U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0253 BLA

THOMAS L. PRUITT, JR., o/b/o the ESTATE OF RUBY I. PRUITT (Widow of THOMAS PRUITT)	)	
Claimant-Respondent	)	
v.	)	
COMMONWEALTH RESOURCES, INCORPORATED	)	DATE ISSUED: 07/09/2018
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

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

Michelle S. Gerdano (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order – Awarding Benefits (2013-BLA-05101) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) rendered on a survivor's claim filed on March 24, 2003, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act or BLBA). The administrative law judge initially determined that employer is the properly named responsible operator. On the merits of entitlement, the administrative law judge found that claimant[1] established that the miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure. He further found

[1] Claimant, Thomas L. Pruitt, Jr., is the son of Thomas Pruitt, the deceased miner, and Ruby I. Pruitt, the miner's deceased surviving spouse. On November 28, 1989, Administrative Law Judge John A. Patton awarded benefits on a claim filed by the miner on August 24, 1984. Director's Exhibit 1. The miner died on November 24, 2002. Director's Exhibit 7. On March 24, 2003, the miner's widow filed a claim for survivor's benefits. Director's Exhibit 3. On February 22, 2012, the miner's widow died and claimant was substituted on behalf of his mother's estate. Director's Exhibit 133.

that claimant established that the miner died due to pneumoconiosis and awarded benefits accordingly.[2]

On appeal, employer challenges the administrative law judge's finding that employer is the properly named responsible operator, and asserts that liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund). Employer further asserts that the administrative law judge erred in finding that claimant established that the miner had legal pneumoconiosis and that the miner's death was due to legal pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to hold that there is no reversible error in the administrative law judge's designation of employer as the responsible operator.

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.[3] 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).

[2] Because this survivor's claim was filed before January 1, 2005, the rebuttable presumption of death due to pneumoconiosis, set forth at 30 U.S.C §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305, and the derivative entitlement provision set forth at 30 U.S.C. §932(*l*) (2012), are not applicable. Pursuant to 30 U.S.C. §932(*l*), in claims filed after January 1, 2005, a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010). If the miner's widow had met the filing date requirement, she would have been awarded survivor's benefits based on the 1989 award of benefits in the miner's claim.

[3] Because the record indicates that the miner's last coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 14-15; Director's Exhibit 1.

I. Procedural History

This case has a protracted history. The miner filed a claim on August 24, 1984. After litigation that lasted for years, Administrative Law Judge John S. Patton dismissed the originally designated responsible operator and subsequently issued a Decision and Order awarding benefits on November 28, 1989, designating the Trust Fund as liable for the payment of benefits. The Director appealed to the Board on December 28, 1989, but subsequently filed a request to dismiss the appeal, which the Board granted on July 17, 1990. *Pruitt v. Royal Machine Works, Inc.*, BRB No. 90-0109 BLA (July 17, 1990) (unpub. Order).

The miner died on November 24, 2002, and his widow filed this survivor's claim on March 24, 2003. Director's Exhibit 3. The district director identified employer as the potentially liable operator and served it with a Notice of Claim.[4] Director's Exhibits 9, 10, 12. The district director subsequently awarded benefits in a Proposed Decision and Order Granting Request for Modification dated November 23, 2005. Director's Exhibit 65. Employer requested a hearing.

On March 10, 2006, the district director referred the case to the Office of Administrative Law Judges (OALJ). Administrative Law Judge Richard T. Stansell-Gamm issued a Notice of Hearing and instructed employer to explain its opposition to its designation as the responsible operator. Director's Exhibit 77. On August 15, 2006, Judge Stansell-Gamm granted employer's motion to remand the case to the district director to provide employer "an opportunity to present evidence at the district director level concerning its potential liability as the named responsible operator," noting that the district

[4] On July 13, 2003, the district director issued a Proposed Decision and Order denying the survivor's claim by reason of abandonment. Director's Exhibit 16. On April 28, 2004, the miner's widow requested modification. Director's Exhibit 28. By Order issued on March 1, 2005, Administrative Law Judge Richard T. Stansell-Gamm granted the miner's widow's request for modification, based on a mistake of fact, and vacated the district director's denial by reason of abandonment. Director's Exhibit 56. Judge Stansell-Gamm also remanded the case to the district director for adjudication of the survivor's claim. *Id.*

On remand, in a Proposed Order dated October 12, 2005, the district director determined that the medical evidence established that the miner's death was due to pneumoconiosis and gave the parties thirty days to show cause why an award of benefits in the widow's claim should not be granted. Director's Exhibit 61. Employer disagreed with the district director's determination, but did not submit any medical evidence. Director's Exhibit 65.

director had not fully considered the issue of employer's designation as the responsible operator. Director's Exhibits 79, 81.

On remand, the district director gave employer an opportunity to develop evidence on the responsible operator issue. Employer filed various motions maintaining that it could not be held liable as the responsible operator in a survivor's claim where the Trust Fund had assumed liability in the miner's claim. The district director denied the motions on April 19, 2007 and, at employer's request, the case was referred to the OALJ.

Administrative Law Judge Edward Terhune Miller held a hearing on February 13, 2008. In an Order dated September 25, 2009, Judge Miller rejected employer's motion to be dismissed as a party, found that employer was the properly designated responsible operator, and remanded the case to the district director.[5] On remand, the district director issued a Schedule for the Submission of Additional Evidence, as directed by Judge Miller, and subsequently issued a Proposed Decision and Order Awarding Benefits on July 26, 2011. Employer requested a hearing and the case was referred to the OALJ.

The case was assigned to Judge Stansell-Gamm, who scheduled a hearing for March 29, 2012. Upon notice of the widow's death on February 22, 2012, Judge Stansell-Gamm continued the hearing and remanded the case to the district director for a determination of whether there was an appropriate party to pursue the claim. At the request of the widow's son, the district director substituted him as the claimant and the case was again referred to the OALJ on October 9, 2012.

Before the administrative law judge, employer argued that it is not the responsible operator because it was never notified of its potential liability during the pendency of the

[5] Administrative Law Judge Edward Terhune Miller noted that the issue sought to be precluded, the naming of the responsible operator, was not identical in the miner's claim and the survivor's claim because the Department of Labor amended the regulations in 2001 to shift the burden of proof with regard to the criteria for determining the responsible operator from the district director to the putative responsible operator. 20 C.F.R. §725.495(b). Judge Miller concluded that "[t]he shift in burdens shows that the responsible operator issue is not identical in the [m]iner's claim and the survivor's claim, which renders collateral estoppel inapplicable." September 25, 2009 Remand Order at 4; Director's Exhibit 117.

miner's original claim, which resulted in an award of benefits in 1989.[6] Employer also contended that the doctrine of collateral estoppel barred relitigation of the responsible operator issue and required the Trust Fund to assume liability for any benefits awarded in the survivor's claim. Upon agreement of the parties that the case be decided on the record, the administrative law judge acknowledged employer's arguments set forth in its brief and, after reviewing Judge Miller's September 25, 2009 Remand Order, agreed with the reasoning, found that employer is the properly named responsible operator, and that claimant established entitlement to survivor's benefits on the merits. Decision and Order at 15-16, 19. This appeal followed.

A. Responsible Operator

1. Res Judicata does not bar relitigation of the responsible operator issue.

Employer does not contest that it meets the responsible operator criteria. *See* 20 C.F.R. §§725.494, 725.495. Instead, it argues that because the Trust Fund was found liable for benefits in the miner's claim, the administrative law judge was bound by that determination in the survivor's claim. But it takes a different route than it did below to get there. Abandoning its position that the miner's and survivor's claims are separate, and that collateral estoppel bars relitigation of the responsible operator issue in the survivor's claim, employer now argues that the claims are the same for the purposes of identifying a responsible operator and that res judicata bars the relitigation of the issue. *See* Employer's Brief at 7-10.

There are material differences, however, in the two doctrines. Under res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties based on the same cause of action. Under collateral estoppel, the second claim is upon a different cause of action; the doctrine precludes relitigation of issues in the second suit that were actually litigated and necessary to the outcome of the first suit. *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 327 (1979). Both are affirmative defenses that can be waived or abandoned – even where they are mentioned in initial proceedings – if not developed and pressed below. *See Arizona v. California*, 530 U.S. 392, 410 (2000); *Southern Pac.*

[6] In his Decision and Order at dated November 28, 1989, Judge Patton determined that the miner established the existence of both clinical and legal pneumoconiosis arising out of coal mine employment, and that he was totally disabled by legal pneumoconiosis. Judge Patton gave greatest weight to the opinion of Dr. Sutherland, who diagnosed totally disabling chronic obstructive pulmonary disease (COPD) due to the coal dust exposure, as supported by the opinions of Drs. Baxter, Cardona and Qazi. 1989 Decision and Order at 9-10.

Communications Co. v. Am. Tel. & Tel. Co., 740 F.2d 1011, 1018 (D.C. Cir. 1984); *see generally* Wright, Miller & Cooper, Federal Practice and Procedure (2d ed. 2010) § 4405.

Employer does not mention the doctrine of collateral estoppel anywhere in its argument before us. Employer's Brief at 6-10. And while it made a single passing reference to res judicata in its brief below, it substantively argued only that the claims were distinct and the elements of collateral estoppel were met. Employer's Post Hearing Brief at 7, 7-13. Employer thus has asserted diametrically opposed positions in two successive forums. The Board, however, generally will not consider arguments raised for the first time on appeal. *See McKinney v. Benjamin Coal Co.*, 6 BLR 1-529, 1-531 (1983). Employer's argument that res judicata bars consideration of the responsible operator issue thus has been waived. *Id.*

But even if it were not waived, employer's argument is without merit. The claims are plainly separate. The Act provides independent claims for miners and wholly distinct claims for their survivors, with different elements of entitlement and different remedies for each. *See, e.g.*, 30 U.S.C. §901(a) (the purpose of the Act is to provide benefits "to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to the disease"); 20 C.F.R. §718.204 (providing criteria to establish disability in a miner's claim); 20 C.F.R. §718.205 (providing criteria to establish that a miner's death was due to pneumoconiosis in a survivor's claim); 20 C.F.R. §725.520 (providing the computation of benefits for living miner's and survivor's claims).[7]

Indeed, claimant was not – and could not be – a party to her husband's claim, as, unlike widows, "spouses *of living miners* . . . are not entitled to seek benefits under the

[7] Employer has provided no pertinent authority for its contention that a survivor's claim is derivative of a miner's claim for the purposes of identifying a responsible operator. The only case it cites, *Boyd and Stevenson Coal Co. v. Director, OWCP* [*Slone*], 407 F.3d 663, 23 BLR 2-288 (4th Cir. 2005), is inapposite. *Slone* does not broadly hold that all survivor's claims are derivative of miner's claims for all purposes. Instead, the court narrowly held that language contained in a notice sent by the Virginia Property and Casualty Insurance Guaranty Association ("VPCIGA") should be interpreted to mean that *VPCIGA considered* survivor's claims to be derivative of miner's claims for purposes of determining whether they are time barred under the Virginia Guaranty Act. *See RB & F Coal Inc. v. Mullins,* 842 F.3d 279, 284 (4th Cir. 2016). *Slone* thus has no relevance here: the survivor's claim is governed solely by the Act and its implementing regulations, under which a miner's claim and a survivor's claim are separate claims with distinct procedural histories. *See generally Earl Patton Coal Co. v. Patton,* 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988). The remainder of employer's argument, dealing solely with finality and modification procedures in the same claim, thus is irrelevant.

[BLBA]." *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 221, 23 BLR 2-393, 2-401 (4th Cir. 2006)(emphasis added). She thus properly asserted her survivor's claim independent of her husband's claim after his death. And as a distinct party asserting a distinct claim, res judicata does not bar the relitigation of the responsible operator issue in her claim.[8] *See, e.g., Sartin v. Macik*, 535 F.3d 284, 287 (4th Cir. 2008) (res judicata "bars the relitigation of any claims that were or could have been raised in a prior proceeding between the same parties.") (citation omitted).

2. Employer was not deprived of due process in the relitigation of the responsible operator issue.

Employer's argument that it was deprived of its right to due process to defend the survivor's claim due to the lengthy procedural history of this case is similarly unavailing. Due process requires that an employer be afforded notice of the claim and the opportunity to mount a meaningful defense. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807, 21 BLR 2-302, 2-319 (4th Cir. 1998). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has emphasized that, in making this inquiry, "it is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184, 21 BLR 2-545, 2-560-61 (4th 1999).

Although this claim has been subject to protracted litigation for various reasons, employer has suffered no prejudice in defending it. The district director provided timely notification to employer of its potential liability in the survivor's claim and of the initial finding of entitlement under the applicable regulations. Moreover, unlike in *Lockhart*,

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[8] To the extent that factual findings in the miner's claim could be binding in the survivor's claim, it would depend on the proper application of collateral estoppel, as employer recognized below. But two elements of that doctrine, which require that the issue sought to be precluded is identical and has been actually decided, are not met in this case. It is indisputable that the issue of whether employer bore responsibility for benefits was not addressed in the miner's claim; the issue was whether *another company* was liable. Thus, as a matter of law, collateral estoppel also does not bar relitigation of the responsible operator issue here. *See, e.g., Collins v. Pond Creek Mining Co*., 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006) (among other things, collateral estoppel requires: (1) the issue sought to be precluded is identical to the one previously litigated; and (2) the issue was actually determined in the prior proceeding). Any error by the administrative law judge in concluding that collateral estoppel does not apply because of the change in burdens of proof regarding operator liability under the 2000 regulatory revisions thus is harmless. *Id.*

employer had the opportunity to have the miner's medical records reviewed by its physicians, attend hearings, and participate in all of the proceedings related to the adjudication of the claim.[9] *See* Director's Letter Brief at 3; Decision and Order at 6 n.13, 7-8.

We further reject employer's argument that it was not given enough time to obtain the widow's authorization for release of the miner's medical records. Employer's Brief at 11; *see* Decision and Order at 6 n.13; Director's Exhibit 105. The widow filed her claim almost nine years before her death. Although employer indicates that it did not obtain a medical records release authorization, claimant's counsel, in a letter dated January 11, 2008, advised Judge Miller that a medical release authorization was sent to employer's counsel on December 31, 2007, and that its receipt was confirmed. Director's Exhibit 106.

Consequently, employer had the opportunity to mount a meaningful defense and was not deprived of due process. As the Director correctly notes, the amount of time this case has taken to litigate thus does not independently justify a finding that due process has been violated. *See Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009) (Due Process Clause's "interest is only in whether an adjudicative procedure as a whole is sufficiently fair and reliable that the law should enforce its result"); Director's Letter Brief at 5 n.4.

Because employer raises no additional allegations of error, we affirm the administrative law judge's determination that it is the properly designated responsible operator in this case. *See RB & F Coal, Inc. v. Mullins*, 842 F.3d 279, 282, 25 BLR 2-841, 2-848 (4th Cir. 2016).

II. Merits of Entitlement

To establish entitlement to survivor's benefits, claimant must demonstrate 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, 718.203, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

[9] In *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), the Fourth Circuit held that the Department of Labor's seventeen year delay in *notifying* the employer of its potential liability in the processing of a claim deprived it of the opportunity to mount a meaningful defense. *Lockhart*, 137 F.3d at 806-08, 21 BLR at 2-318-22. There was no such delay in notifying employer of its potential liability here.

A. The Decision Below

In considering whether pneumoconiosis caused the miner's death, the administrative law judge reviewed the November 24, 2002 death certificate prepared by Dr. Patel, numerous treatment records and medical reports dated from October 15, 1984 to March 30, 1989, and Dr. Perper's December 22, 2003 medical report, based on the physician's review of those records. Decision and Order at 9-14; Director's Exhibit 53 at 1-2. Notably, as the administrative law judge recognized, these exhibits were the only relevant medical evidence submitted in this case. Decision and Order at 7-8. As such, they are uncontroverted.[10]

With regard to the existence of legal pneumoconiosis, Dr. Perper reviewed the notes of Dr. Sutherland, among other medical evidence. Those records state that the miner was hospitalized in 1986 for "severe shortness of breath, wheezing and productive cough." Decision and Order at 12; *see* Director's Exhibit 1. Dr. Sutherland noted at that time that the miner had a "harsh productive cough of thick yellowish whitish sputum [of] tenacious inconsistency with increasing dyspnea on even mild exertion." Director's Exhibit 1. Dr. Sutherland further noted that the miner "had been tried on an outpatient basis with various bronchodilators without success" and that he was in "severe respiratory distress with audible wheeze and upper airway congestion." *Id.* Among Dr. Sutherland's initial impressions were acute bronchitis, COPD/pneumoconiosis, and bronchiectasis; he admitted the miner for inpatient treatment for his respiratory problems. *Id.*

The miner's test results from his subsequent hospitalization indicated "moderate to severe emphysema with extensive chronic interstitial changes . . . bilaterally consistent with COPD . . . with history of exposure to coal dust." Decision and Order at 12; *see* Director's Exhibit 1. Dr. Sutherland ultimately diagnosed acute bronchitis and "severe hypoxia [and] polycythemia" – secondary to COPD, pneumoconiosis, hypertensive vascular disease, and bronchiectasis. Director's Exhibit 1. Similar respiratory symptoms and diagnoses were reported in treatment records from various periods in 1988 and 1989, as referenced in Dr. Perper's report. Director's Exhibit 53 at 8-12.

As the administrative law judge identified, after summarizing in detail the medical information he reviewed, Dr. Perper opined that the miner "had significant coal worker's pneumoconiosis during his life." Decision and Order at 10; *see* Director's Exhibit 53. Citing several medical studies, Dr. Perper reported that the miner's thirty to thirty-four year history of coal mine employment was a "much more than sufficient period of exposure to

[10] Although employer's evidence summary form listed medical reports from Drs. Rosenberg and Jarboe, employer failed to submit the reports to the district director or to the Office of Administrative Law Judges. Decision and Order at 8.

mixed coal dust to account for the development of coal worker's pneumoconiosis." *Id.* In addition to the long history of occupational exposure, Dr. Perper stated that he based his diagnosis on "the worsening clinical symptomatology even after the cessation of smoking,[11] the positive radiological readings by most readers, and the combined restrictive/obstructive respiratory defect with associated hypoxemia and abnormal diffusion of respiratory gases." Director's Exhibit 53 at 13. Based on his review, Dr. Perper concluded that legal pneumoconiosis "rendered the miner totally and permanently disabled during his lifetime." Decision and Order at 10; Director's Exhibit 53 at 13.

The administrative law judge found Dr. Perper's conclusions to be well-reasoned and well-documented.[12] Decision and Order at 18. He noted that Dr. Perper based his diagnosis on the miner's symptoms "reported in his treatment records," the miner's objective tests, the fact that the [m]iner's condition worsened in the years since he stopped smoking, and "a detailed analysis of medical literature and studies," which included medical literature "relied on by the Department of Labor in promulgating its regulations." *Id.* The administrative law judge thus reasoned:

> Because Dr. Perper's [conclusions are] based on medical evidence that is properly part of the record, and on a scientific understanding and detailed analysis of legal pneumoconiosis that is consistent with the medical science underlying the amended regulations, this presiding Judge finds Dr. Perper's medical opinion on the issue of the [m]iner suffering from legal pneumoconiosis to be well-documented, well-reasoned, and entitled to significant probative weight. *In the absence of contrary probative evidence*, Dr. Perper's medical opinion establishes that the miner had legal pneumoconiosis prior to his death.

Id. at 18 (emphasis added). The administrative law judge gave similar weight to Dr. Perper's report in considering whether claimant established that legal pneumoconiosis contributed to the miner's death. *Id*. at 18-19; *see* Director's Exhibit 53 at 19-20.

The death certificate identified the immediate cause of death as "cardiopulmonary arrest," with "acute hypoxic respiratory failure," with COPD, coal workers'

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[11] Dr. Perper stated that, although there is no medical documentation of the miner during the last years of his life, "the certification of death indicating that he died of acute hypoxic respiratory failure to COPD, coal worker's pneumoconiosis and complicating pneumonia" attest to a worsening of these conditions. Director's Exhibit 53 at 15.

[12] They are also consistent with the findings in the living miner's claim. 1989 Decision and Order.

pneumoconiosis, pneumonia, and renal failure as underlying causes. Director's Exhibit 7. Other than the death certificate, there are no medical records contemporaneous with the miner's death in the record.

After reviewing the death certificate, however, Dr. Perper concluded that the miner's totally disabling legal pneumoconiosis identified contributed to his death. Citing medical literature for support, Dr. Perper explained that the miner's coal dust related COPD/centrilobular emphysema "were effective causes of death" because they contributed to "pulmonary damage and impairment and terminal acute bronchopneumonia." Director's Exhibit 53 at 25. Based on these studies and his review of the record, Dr. Perper concluded that "severe simple coal workers' pneumoconiosis and the causally associated centrilobular emphysema resulted in progressive pulmonary insufficiency and hypoxemia that ultimately [both] was an effective cause of death and [a] hastening factor in [the miner's death]." *Id.*

Reviewing this evidence, the administrative law judge accorded the death certificate itself "no weight" on the cause of the miner's death because it "constitutes a statement of the medical opinion of Dr. Patel without supporting rationale."[13] Decision and Order at 18. But he credited Dr. Perper's uncontroverted opinion to fill the necessary gaps left by Dr. Patel: "Dr. Perper's opinion on the mechanism by which the [m]iner's legal pneumoconiosis contributed to his death is based on the same information and medical reasoning underlying his opinion that the [m]iner had that condition. Accordingly, it is similarly well-documented and well-reasoned." *Id*. at 19. In the absence of any contrary evidence, the administrative law judge thus concluded that claimant "established by a preponderance of the evidence the [m]iner's death was hastened by pneumoconiosis," and he awarded survivor's benefits accordingly. *Id*.

1. Substantial evidence supports the administrative law judge's decision that the miner suffered from legal pneumoconiosis.

To establish legal pneumoconiosis, claimant must demonstrate that the miner suffered from a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b). Employer argues that, in determining that coal dust significantly contributed to the miner's COPD/emphysema, the administrative law judge failed to account for the gap in medical evidence between the miner's last treatment and his death

[13] The administrative law judge used the terminology "little weight" in one portion of his opinion, and "no weight" in another. Decision and Order at 9, 18.

and failed to consider whether the miner's symptoms persisted after he ceased smoking in 1988. Employer's Brief at 12-13. We reject both arguments.

As a threshold matter, employer's basic premise is incorrect: Dr. Perper's opinion, based on the records and studies he reviewed, is itself medical evidence of the existence of legal pneumoconiosis at the time of the miner's death. 20 C.F.R. §718.202(a)(4) ("[a] determination of the existence of pneumoconiosis may also be made if a physician . . . finds that the miner suffers or suffered from pneumoconiosis . . . based on objective medical evidence[.]"). That opinion is uncontroverted.

Moreover, there is no evidence in the record that claimant ceased to suffer from the disease at any point prior to his death. On the contrary, the death certificate lists the COPD that the administrative law judge determined was legal pneumoconiosis as an underlying cause of death. Director's Exhibit 7. Employer similarly has not identified any evidence in support of its assertion that the miner stopped smoking in 1988. Nor has it submitted any physician opinion evidence demonstrating why, even if that was the case, it would undermine Dr. Perper's diagnosis that the miner was permanently disabled by the disease by 1989, based on his review of the treatment records and work history prior to that date.

The administrative law judge permissibly concluded that Dr. Perper's opinion on the existence of legal pneumoconiosis is well-reasoned and well-documented. Employer has not demonstrated, nor can we see, any error in that finding. No more is required for our review. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000) (substantial evidence "is such relevant evidence as a reasonable mind might accept to support a conclusion"); *Trumbo*, 17 BLR at 1-85 (before finding medical reports sufficient to establish the existence of pneumoconiosis, the administrative law judge must determine if the reports are reasoned and documented and resolve any inconsistencies in relevant evidence). We therefore affirm the administrative law judge's finding that claimant satisfied his burden of establishing the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a).

2. Substantial evidence supports the administrative law judge's decision that legal pneumoconiosis hastened the miner's death.

Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000), *citing Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-93 (4th Cir. 1992). Employer and our dissenting colleague argue that the administrative law judge's decision not to credit either the death certificate, or Dr. Perper's diagnosis of clinical pneumoconiosis, makes his report, which referenced both, too speculative. We disagree.

In determining whether a physician's opinion on death causation is documented and reasoned, we must defer to the administrative law judge's evaluation of the proper weight to accord the medical opinion. *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 342, 20 BLR 2-246, 2-259 (4th Cir. 1996). "As in all agency cases, we must be careful not to substitute our judgment for that of the [administrative law judge], as long as substantial evidence supports an [administrative law judge's] findings, 'we must sustain the [administrative law judge's] decision, even if we disagree with it.'" *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310, 25 BLR 2-115, 2-122 (4th Cir. 2012), *quoting Smith v. Chater*, 99 F.3d 635, 637-38 (4th Cir. 1996).

The United States Court of Appeals for the Seventh Circuit has emphasized that administrative law judges "have the skill needed to handle evidence" and "a corresponding obligation to *use* that skill when evaluating technical evidence." *Peabody Coal Co. V. McCandless*, 255 F.3d 465, 469, 22 BLR 2-311, 2-317 (7th Cir. 2001). Similarly, the Fourth Circuit has held that "the administrative law judge is charged with making factual findings, including evaluating the credibility of witnesses and weighing contradicting evidence." *See Doss v. Itmann Coal Co.*, 53 F.3d 654, 658, 19 BLR 2-181, 2-183 (4th Cir. 1995). Thus, administrative law judges have the discretion to "consider the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudices." *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997).

That is precisely what the administrative law judge did here. He permissibly exercised his discretion and evaluated the only medical opinion on the cause of death in the case, based on all relevant evidence. He concluded – in light of the published and accepted science, clinical findings, work history, and Dr. Perper's own reasoned medical judgment – that Dr. Perper explained why legal pneumoconiosis rendered the miner totally and permanently disabled during his lifetime. Decision and Order at 10-11, 18. He similarly found that legal pneumoconiosis contributed to the miner's death based on additional studies cited by Dr. Perper in coming to his unequivocal conclusion that pneumoconiosis "resulted in progressive pulmonary insufficiency and hypoxemia that ultimately was an effective cause of death and a hastening factor in [death.]" *Id.* at 18-19; Director's Exhibit 53 at 17. In the absence of any contrary evidence, we cannot say the administrative law judge's conclusions were unreasonable. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Nor does the administrative law judge's treatment of the death certificate make it so. The administrative law judge did not credit the death certificate as independently establishing the cause of the miner's death because it did not sufficiently contain the signing physician's rationale for his conclusions. But employer and our dissenting

colleague attempt to make too much of this fact. Failing to credit the certificate *on its face* as independently establishing a cause of death does not negate the administrative law judge's decision to credit Dr. Perper in explaining how the record demonstrates the death certificate's accuracy. *See, e.g., Richardson v. Director, OWCP*, 94 F.3d 164, 165, 21 BLR 2-373, 2-380-81 (4th Cir. 1996) (death certificate must be evaluated with the evidence of record to determine its weight).

In this respect, this case is materially distinguishable from *Sparks*, 213 F.3d at 192, 22 BLR at 2-263, relied on by both employer and the dissent. In that case, the court determined that an unexplained death certificate cannot independently establish a cause of death. But it only came to the conclusion that the death certificate was not credible after finding that an autopsy report failed to cure its deficiency because it similarly shed no light on whether pneumoconiosis contributed to death. *Id*. The court concluded that "the death certificate and the autopsy report in this case, without additional support or explanation, fail to provide a basis upon which to sustain a finding that [the miner's] pneumoconiosis hastened his death." *Id.* That is not the case here. Dr. Perper's reasoned and documented medical opinion that the pneumoconiosis that totally disabled the miner during his life also hastened his death is uncontroverted, and the administrative law judge acted within his discretion in crediting it. *Underwood,* 105 F.3d at 951, 21 BLR at 2-31-32. The uncontroverted record in this case thus provides the support and explanation missing in *Sparks*.

Similarly, employer has not demonstrated how the administrative law judge's alleged failure to reconcile his finding that the miner did not suffer from clinical pneumoconiosis with his crediting of Dr. Perper's report amounts to reversible error. It is claimant's burden to establish that *either* legal or clinical pneumoconiosis was a "substantially contributing cause" of the miner's death. 20 C.F.R. §718.205(b)(6). There is no statutory or regulatory requirement that either form be the only, or even primary, cause of death. *Id.* Nor is there any requirement that claimant disprove other possible causes of death if his affirmative burden is met. *Id.* Employer has failed to show with any credible medical evidence how Dr. Perper relied on clinical pneumoconiosis in determining that the miner's totally disabling legal pneumoconiosis attributed to his death. Contrary to the employer's assertion, the only evidence in the case is that the miner had totally disabling legal pneumoconiosis in the form of emphysema/COPD at the time of his death, and that he died from cardiopulmonary arrest with acute hypoxic respiratory failure. Director's Exhibits 7, 53. Dr. Perper credibly explained why the former contributed to the latter. An administrative law judge is not required to address exhaustively all potential flaws in the evidence; rather, the administrative law judge must simply "adequately explain why he credited certain evidence and discredited other evidence." *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253, 25 BLR 2-779, 2-788 (4th Cir. 2016). We believe the administrative law judge did so here. Employer has thus failed to demonstrate why claimant failed to

meet his burden in this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference.").[14]

We therefore affirm the administrative law judge's Decision and Order – Awarding Benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[14] In our view, our dissenting colleague overstates the significance of the administrative law judge's reliance on evidence not in the record and an alleged inconsistency between his findings on clinical pneumoconiosis and death causation. "[B]ecause the amended regulations do not contain a provision regarding the appropriate treatment of admissible evidence which contains references to evidence excluded because it exceeds the limitations," the issue is "committed to the [administrative law judge's] discretion." *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring & dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring & dissenting). The administrative law judge rationally explained which portions of Dr. Perper's report he relied upon in deciding that the legal pneumoconiosis that totally disabled the miner at least thirteen years prior to his death also contributed to his death. No more is required. *Id.* Moreover, in our view, the unsupported notion that Dr. Perper could not offer an opinion on the cause of death in this case given the gap between the miner's last treatment record and his death is "tantamount" to substituting our "untrained opinion for that of qualified experts, which is not allowed." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998).

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. I agree with employer that Dr. Perper's medical opinion is not sufficiently reasoned and documented to satisfy claimant's burden to establish that the miner's legal pneumoconiosis hastened the miner's death. In reaching his opinion, Dr. Perper relied on the death certificate, which the administrative law judge found is not credible. The other medical information on which Dr. Perper based his medical opinion addresses the miner's medical condition more than thirteen years before his death.[15] That information is too remote in time to establish death causation. Dr. Perper's opinion thus is reduced to speculation. Consequently, I would reverse.

In the preamble explaining the revisions to 20 C.F.R. §718.205, the Department of Labor emphasized that to establish that pneumoconiosis hastened a miner's death, it is the survivor's burden to establish that pneumoconiosis had a "tangible impact" on the miner's death. 65 Fed. Reg. 79,920, 79,951 (Dec. 20, 2000). In addition, the United States Court of Appeals for the Fourth Circuit has held that, for an administrative law judge to credit a physician's opinion that pneumoconiosis hastened a miner's death, the physician must sufficiently explain the causal connection between the disease and the resulting death, and must identify the basis for his or her opinion. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-263 (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); *see also Eastover Mining*

[15] Further, as noted *infra*, most of the medical information on which Dr. Perper based his opinion was specifically excluded from the record by the administrative law judge.

Company v. Williams, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003) (the legal standard for death due to pneumoconiosis requires proof that pneumoconiosis hastened death through a specifically defined process that reduces the miner's life by an estimable time).

The administrative law judge found that there are only two items of evidence relevant to the issue of death causation – the miner's 2002 death certificate, authored by Dr. Patel, and Dr. Perper's opinion. Decision and Order at 18; Director's Exhibits 7, 53. The administrative law judge gave "no weight" to the death certificate authored by Dr. Patel.[16] Decision and Order at 18; Director's Exhibit 7.

In his December 3, 2002 report, Dr. Perper reviewed the death certificate and various medical records (including x-rays, treatment notes, pulmonary function and blood gas reports) dating from 1984-1989,[17] thirteen or more years before the miner's death. Director's Exhibit 53. Dr. Perper opined that the miner had "significant coal worker's pneumoconiosis during his life" and COPD/emphysema. Under the portion of his report that asked whether "the miner's coal workers' pneumoconiosis [was] a substantial

[16] The administrative law judge used the terminology "little weight" in one portion of his opinion, and "no weight" in another. Decision and Order at 9, 18. However, in any event he did not find it reliable. He explained that he did not credit the death certificate because there are "[n]o medical treatment records submitted which indicate that Dr. Patel was an attending physician with personal knowledge of the [m]iner's medical condition leading up to the time of death or that Dr. Patel reviewed the [m]iner's medical records prior to signing the death certificate." Decision and Order at 9.

[17] Dr. Perper reviewed the following evidence that was admitted by the administrative law judge into the record: the miner's death certificate; a pulmonary function study and a blood gas study dated October 15, 1984; a pulmonary function study dated July 12, 1988 and a blood gas study dated August 4, 1988; records from a hospital admission on September 23, 1986; and Dr. Sutherland's treatment notes from examinations on July 7, July 28, and October 20 of 1988. Decision and Order at 11; Director's Exhibits 1, 7, 53.

Dr. Perper's opinion is also based on evidence that was not included in the record in this case. The administrative law judge specifically excluded from the record the following evidence considered and cited by Dr. Perper: Dr. Baxter's medical report; Dr. Qazi's medical report; Dr. Cardona's medical report; Dr. Endres-Bercher's medical report; medical records from Midway Medical Group; and ten x-ray "reports." Decision and Order at 13; Administrative Law Judge's Exhibit 5 at 7-8.

contributory cause of death either directly and/or by related complications of pneumoconiosis," Dr. Perper stated:

> a. [The miner's] coal workers[']s pneumoconiosis and *the causally related centrilobular emphysema/COPD* were effective causes of death which resulted in pulmonary damage and impairment and terminal acute bronchopneumonia.
>
> b. Coal workers' pneumoconiosis is [] well recognized on its own as a cause of significant mortality through a number of mechanisms including:
>
> i. Pulmonary insufficiency by direct and replacement of normal lung tissue by non-breathing pneumoconiotic lesions and associated centrilobular chronic emphysema, cor pulmonale and resulting hypoxemia, which was also demonstrated clinically. [The miner] had clear clinical evidence of hypoxia and abnormal diffusion of pulmonary gases. *His death certificate clearly listed* [*a*]*cute hypoxic respiratory failure as a cause of death, secondary to COPD/CWP and complicating pneumonia*.
>
> ii. Through hypoxemia precipitating/aggravating a cardiac arrhythmia in an individual with heart disease. As a matter of fact the scientific literature has substantiated such mechanism. . . .

Director's Exhibit 53 (emphasis added) (citations to medical literature omitted).

In crediting Dr. Perper's opinion, the administrative law judge summarily stated that "Dr. Perper's opinion on the mechanism by which the [m]iner's legal pneumoconiosis contributed to his death is based on the same information and medical reasoning underlying his opinion that the [m]iner had that condition. Accordingly it is similarly well-documented and well-reasoned." Decision and Order at 19. Employer is correct that the administrative law judge's crediting of Dr. Perper's opinion is not rational. Dr. Perper's opinion on death causation is based on his belief that the miner suffered from "significant coal workers' pneumoconiosis" with "causally associated centrilobular emphysema" that manifested in "pulmonary insufficiency and severe hypoxemia" that caused the miner's death. Director's Exhibit 53. Positive radiological findings were relied upon by Dr. Perper

in making his diagnosis of "significant coal workers' pneumoconiosis."[18] Director's Exhibit 53. However, no radiological evidence was admitted into the record in this case,[19] and the administrative law judge found that Dr. Perper's opinion as to the issue of clinical pneumoconiosis could not be given probative weight because it "lacks the degree of specificity and supporting rationale" necessary for that purpose. Decision and Order at 18. Nonetheless, the administrative law judge gave full probative weight to Dr. Perper's opinion regarding the cause of the miner's death. The administrative law judge's crediting of Dr. Perper's death causation opinion is inconsistent with his clinical pneumoconiosis findings. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) (administrative law judge must identify specific and persuasive reasons for concluding that a doctor's judgment does not stem from his misdiagnosis); *Trujillo v. Kaiser Steel Corp*., 8 BLR 1-472 (1986) (the administrative law judge did not err in rejecting physician's opinion on causation if underlying premise on the existence of pneumoconiosis was inaccurate).

More significantly, Dr. Perper's description of the mechanism of death is based on speculation. In discussing the mechanism of death, Dr. Perper relied on the death certificate, in conjunction with generalities in the medical literature, to support his conclusions. But the administrative law judge specifically found that the death certificate was not reliable as to the cause of the miner's death. As there is no credible medical evidence in the record regarding the miner's medical condition from April 1989 until the miner's death on November 24, 2002, there is no reliable evidentiary support in the record for Dr. Perper's opinion that "[s]evere simple coal workers' pneumoconiosis and the causally associated centrilobular emphysema, resulted in progressive pulmonary insufficiency" that ultimately hastened the miner's death. *Sparks*, 213 F.3d at 192, 22 BLR

[18] Dr. Perper diagnosed "coal workers pneumoconiosis" and did not specifically address "clinical pneumoconiosis" as distinct from "legal pneumoconiosis," although the administrative law judge did so in his decision.

[19] The x-rays were excluded as inadmissible on the basis that the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(2) were exceeded. Decision and Order at 13. The Board has held that an administrative law judge must address the credibility of a medical opinion, taking into consideration whether the physician has reviewed inadmissible evidence and specifically ascertain whether the opinion has been tainted by the review of the inadmissible evidence. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery & Hall, JJ., concurring & dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring & dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004).

at 2-263; *Shuff*, 967 F.2d at 979-80, 16 BLR at 2-93; *see also Williams*, 338 F.3d 501, 22 BLR 2-625.

An administrative law judge must consider the credibility of medical opinions based on the physicians' explanations for their conclusions and the documentation underlying their medical judgments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76. Under the facts of this case, and in view of the evidentiary and credibility determinations of the administrative law judge, I would hold that the administrative law judge erred in crediting Dr. Perper's opinion, as it is neither sufficiently documented nor reasoned to satisfy claimant's burden of proof. Accordingly, as there is no credible evidence to establish that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205, I would reverse the award of survivor's benefits.[20]

Thus, I also would decline to address, as unnecessary, the responsible operator issue. However, I wish to note my disagreement with the majority that employer waived its argument as to the responsible operator. The record reflects that employer raised both the issues of res judicata and collateral estoppel throughout the litigation, and its brief below specifically contended that the surviving spouse stands in the shoes of the miner and her action must be treated accordingly. Thus, employer did not waive the argument it raises to the Board.

JUDITH S. BOGGS
Administrative Appeals Judge

[20] Claimant has the burden of establishing entitlement and bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element of entitlement. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). To the extent the majority states that employer failed to demonstrate why claimant failed to satisfy her burden of proof, this suggests burden shifting. Employer has shown in this case why the evidence in this record is legally insufficient to support an award of benefits.