BRB No. 08-0447 BLA

K.S. (Widow of W.S.) Claimant-Respondent v. ARMCO, INCORPORATED/ AK STEEL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/27/2009 DECISION and ORDER

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

Mary Z. Natkin (Legal Clinic, Washington and Lee University), Lexington, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-0092 and 04-BLA-5953) of Administrative Law Judge William S. Colwell awarding benefits on claims filed pursuant

to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case involves a miner's claim and a survivor's claim.

Background Information

The miner filed a claim for benefits on January 1, 1982. Director's Exhibit M-1.[2] In a Decision and Order dated March 23, 1989, Administrative Law Judge Ben L. O'Brien found that the x-ray evidence established the existence of clinical pneumoconiosis. Director's Exhibit M-40. Judge O'Brien also found that the miner suffered from Alpha-1 Antitrypsin Deficiency (AAD), a rare enzyme deficiency that renders an individual more susceptible to the development of emphysema. *Id.* Judge O'Brien found that the medical opinion evidence established that the miner suffered from legal pneumoconiosis,[3] in the form of AAD-induced emphysema that was substantially aggravated by the miner's coal mine dust exposure. 20 C.F.R. §718.201. Judge O'Brien also found that the evidence established that the miner was totally disabled due to his legal pneumoconiosis. *Id.* Accordingly, Judge O'Brien awarded benefits. *Id.* By letter dated November 27, 1989, employer agreed to pay benefits in the miner's claim. Director's Exhibit M-46.

The miner subsequently underwent a right lung transplant operation on August 27, 2000. Director's Exhibit M-57. On January 18, 2001, employer filed a request for modification, contending, *inter alia*, that new biopsy evidence of the miner's removed right lung revealed that the miner did not suffer from clinical pneumoconiosis. *See* 20 C.F.R. §725.310 (2000); Director's Exhibit M-59.

While employer's request for modification was pending, the miner died on July

[1] 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 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[2] The evidence in the miner's claim is identified with an "M" and the evidence in the survivor's claim is identified with an "S."

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

19, 2001. Director's Exhibit S-9. Claimant[4] filed a survivor's claim on January 7, 2002. Director's Exhibit S-2. In a Proposed Decision and Order dated August 15, 2003, the district director awarded benefits in the survivor's claim. Director's Exhibit S-20. In a Proposed Decision and Order dated December 31, 2003, the district director denied employer's request for modification in the miner's claim. Director's Exhibit M-82. Each claim was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit M-84; Director's Exhibit S-26. After the cases were consolidated, Administrative Law Judge William S. Colwell (the administrative law judge) held a hearing on January 19, 2006.

The Administrative Law Judge's Decision and Order dated February 15, 2008

The administrative law judge adjudicated the miner's claim and the survivor's claim separately.[5] In his consideration of the miner's claim, the administrative law judge found that neither the x-ray evidence, nor the autopsy evidence of the miner's native left lung, established the existence of clinical pneumoconiosis. However, the administrative law judge found that the biopsy evidence of the miner's removed, native right lung established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Weighing all of the evidence together, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[6] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge also found that the medical opinion evidence established two types of legal pneumoconiosis: (1) focal emphysema caused by

[4] Claimant is the surviving spouse of the miner.

[5] Because the survivor's claim was filed after January 19, 2001, it is subject to the evidentiary limitations of 20 C.F.R. §725.414. *See* 20 C.F.R. §725.2(c). Because the miner's claim was pending on January 19, 2001, it is not subject to the evidentiary limitations. *Id.*

[6] Although autopsy evidence is ordinarily considered the most reliable evidence of the existence of pneumoconiosis, *see Terlip v. Director, OWCP*, 8 BLR 1-363 (1985), the administrative law judge, in this case, credited Dr. Green's opinion, as supported by Dr. Tomashefski's observations, that the sections of tissue from the miner's left lung obtained on autopsy contained necrotizing pneumonia and were "of insufficient quantity and quality to diagnose the presence or absence of pneumoconiosis." Decision and Order at 33. In weighing the other evidence of record, the administrative law judge found that the biopsy evidence was more probative regarding the existence of pneumoconiosis than the x-ray evidence. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); Decision and Order at 62.

coal mine dust exposure; and (2) AAD-induced emphysema that was "triggered" by the miner's smoking and coal mine dust exposure. The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Regarding the issue of causation of the miner's total disability pursuant to 20 C.F.R. §718.204(c), the administrative law judge stated:

> [The] medical experts agree that the miner's [AAD] was "triggered" and resulted in the severe, debilitating emphysema leading to a lung transplantation and eventual death. For reasons previously set forth in this opinion, this tribunal has concluded that the miner's smoking *and* coal dust exposure histories each served as a "trigger" to development of the emphysema. As a result, it is determined that coal dust exposure was a "substantially contributing cause" to the miner's totally disabling respiratory impairment . . . .

Decision and Order at 63-64 (footnote omitted). Accordingly, the administrative law judge awarded benefits in the miner's claim.

Because claimant's survivor's claim was subject to the evidentiary limitations set forth at 20 C.F.R. §725.414, the administrative law judge considered a more limited set of evidence in his adjudication of the survivor's claim. However, the administrative law judge again found that the evidence established the existence of both clinical pneumoconiosis and two types of legal pneumoconiosis. The administrative law judge also found that the miner's AAD-induced emphysema, that was "triggered" by both the miner's smoking and coal dust exposure, was a substantially contributing cause or factor leading to his death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established that the miner's AAD-induced emphysema was aggravated in part by his coal mine dust exposure and, therefore, constituted legal pneumoconiosis. Employer also contends that the administrative law judge erred in excluding Dr. Oesterling's deposition testimony in the survivor's claim. Employer further argues that it cannot be held responsible for the payment of benefits because its due process rights were violated by the district director's failure to resolve a discovery dispute before the miner died on July 19, 2001. Claimant responds in support of the administrative law judge's award of benefits in the miner's and survivor's claims. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject employer's due process argument, and its

contention that the administrative law judge erred in excluding Dr. Oesterling's deposition in the survivor's claim.[7]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[8] 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).

The Miner's Claim

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. The miner established these elements of entitlement and was awarded benefits. Director's Exhibit M-40. Subsequently, employer requested modification of the award. *See* 20 C.F.R. §725.310 (2000).

Burden of Proof

We initially note that, while employer may establish a basis for modification of the award of benefits by establishing either a change in conditions since the issuance of the previous decision or a mistake in a determination of fact in the previous decision, 20 C.F.R. §725.310(a) (2000); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), the burden of proof to establish a basis for modifying the award of benefits rests with employer. Claimant does not have the burden to re-establish the miner's entitlement to benefits. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). Employer, as the proponent of an order terminating an award of benefits, bears the burden of disproving at least one element of entitlement. *Id.*; *see also Branham v. BethEnergy Mines*, 20 BLR 1-27 (1996).

[7] Because no party challenges the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[8] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit M-2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

In this case, the administrative law judge considered all of the evidence of record, and readjudicated the miner's claim *de novo* with the burden on claimant to establish entitlement, rather than placing the burden of proof on employer to establish a basis for modification of the prior decision.[9] Decision and Order at 8-64. However, in light of our affirmance of the administrative law judge's findings that claimant established all of the elements of entitlement in the miner's claim, *see* discussion, *infra*, the administrative law judge's error in placing the burden of proof on claimant was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis, in the form of AAD-induced emphysema triggered in part by the miner's coal mine dust exposure.

It is undisputed that the miner suffered from AAD. The administrative law judge noted that it "is well-established on this record that [AAD] is an inherited condition that predisposed the miner to [the] development of severe, debilitating panlobular emphysema." Decision and Order at 50. The administrative law judge further stated that the issue before him was whether coal mine dust exposure contributed to the development of the miner's emphysema:

> Medical experts agree that [the] mere presence of the inherited [AAD] does not render development of debilitating emphysema inevitable; rather some "trigger" is needed. Without a "trigger," persons with [AAD] can lead normal, or near-normal, lives.
>
> It is further established by current medical data that smoking constitutes one "trigger" that will lead a person with the deficiency to suffer respiratory demise, typically through development of severely debilitating panlobular emphysema. Here, the record supports a finding that the miner smoked

[9] Because Administrative Law Judge Ben L. O'Brien, in his 1989 Decision and Order, found that the medical opinion evidence established that the miner suffered from legal pneumoconiosis, in the form of Alpha-1 Antitrypsin Deficiency (AAD)-induced emphysema that was substantially aggravated by the miner's coal mine dust exposure, and was totally disabled due to pneumoconiosis, employer had the burden of proving either that the miner's AAD-induced emphysema was not aggravated by his coal mine dust exposure or that the miner was not totally disabled due to pneumoconiosis. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

> one-half a pack of cigarettes per day for 13 years. Thus, the miner was exposed to one "trigger" that led to the development of his debilitating emphysema according to the medical experts. The inquiry, however, does not end here. Namely, the fact that smoking constitutes a "trigger" does not preclude a finding that another exposure also served as a "trigger." This leads to the central dispute among the medical experts of: (1) whether the miner's coal dust exposure was a "trigger" in the development of his respiratory demise; and, if so, (2) whether the definition of legal coal workers' pneumoconiosis is satisfied. With regard to the second prong, this tribunal finds that, if coal dust served as one of the "triggers" in this case, then the definition of legal coal workers' pneumoconiosis is satisfied, *i.e.*, the miner's respiratory demise was related to, or significantly aggravated by, the miner's 11 years of coal mine employment.

Decision and Order at 51-52.

Thus, the central issue in this case is whether the miner's emphysema was significantly related to, or substantially aggravated by, coal mine dust exposure, in addition to his smoking.[10] *See* 20 C.F.R. §718.201(a)(2). In addressing this issue, the administrative law judge considered the opinions of Drs. Rasmussen, Daniel, Wagner, Crisalli, Green, Cohen, Doyle, Tomashefski, Oesterling, Yousem, Nichols, Castle, Branscomb, and Spagnolo.[11] While Drs. Green, Wagner, Cohen, and Doyle opined that

[10] As previously noted, the administrative law judge found that the evidence also established the existence of clinical pneumoconiosis and a second type of legal pneumoconiosis (focal emphysema caused by coal dust exposure). The administrative law judge, however, noted that the "medical experts, including Dr. Green, agree that the eight coal macules and focal emphysema observed by Dr. Green on the biopsy slides were too mild, standing alone, to have caused a lifetime impairment or hastened the miner's death." Decision and Order at 83 n.56.

[11] Judge O'Brien had previously considered the opinions of Drs. Rasmussen, Daniel, Wagner, and Crisalli. In his consideration of employer's request for modification, the current administrative law judge found that the 1981 and 1983 opinions of Drs. Rasmussen and Daniel were of "little probative value" in determining whether the miner suffered from legal pneumoconiosis because neither physician addressed the impact, if any, of coal mine dust exposure on a person suffering from AAD. Decision and Order at 51. In regard to the 1982 and 1985 opinions of Drs. Wagner and Crisalli, the administrative law judge found that Judge O'Brien properly credited Dr. Wagner's opinion, that coal mine dust exposure contributed to the miner's pulmonary impairment, over Dr. Crisalli's contrary opinion, based upon Dr. Wagner's status as the miner's treating physician and his reliance upon studies regarding AAD conducted by the

the miner's coal dust exposure was a "trigger" leading to the development of his AAD-induced emphysema, Drs. Tomashefski, Spagnolo, Oesterling, Branscomb, and Castle opined that the miner did not suffer from any lung disease arising out of his coal mine employment.[12]

In weighing the conflicting evidence, the administrative law judge accorded the greatest weight to Dr. Green's opinion based upon Dr. Green's superior qualifications. Decision and Order at 59-60. The administrative law judge also accorded the greatest weight to Dr. Green's opinion because he found that it was well-reasoned and supported by the recent medical literature. *Id.* at 61. The administrative law judge further credited Dr. Green's opinion because he found that it was consistent with the comments accompanying the Department of Labor's (DOL's) regulations. *Id.* The administrative law judge also found that Dr. Green's opinion was supported by the opinions of Drs. Cohen, Doyle, and Wagner. *Id.* at 60.

Conversely, the administrative law judge found that the opinions of Drs. Tomashefski, Spagnolo, and Oesterling, that the miner's AAD-induced emphysema was unrelated to his coal mine dust exposure, were not as persuasive both because their experience and credentials were less relevant than those of Dr. Green, and because they did not adequately explain why coal mine dust exposure did not contribute to, aggravate, or accelerate the development of the miner's emphysema, particularly taking into account their acknowledgement that persons suffering from AAD should not be exposed to coal dust. Decision and Order at 53-54.

National Institutes of Health. *Id.* The administrative law judge also agreed with Judge O'Brien that, while Dr. Crisalli opined that the miner would have been totally disabled due to AAD even if he had never stepped foot in the mines, the doctor did not adequately address the central issue of whether the miner's AAD-induced emphysema was aggravated by his coal mine dust exposure. *Id.*

[12] When asked whether exposure to occupational dust would accelerate the development of emphysema in a person suffering from AAD, Dr. Yousem stated that he could not answer the question because it was "sort of getting [him] out of [his] realm of expertise." Employer's Exhibit M-1 at 29-30. Dr. Yousem, however, acknowledged that someone with AAD "would be expected to be more sensitive to inflammatory agents than the usual person." *Id.* at 30. Dr. Yousem also stated that he probably would not recommend that a person with AAD work in a coal mine. *Id.* at 31.

Dr. Nichols, the autopsy prosector, listed [AAD] as an underlying cause of death, but did not address whether the miner's coal dust exposure served as a "trigger" to the development of the miner's AAD-induced emphysema. Director's Exhibit M-71.

The administrative law judge accorded less weight to Dr. Branscomb's opinion because he opined that coal mine dust exposure does not cause emphysema, an opinion contrary to the DOL's position. Decision and Order at 52 n.27. The administrative law judge also accorded less weight to Dr. Branscomb's opinion because he testified that he was not familiar with current medical literature pertaining to AAD. *Id.* The administrative law judge found that while Dr. Castle opined that the miner's condition was not caused by coal mine dust exposure, the doctor provided no explanation regarding why coal mine dust exposure did not contribute to, or aggravate, the miner's emphysema. Decision and Order at 52 n.27.

Consequently, the administrative law judge found that the most credible evidence established the existence of legal pneumoconiosis, in the form of AAD-induced emphysema that was "triggered" by both smoking and coal dust exposure. Decision and Order at 62.

Employer contends that the administrative law judge committed numerous errors in finding that the evidence established that the miner's totally disabling emphysema constituted legal pneumoconiosis. Employer initially contends that the administrative law judge erred in finding that Dr. Green's qualifications were superior to those of Drs. Tomashefski, Oesterling, and Yousem.[13] We disagree. The administrative law judge clearly explained his basis for finding that Dr. Green's qualifications were superior to those of the other physicians of record. The administrative law judge specifically found that Dr. Green "has superior medical credentials in the area of occupational pneumoconiosis." Decision and Order at 80. The administrative law judge based his finding on Dr. Green's experience in the research field of occupational pneumoconiosis:

> Dr. Green worked for the [Appalachian Laboratory for Occupational Safety and Health] in Morgantown, West Virginia for 12 years. He conducted research on occupational pneumoconiosis for the National Institutes of Health. He has been the co-author of recent peer-reviewed studies and articles pertaining to occupational lung diseases, including "Advances in the Prevention of Occupational Respiratory Diseases" and "The Role of Coal Mine Dust Exposure in the Development of Pulmonary Emphysema." Dr. Green was one of three NIOSH-appointed pathologists to develop standards for diagnosing pneumoconiosis on autopsy or biopsy and, he is currently a member of a NIOSH-appointed task group to revise the United States' regulations for the National Coal Workers' Autopsy Program. Prior to coming to the United States, Dr. Green worked in the area of

[13] Employer does not challenge the administrative law judge's finding that Dr. Green's qualifications are superior to those of Drs. Spagnolo, Branscomb, and Castle.

> occupational pneumoconiosis for eight years in Great Britain. Overall, it is determined that Dr. Green has extensive, long-term knowledge and experience in the area of occupational pneumoconiosis.

Decision and Order at 80.

The administrative law judge found that Drs. Tomashefski and Oesterling did not possess the same level of knowledge and research experience in the relevant field:

> Dr. Tomashefski conducted NIH-sponsored research on persons with [AAD], but testified that he had not concentrated on occupational pulmonary diseases in his publications. Rather, his major research areas are related to cystic fibrosis and adult respiratory distress syndrome and his credentials do not reflect a level of knowledge and experience compatible with Dr. Green for purposes of this case. . . . Dr. Oesterling is [B]oard-certified in pathology, but his *curriculum vitae* and deposition testimony reflect no research, papers, studies, or publications related to occupational pneumoconiosis.

Decision and Order at 80.

The administrative law judge found that Dr. Yousem also lacked the same level of expertise in the field of occupational pneumoconiosis:

> Dr. Yousem is a [B]oard-certified pathologist and works at the University of Pittsburgh's Department of Pathology. His practice is "largely restricted . . . to thoracic pathology." While Dr. Yousem has a background in pulmonary pathology, his deposition testimony did not demonstrate the level of expertise and knowledge in the area of occupational pneumoconiosis possessed by Dr. Green. There is no evidence that Dr. Yousem has been the author of any published research on texts on the effects of coal dust exposure or occupational pneumoconiosis.

Decision and Order at 36 n.21.

Employer contends that Dr. Tomashefski has greater expertise in regard to the issue of AAD because he published the most recent article concerning patients with the disease. Although the administrative law judge acknowledged that Dr. Tomashefski conducted NIH-sponsored research on persons with AAD, he permissibly found that Dr. Tomashefski's comparative lack of experience with occupational lung diseases rendered him less qualified than Dr. Green in regard to the central issue in this case: whether the

miner's coal mine dust exposure triggered his disabling emphysema.[14] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

We hold that the administrative law judge permissibly credited Dr. Green's opinion, that the miner's coal dust exposure triggered his emphysema, over the contrary opinions of Drs. Tomashefski, Spagnolo, Oesterling, Branscomb, and Castle, based upon Dr. Green's superior qualifications. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

We also reject employer's contention that the administrative law judge erred in finding that Dr. Green's opinion was supported by the recent medical literature. The administrative law judge explained that:

> Dr. Green cites to the August 2000 peer-reviewed article from Annyce Mayer titled, "Occupational Exposure Risks in Individuals With Alpha-1 Antitrypsin Deficiency." He notes publication of the article in the "premier" *American Journal of Respiratory and Critical Care Medicine*. Dr. Green asserts that the Mayer study supports the premise that coal dust exposure serves as a "trigger" in persons with [AAD] and that 11 years of such exposure in this case was sufficient to promote development of panlobular emphysema in a miner who suffered from the deficiency.

Decision and Order at 75.

> Dr. Green quoted the following from the Mayer study:
>
> In this study, we have demonstrated for the first time that occupational exposure to mineral dust is independently associated with a dose-dependent increased prevalence of chronic cough, lower FEV-1, and lower FEV1/FVC ratio in individuals with [AAD].

Claimant's Exhibit M-4 at 29-30.

[14] Employer also argues that the administrative law judge failed to consider the fact that claimant's experts did not discuss Dr. Tomashefski's article (The Bronchopulmonary Pathology of Alpha-1 Antitrypsin Deficiency: Findings of the Death Review Committee of the National Registry for Individuals with Severe Deficiency of Alpha-1 Antitrypsin). Employer's Brief at 18. Contrary to employer's contention, the administrative law judge addressed Dr. Green's review of Dr. Tomashefski's article. Decision and Order at 58-59, 78-79; Claimant's Exhibit M-4 at 23-25.

Dr. Green also explained that the Mayer study found that "[o]ccupational inhalation exposure also affected quality of life, as measured by having to leave a job due to breathlessness." *Id.*

In addressing the methodology of the Mayer study, Dr. Green stated that:

> [T]hey had excellent numbers of individuals enrolled in the study, 128, which is a very large number for this disease. They used standardized questionnaires to determine exposures and symptoms. They used standardized pulmonary function testing to get the FEV1 and other parameters. So, I see no problem with the methodology at all.

Claimant's Exhibit M-4 at 30-31. Additionally, the administrative law judge noted that while Dr. Tomashefski declined to conclude that there was a causal nexus between coal mine dust exposure and the development of emphysema in persons with AAD, the doctor acknowledged that the Mayer study "presented a statistical correlation."[15] Decision and Order at 75.

The administrative law judge found that Dr. Green provided a sound basis for his opinion, noting that Dr. Green explained how the medical literature supported his opinion:

> Based on the epidemiologic literature we have discussed, but also based on the established fact that coal mine dust can independently cause emphysema with or without . . . [AAD], based on the dose response studies that have been done with coal miners, based on numerous animal and test tube studies showing that coal mine dust or dust, mineral dust, can stimulate this same kind of inflammatory response in the lung, as cigarette smoking, and also that coal mine dust can directly inactivate alpha-1 antitrypsin, and that someone who has very low levels of that, if they have a direct effect of the dust on the alpha-1 antitrypsin, and it is inactivated, that's going to significantly further impair their defence [sic] mechanisms. So my opinion is based on a lot of sources and lines of evidence.

Claimant's Exhibit M-4 at 63-64.

[15] Although Dr. Tomashefski acknowledged that the Mayer study found "a statistical association between mineral dust exposure and a decrease in FEV1," he stated that "whether that means causation or not isn't entirely certain." Employer's Exhibit M-7 at 40.

In regard to the triggering of emphysema in individuals suffering from AAD, Dr. Green explained:

> I would say the mechanism whereby cigarette smoke does it, is identical to the way coal mine dust does it. I would say probably there's equal amounts of data on both smoking and coal mine dust in terms of the mechanisms and from my reviews of the subject, the pathways, the inflammatory pathways are virtually identical.

Id. at 64.

Because Dr. Green explained why he found that the miner's coal mine dust exposure was a trigger to the development of his emphysema and provided support for his opinion in the medical literature, the administrative law judge acted within his discretion in finding that Dr. Green's opinion was well-reasoned. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

Employer also argues that the administrative law judge erred in finding that Dr. Green's opinion was consistent with the comments to the regulations. We disagree. The administrative law judge noted that the premise of Dr. Green's opinion, that smoking and coal dust exposure operate through similar mechanisms to prompt the release of "proteases" is consistent with the comments to the regulations:

> *In vitro* studies have . . . demonstrated that the protective anti-protease activity of alpha-1 antitrypsin is decreased by exposure to coal dust. These observations support the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms – namely, the excess release of destructive enzymes from dust – (or smoke-) stimulated inflammatory cells in association with a decrease in the protective enzymes in the lung.

Decision and Order at 81 (quoting 65 Fed. Reg. 79920, 79943 (Dec. 20, 2000)).

Contrary to employer's contention, the administrative law judge did not rely on the comments to suggest that coal mine dust exposure "causes emphysema in all miners." Employer's Brief at 50. Rather, the administrative law judge permissibly found that Dr. Green's analysis and reasoning were consistent with the comments to the regulations. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

The administrative law judge also found that Dr. Cohen's opinion, that the miner's coal mine dust exposure had an independent effect on the miner's AAD-induced

emphysema, was consistent with Dr. Green's opinion. Decision and Order at 60; Claimant's Exhibits M-5, S-3. Like Dr. Green, the administrative law judge found that Dr. Cohen possessed "impressive credentials" in the field of occupational pneumoconiosis.[16] *Id.*

Employer next argues that the administrative law judge erred in finding that the opinions of Drs. Tomashefski, Spagnolo, and Oesterling were undermined by their acknowledgement that persons suffering from AAD should not be exposed to coal dust. Employer contends that this rationale is an improper basis to discredit the opinions of its experts because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment. However, as the Director notes, the issue in this case is not whether the miner suffered from a totally disabling respiratory impairment. The issue is whether the miner's coal mine dust exposure effectively triggered the development of his emphysema. *See* 20 C.F.R. §718.201(a)(2), (b). In this case, the administrative law judge rationally found that the documentation presented by Drs. Tomashefski, Spagnolo, and Oesterling did not adequately support their opinions, that coal dust exposure does not trigger the development of emphysema in a miner suffering from AAD, especially in light of their acknowledgement that a person suffering from AAD should avoid work in a dusty environment.[17] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*);

[16] The administrative law judge noted that, in addition to being Board-certified in Internal Medicine and Pulmonary Disease, Dr. Cohen had worked with NIOSH to develop national guidelines for the diagnosis and treatment of patients at black lung clinics. Decision and Order at 60; Claimant's Exhibits M-5, S-3. The administrative law judge also noted Dr. Cohen's position as an Assistant Professor of Environmental and Occupational Health Sciences at the University of Illinois School of Public Health. *Id.*

[17] Dr. Tomashefski opined that the miner suffered from a lifetime impairment due to severe panlobular emphysema due to AAD that was "in no way" aggravated by his coal dust exposure. Employer's Exhibit M-7 at 47. However, Dr. Tomashefski also stated that "any patient who has severe underlying disease such as those patients with alpha-1 antitrypsin deficiencies, inhaling dust would . . . increase their respiratory distress" and would be "detrimental" to them. *Id.* at 57.

Dr. Spagnolo opined that coal dust exposure does not exacerbate or accelerate the development of AAD-induced emphysema. Employer's Exhibit M-6 at 35. However, Dr. Spagnolo acknowledged that a person with AAD would be "probably sensitive" to airway irritants. *Id.* at 82. Dr. Spagnolo further stated that he would not recommend that an individual with AAD work in an underground coal mine. *Id.* Dr. Spagnolo also stated that he would advise the miner not to "work in a dusty environment." *Id.* at 83.

Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985).

Employer's remaining statements regarding the opinions of its experts amount to no more than a request to reweigh the evidence of record.[18] Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

In weighing the conflicting medical opinion evidence, the administrative law judge properly addressed the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge's decision to accord the greatest weight to Dr. Green's opinion, as supported by the opinions of Wagner, Cohen and Doyle, is supported by substantial evidence. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of AAD-induced emphysema that was triggered by both smoking and coal mine dust exposure. 20 C.F.R. §718.201(a)(2).

Based upon his review of the evidence as a whole, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20

Dr. Oesterling opined that, while the miner's smoking history was an "accelerant in the deterioration of lung function" in persons with AAD, coal dust exposure was not a known irritant. Employer's Exhibit M-5 at 41. However, when asked whether he would recommend that a person with AAD work in the mines, Dr. Oesterling answered: "No, I would not advise anybody with that type of pulmonary disease to subject themselves to any more dust than they had to." *Id.* at 47.

[18] As previously noted, the administrative law judge accorded less weight to Dr. Branscomb's opinion because he opined that coal mine dust exposure does not cause emphysema, an opinion contrary to the Department's position. Decision and Order at 52 n.27. The administrative law judge also accorded less weight to Dr. Branscomb's opinion because he testified that he was not familiar with current medical literature pertaining to AAD. *Id.* The administrative law judge found that while Dr. Castle opined that the miner's condition was not caused by coal dust exposure, the doctor provided no explanation regarding why coal dust exposure did not contribute to, or aggravate, the miner's emphysema. Decision and Order at 52 n.27. Because employer does not challenge the administrative law judge's bases for discrediting these opinions, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

C.F.R. §718.202(a). *Compton*, 211 F.3d at 211, 22 BLR at 2-174; Decision and Order at 62. We affirm this finding, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Total Disability Due to Pneumoconiosis

Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

The administrative law judge found that:

> [The] medical experts agree that the miner's [AAD] was "triggered" and resulted in the severe, debilitating emphysema leading to a lung transplantation and eventual death. . . [T]his tribunal has concluded that the miner's smoking *and* coal dust exposure histories each served as a "trigger" to development of the emphysema. As a result, it is determined that coal dust exposure was a "substantially contributing cause" to the miner's totally disabling respiratory impairment . . .

Decision and Order at 63-64 (footnote omitted).

This finding is affirmed as unchallenged on appeal. *Skrack*, 6 BLR at 1-711. As the administrative law judge properly found no basis to modify the determination that the miner was totally disabled due to legal pneumoconiosis, we affirm the denial of employer's request for modification in the miner's claim.[19]

[19] In light of employer's failure to establish a basis for modification of Judge O'Brien's award of benefits in the miner's claim, the administrative law judge's

The Survivor's Claim

Because claimant's survivor's claim is subject to the evidentiary limitations set forth at 20 C.F.R. §725.414, the administrative law judge considered a more limited set of evidence in his adjudication of this claim. The administrative law judge admitted Dr. Green's February 3, 2005 deposition testimony as claimant's combined biopsy and autopsy report and Dr. Oesterling's report as employer's combined biopsy and autopsy report. 20 C.F.R. §725.414(a)(2)(i), (3)(i). The administrative law judge admitted the opinions and deposition testimony of Drs. Green and Cohen as claimant's affirmative medical opinion evidence. 20 C.F.R. §725.414(a)(2)(i). The administrative law judge admitted the reports and deposition testimony of Drs. Tomashefski and Spagnolo as employer's affirmative medical opinion evidence. 20 C.F.R. §725.414(a)(3)(i). The administrative law judge also admitted Dr. Yousem's pathology report and deposition testimony "solely for purposes of impeachment." Decision and Order at 2.

Employer contends that the administrative law judge erred in excluding Dr. Oesterling's deposition testimony. We disagree. Section 725.414(c) provides, in relevant part, that:

> A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided by this section. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of §725.456 of this part.

20 C.F.R. §725.414(c).

Section 725.414(a)(1) provides that a "medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition." 20 C.F.R. §725.414(a). A medical report may be prepared by "a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a)(1).

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determination of an onset date of benefits in the miner's claim was unnecessary. Decision and Order at 64.

Dr. Oesterling's deposition testimony was inadmissible under 20 C.F.R. §725.414(c), because employer had already submitted its full complement of medical reports, *i.e.*, the affirmative medical reports of Drs. Tomashefski and Spagnolo pursuant to 20 C.F.R. §725.414(a)(3)(i). Employer did not argue to the administrative law judge that good cause justified the admission of Dr. Oesterling's deposition. We, therefore, reject employer's argument and turn to the administrative law judge's analysis of the survivor's claim.[20]

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[21] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

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[20] Employer also argues that the administrative law judge erred in failing to consider the "cross-examination deposition of Dr. Yousem." Employer's Brief at 53. Contrary to employer's contention, the administrative law judge admitted and considered Dr. Yousem's deposition in the survivor's claim. Decision and Order at 65.

[21] Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

For the same reasons that he articulated in his adjudication of the miner's claim, the administrative law judge accorded the greatest weight to Dr. Green's opinion that the miner's smoking and coal mine dust exposure triggered the development of his "severe, extensive, and disabling emphysema." Decision and Order at 82. The administrative law judge, therefore, found that the evidence established the existence of legal pneumoconiosis. *Id.* Employer challenges this finding based on the same arguments that it made in the miner's claim. For the same reasons set out in our review of the miner's claim, we affirm the administrative law judge's finding that the miner's emphysema constituted legal pneumoconiosis pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4).

The administrative law judge also found that the evidence established that the miner's legal pneumoconiosis, in the form of emphysema triggered by both smoking and coal mine dust exposure, was a "substantially contributing cause or factor" leading to the miner's death. 20 C.F.R. §718.205(c). This finding is affirmed as unchallenged on appeal. *Skrack*, 6 BLR at 1-711. We, therefore, affirm the administrative law judge's award of benefits in the survivor's claim.

Due Process

Relying upon *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998) and *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), employer argues that liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund). Employer contends that its due process rights were violated because of the district director's failure to resolve a discovery dispute before the miner died on July 19, 2001.[22] Employer argues that the district director's inaction prevented it from obtaining pertinent family, medical, and exposure histories from the miner. The Director contends that the facts of the instant case are distinguishable from those of *Lockhart and Borda*. We agree.

In *Lockhart*, the United States Court of Appeals for the Fourth Circuit held that the DOL's inexcusable delay in notifying the employer of its potential liability deprived it of the opportunity to mount a meaningful defense. *Lockhart*, 137 F.3d at 808, 21 BLR at 2-322. The Fourth Circuit, therefore, held that benefits were to be paid from the Trust Fund. *Id.* By contrast, in this case, the DOL provided timely notification to employer of its potential liability.

[22] On March 27, 2001, employer notified the district director that the miner had refused to answer interrogatories or sign a medical release. Employer requested that the district director order the miner to comply with its discovery requests. The miner died before the discovery issues could be resolved.

In *Borda*, the Fourth Circuit noted that *Lockhart* established a straightforward test for determining whether an employer has been denied due process by the government's delay in notification of potential liability: whether the government deprived the employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property." *Borda*, 171 F.3d at 183, 21 BLR at 2-559-560 (citation omitted). The Fourth Circuit emphasized that it "is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Borda*, 171 F.3d at 183, 21 BLR at 2-560.

In this case, employer was timely notified of the miner's claim in 1983 and was provided an opportunity to submit interrogatories to the miner, cross-examine the miner at a formal hearing, and have the miner examined by its physicians who had the opportunity to ask the miner about his employment and medical histories. Director's Exhibits M-6, M-29, M-35. Moreover, at the time of the initial adjudication of the miner's claim, the relationship of the miner's coal mine dust exposure to his AAD-induced emphysema was an issue in the case. Thus, employer was aware of the issue at that time. We, therefore, reject employer's contention that it was unlawfully deprived of a meaningful opportunity to question the miner.[23] Consequently, under the facts of this case, we hold that the DOL did not deprive employer of a fair opportunity to mount a meaningful defense. Consequently, we decline to transfer liability for the payment of benefits to the Trust Fund.

[23] Employer notes that it filed its request for modification on January 18, 2001 and that the miner died on July 19, 2001, before it could question him. However, "[t]he Due Process Clause does not require the government to insure the lives of black lung claimants." *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 807, 21 BLR 2-302, 2-319 (4th Cir. 1998). The issue is whether the government's delay in notice of a claim deprives a party of the ability to mount a defense. *Id*. In this case, there was no delay in notification and employer was not deprived of an ability to mount a defense. Employer submitted numerous reports of physicians addressing the relevant issue in this case, namely, whether the miner's AAD-induced emphysema was triggered or aggravated by his coal mine dust exposure.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge