the administrative law judge must reconsider his weighing of these medical opinions in light of his finding on remand regarding the biopsy evidence. In doing so, the administrative law judge must set forth his findings in detail, including the underlying rationale, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. In addition, as employer has contended, the administrative law judge must reconsider whether evidence of the absence of a pulmonary impairment supports the medical opinions in which the physicians concluded that the miner did not have complicated pneumoconiosis. Although the administrative law judge indicated correctly that such evidence is not dispositive of the existence of complicated pneumoconiosis, Decision and Order at 19, it is relevant to the inquiry under Section 718.304. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

Employer's allegations of error regarding the administrative law judge's consideration of the x-ray and autopsy evidence have no merit, however. With respect to the absence of diagnoses of complicated pneumoconiosis in the x-ray and autopsy evidence, the administrative law judge acted within his discretion in determining that the biopsy evidence which, unlike the autopsy evidence, was based upon a microscopic review of the miner's lung tissue, was the most probative as to whether the miner had complicated pneumoconiosis. *See Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); Decision and Order at 20.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge