BRB Nos. 03-0364 BLA
and 03-0364 BLA-A

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| BUNA HUNT<br>(Widow of BENNETT HUNT) | ) | |
| Claimant-Respondent<br>Cross-Petitioner | ) | |
| v. | ) | |
| KENTLAND ELKHORN COAL CORPORATION | ) | DATE ISSUED: 03/31/2004 |
| Employer-Petitioner<br>Cross-Respondent | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order – Denying Benefits on Living Miner's Claim and Awarding Benefits on Survivor's Claim of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James L. Hamilton (Hamilton & Stevens, PLLC), Pikeville, Kentucky, for claimant.

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

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals, and claimant[1] cross-appeals, the administrative law judge's Decision and Order – Denying Benefits on Living Miner's Claim and Awarding Benefits on Survivor's Claim.[2] The procedural history of this case is as follows: The miner filed his application for benefits on June 29, 1973 which was denied by the claims examiner on July 22, 1980. Director's Exhibit 20. No further action was taken on this claim.

On March 18, 1985, the miner filed another claim for benefits, which the district director denied. The miner appealed to the Board, and subsequently requested that his appeal be dismissed for development of a modification request. On July 27, 1989, the Board granted the miner's motion to dismiss his appeal. Director's Exhibit 20. On June 15, 1999, the miner filed a new application for benefits, Director's Exhibit 1. After the miner's death, claimant filed her survivor's claim, on October 21, 1999.

The administrative law judge noted the procedural posture of the claims in this case, and credited the miner with at least thirty-six years of coal mine employment. Addressing the miner's claim, the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis. The administrative law judge determined that the evidence demonstrates a deterioration in the miner's condition and the administrative law judge found it to be substantially more supportive of the miner's application. Thus, the administrative law judge found a material change in conditions established. *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); Decision and Order at 26-27. The administrative law judge then considered the merits of entitlement on the miner's claim. The administrative law judge referred to his finding based on the newly submitted evidence and he noted that autopsy evidence is the most reliable evidence of the existence of pneumoconiosis, as well as being the most recent evidence of record. Consequently, the administrative law judge found that the miner

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[1] Claimant is Buna Hunt, the widow of Bennett Hunt, the miner, who died on October 1, 1999. Director's Exhibit 28. Claimant is pursuing her survivor's claim as well as the miner's claim, which is a second duplicate claim.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). In addition, the administrative law judge determined that the evidence is sufficient to establish that the miner was totally disabled due to a respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b). However, the administrative law judge found that the evidence is insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge denied benefits on the miner's claim. Turning to the survivor's claim, the administrative law judge found the evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). Therefore, the administrative law judge awarded benefits on the survivor's claim.

On appeal, employer maintains that the administrative law judge erred by finding the existence of pneumoconiosis established at Section 718.202(a)(4). Employer also contends that the record does not contain evidence that pneumoconiosis hastened the miner's death. Claimant responds, urging affirmance of the award of benefits on the survivor's claim. In her cross-appeal, claimant asserts that the opinions of Drs. Younes and Casey support her position that the miner's total disability was due to pneumoconiosis. In addition, claimant asserts that the contrary opinions of Drs. Fino and Repsher do not constitute reasoned medical judgments. Employer responds, urging affirmance of the administrative law judge's disability causation finding. The Director, Office of Workers'' Compensation Programs (the Director), has filed a letter responding to both of the appeals. The Director contends that Dr. Repsher's views are hostile and contrary to the Act, and that his report should not be credited at Section 718.204(c). In addition, the Director alleges that Dr. Fino's analytical foundation is flawed, and that the administrative law judge's failure to discuss these flaws requires remand.

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

Existence of Pneumoconiosis

As an initial matter, we consider the administrative law judge's finding regarding the existence of pneumoconiosis. In weighing the newly submitted evidence to determine whether claimant established a material change in conditions, the administrative law judge found it sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), stating "The overwhelming weight of the clinical and pathological evidence establishes that Miner suffered from coal workers'

pneumoconiosis."[3] Decision and Order at 26. In considering the claim on the merits, the administrative law judge stated:

> I found, after reviewing the newly submitted evidence, that Miner suffered from pneumoconiosis based on the overwhelming pathology evidence diagnosing the existence of pneumoconiosis. Autopsy evidence is the most reliable evidence of the existence of pneumoconiosis. The autopsy evidence is also the most recent evidence of record. I find that Claimant has established that Miner suffered from pneumoconiosis under §718.202(a)(4) by a preponderance of the evidence.

Decision and Order at 27.

Although the regulations provide for consideration of autopsy evidence at 20 C.F.R. §718.202(a)(2), the administrative law judge evaluated the autopsy evidence, along with the medical opinion evidence, in his analysis at Section 718.202(a)(4). We therefore transfer the administrative law judge's findings regarding the autopsy evidence to the proper subsection, *i.e.*, 20 C.F.R. §718.202(a)(2), *see Campbell v. Director, OWCP*, 11 BLR 1-16 (1987), and we affirm the administrative law judge's finding that the autopsy evidence establishes the existence of pneumoconiosis.[4] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Miner's Claim: Disability Causation

Considering the medical opinions which address the cause of the miner's disability, the administrative law judge stated:

> Drs. Younes and Casey found that Miner's total disability was due to pneumoconiosis. However, only Dr. Younes provided sufficient reasoning to support his conclusion. Although I accord it little

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[3] The administrative law judge had earlier found that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(2) because the record does not contain biopsy evidence. Decision and Order at 22.

[4] In addition, we affirm the administrative law judge's decision to credit the miner with at least thirty-six years of coal mine employment, his finding that a material change in conditions is established in the miner's claim, and his finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> weight, the medical evidence obtained between 1973 and 1988 does not show that Miner was totally disabled due to pneumoconiosis. Drs. Branscomb, Broudy, Fino, and Repsher opined that Miner's pulmonary disability was caused by cigarette smoking. The opinions of Drs. Fino and Repsher are entitled to probative weight enhanced by their status as board-certified pulmonologists. Drs. Fino and Repsher provided adequate reasoning to support their opinion that Miner's disability arose from smoking, not from coal dust exposure. There is not sufficient evidence to establish, by a preponderance, that Miner's total disability was due to pneumoconiosis. I find that Miner was not totally disabled due to pneumoconiosis under §718.204(c).

Decision and Order at 36.

The Director maintains that Dr. Repsher's statement that a miner with a negative x-ray would not have any pulmonary impairment "is contrary to the Act at 30 U.S.C. 923(b), which provides that no claim may be denied based solely upon the results of X-ray analysis." Director's Brief at 3; *see* Employer's Exhibit 6 at 18.

Dr. Repsher indicates that it is possible for a miner with a negative x-ray to have a pulmonary function impairment, and his opinion is phrased as "in general,… miners who have a negative chest x-ray for coal worker's pneumoconiosis will not have any associated measurable pulmonary function impairment," Employer's Exhibit 5 at 18 (emphasis added). The United States Court of Appeals for the Sixth Circuit and the Board have held that a medical opinion may be deemed to be contrary to the spirit of the Act where it "foreclose[s] all possibility that simple pneumoconiosis can be totally disabling." *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72 (6th Cir. 1987); *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). Given the qualified nature of Dr. Repsher's opinion, we hold that it is not contrary to the Act.

The Director also asserts that Dr. Repsher's opinion is at odds with the amended regulations, particularly 20 C.F.R. §718.201, which provides that coal mine employment may cause chronic obstructive pulmonary disease. The Director therefore contends that no credit should be given to Dr. Repsher's opinion. The Director alleges that Dr. Fino's analytical foundation is flawed and he questions Dr. Fino's comment that any reduction in the miner's FEV1 value on his pulmonary function study would not be clinically significant. The Director challenges Dr. Fino's opinion regarding the variability between the blood gas study and the pulmonary function study results, asserting that pulmonary function studies and blood gas studies measure different conditions. In addition, the Director challenges Dr. Fino's view that the miner's chronic obstructive pulmonary disease is due to cigarette smoking because his pulmonary disease progressed after he

ended his coal mine employment. However, the Director further notes that Dr. Fino states that coal workers' pneumoconiosis may be progressive.

In weighing the medical opinion evidence regarding the cause of the miner's disability at 20 C.F.R. §718.204(c), the administrative law judge accorded great weight to the opinions of Drs. Repsher and Fino, finding them enhanced by their status as Board-certified pulmonologists. In addition, the administrative law judge stated that these physicians "provided adequate reasoning to support their opinion that Miner's disability arose from smoking, not from coal dust." Decision and Order at 36.

After consideration of the opinions of Drs. Repsher and Fino, Employer's Exhibits 1, 2, 5, and the challenges to them, we are not persuaded that these opinions rise to the level of hostility to the Act. We therefore hold that the administrative law judge committed no error in relying on these opinions to find that claimant did not establish disability causation pursuant to Section 718.204(c). In addition, we hold that it was permissible for Dr. Fino to consider the variability of the blood gas study results in his evaluation of the cause of the miner's impairment.[5] Moreover, since the record does not contain a copy of *The Merk Manual* or a statement by Dr. Fino that coal dust exposure does not cause emphysema in the absence of complicated pneumoconiosis, and the administrative law judge's findings must be based solely on the medical evidence contained in the record, *see* 20 C.F.R. §725.477(b), we reject the Director's assertions regarding the impact of emphysema diagnosed in the miner. *See* Director's Brief at 3.

Turning to the other medical evidence relevant to the cause of the miner's disability, the Director asserts that the administrative law judge properly determined that

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[5] Dr. Fino indicated that the miner's blood gas study results were inconsistent, noting that the results were normal until the miner was in "periods of heart failure." Employer's Exhibit 5 at 9. Dr. Fino stated that if pneumoconiosis causes an impairment on blood gas studies, that would be a permanent impairment. Employer's Exhibit 5 at 9. Dr. Fino opined that the abnormalities in the miner's blood gas study results were not in any way related to inhalation of coal mine dust. Employer's Exhibit 5 at 10. Inasmuch as Dr. Fino did not state that pulmonary function studies and blood gas studies measure the same type of impairment, nor did he opine that the impairment shown on pulmonary function study and blood gas study must have the same cause, the Director's statement that "the fact that the disability shown on blood gas analysis may be due to smoking is not inconsistent with the understanding that the disability shown on pulmonary function analysis may be due to coal mine employment," Director's Brief at 4 (citations omitted), is not a valid challenge to Dr. Fino's opinion.

the opinions of Drs. Broudy, Caffrey and Branscomb, that the miner's disability was not due to pneumoconiosis or his coal mine employment, were not entitled to deciding weight. We affirm the administrative law judge's credibility findings regarding the opinions of Drs. Broudy and Branscomb. *See Skrack*, *supra*; Decision and Order at 35-36; Director's Exhibits 20, 33; Employer's Exhibit 3.

Employer, however, asserts that the administrative law judge erred by finding Dr. Caffrey's opinion, Director's Exhibit 33, hostile to the Act. The administrative law judge found Dr. Caffrey's opinion, that the miner did not suffer from a pulmonary disability due to pneumoconiosis, hostile to the Act because it is "predicated on his belief that simple CWP is not progressive," Decision and Order at 33. Employer maintains that since Dr. Caffrey diagnosed simple pneumoconiosis, progressivity is not an issue in this case. Employer also contends that Dr. Caffrey's view that pneumoconiosis does not progress after cessation of exposure, is consistent with the amended regulations.

The administrative law judge found the autopsy evidence sufficient to establish the existence of coal workers' (clinical) pneumoconiosis, and similarly Dr. Caffrey diagnosed coal workers' pneumoconiosis. Since the administrative law judge's finding of coal workers' (clinical) pneumoconiosis is based on objective autopsy evidence, there is no question as to the cause of the respiratory disease process, as there would be in situations where the administrative law judge has instead found legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a), (b), 718.202(a)(4). The issue on which Dr. Caffrey expressed a view that may be hostile to the Act, *i.e.*, the progressivity of pneumoconiosis, is not the dispositive issue in this case. The administrative law judge therefore erred in discrediting Dr. Caffrey's opinion, regarding the cause of the miner's disability and death, on this basis.

Inasmuch as Dr. Caffrey's opinion would not assist claimant in establishing that the miner's disability was due to pneumoconiosis, but instead, lends further support to the administrative law judge's finding that causation is not established at Section 718.204(c), we affirm the administrative law judge's finding. Inasmuch as claimant has not established that the miner's disability was due to pneumoconiosis pursuant to Section 718.204(c), one of the essential elements of entitlement under Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we affirm the administrative law judge's denial of benefits on the miner's claim.

Survivor's Claim

We next consider employer's appeal of the administrative law judge's award of benefits on the survivor's claim. Employer contends that the administrative law judge relied upon impermissible rationales to find that pneumoconiosis hastened the miner's death. Employer further asserts that there is no evidence that pneumoconiosis hastened

the miner's death. Employer notes that the administrative law judge relied primarily on Dr. Casey's report to link the miner's pneumoconiosis with his death. Employer urges that it is Dr. Casey's opinion that the miner's COPD and pulmonary hypertension, not clinical pneumoconiosis, prevented the miner from undergoing surgery, and thus hastened his death. Therefore, employer argues, Dr. Casey's opinion cannot be reconciled with the administrative law judge's existence of pneumoconiosis findings. In addition, employer argues that the administrative law judge erred by automatically preferring the opinion of the miner's treating physician, Dr. Casey, over the opinions of the physicians with superior credentials.

Employer also challenges the administrative law judge's reliance on the opinion of Dr. Dennis. Employer asserts that because the administrative law judge "attributed the [miner's] pulmonary disease to smoking, he cannot endorse Dr. Dennis's claim that pneumoconiosis 'hastened' [the miner's] death." Employer's Brief at 25. Further, employer challenges the credibility of Dr. Dennis's opinion in view of the physician's diagnosis of complicated pneumoconiosis, which is not supported by other evidence of record. Employer also asserts that the administrative law judge does not explain his basis for finding this opinion supported by objective data, after the administrative law judge earlier rejected the findings of Dr. Dennis. Employer also maintains that the administrative law judge has not explained how Dr. Dennis's opinion that anthracosilicosis prevented the miner from recovering from a heart attack substantiates Dr. Casey's theory that lung disease prevented the miner from undergoing coronary artery surgery. Employer finally asserts that the administrative law judge improperly treated claimant's burden as a burden of production rather than a burden of proof, and employer contends, that the administrative law judge failed to weigh the contrary probative evidence or record.

Administrative Law Judge's Findings on the Cause of the Miner's Death

In evaluating the evidence regarding the cause of the miner's death pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered each medical opinion and found Dr. Casey's opinion, that the miner's death was related to his coal workers' pneumoconiosis, entitled to significant probative weight. The administrative law judge found that the opinions of Dr. Branscomb, Broudy, Fino, Repsher, that the miner's death was not related to his coal workers' pneumoconiosis, and the opinion of Dr. Dennis, that coal workers' pneumoconiosis contributed to the miner's death, are well-reasoned and well-documented and are entitled to probative weight enhanced by their respective Board-certifications. The administrative law judge accorded no weight to the opinion of Dr. Caffrey because he found that it is in conflict with the spirit of the Act. Decision and Order at 38-39. After reviewing the medical opinion evidence, the administrative law judge stated:

> I find that Miner's death was hastened by pneumoconiosis. The record establishes that the primary cause of Miner's death was coronary artery disease. Miner's pneumoconiosis contributed to his diminished pulmonary capacity, which prevented him from being able to undergo coronary artery bypass surgery; a procedure that would have prolonged his life. Therefore, pneumoconiosis hastened Miner's death.
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> Dr. Casey opined that much of Miner's pulmonary hypertension was caused by Miner's CWP. Dr. Fino especially, as well as Drs. Branscomb, Broudy, and Repsher, found that Miner's CWP was not a factor in causing Miner's coronary artery disease. The weight of the evidence establishes the Miner's CWP was not a direct cause of his coronary artery disease. But, Dr. Casey also opined that Miner's CWP prevented him from undergoing coronary artery bypass surgery, which would have prolonged his life. Her opinion is entitled to significant probative weight. Dr. Coyer's records confirm Dr. Casey's opinion. Dr. Dennis' opinion indirectly substantiates the opinions of Drs. Casey and Coyer by showing that Miner's ability to withstand and recover from a heart attack was inhibited by his CWP. Dr. Dennis' opinion also substantiates Dr. Casey's opinion that surgical intervention would have prolonged Miner's life. Dr. Fino disagreed with Dr. Casey's opinion that Miner's lung disease prevented Miner from undergoing bypass surgery. His opinion, that he would have recommended that Miner undergo the bypass operation because Miner only faced a 5% mortality rate, is undermined by Dr. Coyer's assessment of Miner's mortality rate. Dr. Coyer's decision, after consulting with Drs. Rogers and Casey, is more credible. Regardless of which assessment of Miner's mortality rate is more accurate, the undeniable fact remains: Miner was prevented from undergoing a procedure that would have prolonged his life because of his pneumoconiosis. Dr. Fino's opinion cannot change the fact that Miner's physicians did not perform coronary artery bypass surgery, in part due to Miner's pneumoconiosis.

Decision and Order at 39-40.

As an initial matter, we reject employer's assertion that Dr. Casey's opinion cannot be reconciled with the administrative law judge's findings regarding the existence of pneumoconiosis. Although the administrative law judge relied upon the autopsy evidence to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a), the administrative law judge also noted that all of the physicians who issued

narrative reports diagnosed coal workers' pneumoconiosis. Decision and Order at 26. In addition, Dr. Casey clearly found that the miner's coal workers' pneumoconiosis was "probably 50% in the contributing factor in [the miner's] death." Claimant's Exhibit 1. Thus, contrary to employer's assertion, there is no conflict between Dr. Casey's opinion and the administrative law judge's existence of pneumoconiosis finding.

We also reject employer's assertion that the administrative law judge automatically preferred the opinion of the miner's treating physician, over the opinions of physicians with superior qualifications. The administrative law judge, who is charged with determining whether the medical opinions are documented and reasoned, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), permissibly found that Dr. Casey's opinion is well-reasoned and well-documented, and rationally accorded her opinion significant probative weight. Decision and Order at 38. As the administrative law judge noted, Dr. Casey provided clinical observations and her reasoning is supported by the objective data. We, therefore, affirm the administrative law judge's credibility determination and his finding that Dr. Casey's opinion is entitled to great weight.

Employer also challenges the administrative law judge's reliance on the opinion of Dr. Dennis at Section 718.205(c). Employer states "inasmuch as the ALJ attributed the pulmonary disease to smoking, the ALJ cannot endorse Dr. Dennis's claim that pneumoconiosis 'hastened' [the miner's] death." Employer's Brief at 25. This assertion lacks merit, since the administrative law judge found that the miner suffered from pneumoconiosis arising out of his coal mine employment. *See* Decision and Order at 26, 28-29.

We further reject employer's challenge to Dr. Dennis's credibility. The administrative law judge did not reject Dr. Dennis's opinion of complicated pneumoconiosis, rather, the administrative law judge found that Dr. Dennis's opinion did not satisfy the regulatory definition of pneumoconiosis. Decision and Order at 23. In addition, it is noted that the administrative law judge indicated that Dr. Dennis' opinion "indirectly substantiates the opinions of Drs. Casey and Coyer by showing that Miner's ability to withstand and recover from a heart attack was inhibited by his CWP." *Id.* at 40 (emphasis added). The administrative law judge, therefore, rationally inferred that Dr. Dennis's opinion lends support to the opinions of Drs. Casey and Coyer, as well as the administrative law judge's finding at Section 718.205(c). *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

We agree with employer, however, that the administrative law judge did not weigh the contrary evidence of record at Section 718.205(c). Although the administrative law judge detailed the physicians' opinions regarding whether pneumoconiosis hastened the miner's death, he did not weigh the opinions which specifically state that pneumoconiosis did not hasten the miner's death, *i.e.*, the opinions of Drs. Branscomb,

Caffrey,[6] Fino and Repsher. Inasmuch as the administrative law judge must weigh all of the evidence of record and explain his crediting and weighing of the evidence, the administrative law judge has not fully discharged his duties in this regard. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We therefore vacate the administrative law judge's finding that claimant has established that the miner's death was due to pneumoconiosis, and we remand this case for the administrative law judge to weigh all of the evidence pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order – Denying Benefits on Living Miner's claim and Awarding Benefits on Survivor's Claim is affirmed in part, 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

I concur:

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring in part and dissenting in part:

While I concur with the opinion of the majority in affirming the administrative law judge's existence of pneumoconiosis finding, as well as the material change in conditions finding, the length of coal mine employment finding and the total disability finding, I disagree with the decision of the majority to hold that the opinions of Drs. Fino, Repsher

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[6] In view of our holding that Dr. Caffrey's opinion is not hostile to the Act, the administrative law judge must weigh Dr. Caffrey's opinion, along with all of the other relevant evidence of record, in considering the cause of the miner's death on remand.

and Caffrey are not hostile to the Act. I, therefore, respectfully dissent, in part, from the opinion of the majority.

Dr. Caffrey's hostility to the Act is apparent in his statement that "I believe it is a well accepted fact in the medical literature that individuals with simple coal worker's (sic) pneumoconiosis and simple silicosis do not have a progression of the disease after they leave the coal mines." Director's Exhibit 33. Therefore, I disagree with the decision of the majority to vacate the administrative law judge's finding to the contrary.

Moreover, I believe this case should be remanded for the administrative law judge to consider the credibility of the opinions of Drs. Fino and Repsher in view of the amended regulations. I would instruct the administrative law judge to make findings regarding the hostility of these opinions, which, any party could then appeal to the Board for review.

Consequently, I would vacate the administrative law judge's findings pursuant to Sections 718.204(c) and 718.205(c) and remand this case for further consideration of the evidence thereunder.

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BETTY JEAN HALL
Administrative Appeals Judge