BRB No. 01-0634 BLA

DAISY M. WILBURN (Widow of ROBERT E. WILBURN) Claimant-Respondent v. CONSOLIDATED COAL COMPANY and ACORDIA EMPLOYERS SERVICES CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,) UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Edward Waldman (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (00-BLA-0616) of Administrative Law Judge Michael P. Lesniak[1] on a survivor's claim[2] 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).[3] The administrative law judge credited

[1]By Order dated July 23, 2001, the Board accepted employer's Petition for Review and brief as part of the record. The Board indicated that response briefs could be filed within thirty days from receipt of the Order. On July 26, 2001, the Director, Office of Workers' Compensation Programs, filed a brief in which he addressed the effect of the amended regulations but declined to respond to employer's Petition for Review and brief.

[2]Claimant, the miner's widow, filed the instant claim on April 27, 1999. Director's Exhibit 1. The miner's death certificate indicates that he died on October 26, 1996 due to acute leukemia. Director's Exhibit 17.

[3]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 65 Fed. Reg. 80,045 - 80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction).

In the instant case, the administrative law judge found that the revised regulations will not affect the outcome of the case, and he applied those regulations. He noted, *inter alia*, that the revision at 20 C.F.R. §718.205(c)(5), providing that 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), codifies the existing law as enunciated by the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Decision and Order at 12, 13, 17, 18.

On August 9, 2001, the United States District Court for the District of Columbia

the miner with at least forty-one and one-half years of coal mine employment as stipulated by the parties. Considering the merits of the claim pursuant to the amended regulations, the administrative law judge found that the autopsy evidence, supported by the pathology report of Dr. Wecht, established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(2), as did the credible medical opinion evidence under 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge also found that claimant established that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203, and that pneumoconiosis was a substantially contributing cause of the miner's death within the meaning of the revised regulation at 20 C.F.R. §718.205(c)(5) and pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in his weighing of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and in finding the autopsy evidence sufficient to establish the existence of the disease at 20 C.F.R. §718.202(a)(2). Employer also challenges the administrative law judge's finding of death due to pneumoconiosis under 20 C.F.R. §718.205(c). The Director, Office of Workers' Compensation Programs, has not responded to these contentions by employer.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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.

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issued its decision, *inter alia*, upholding the validity of the challenged regulations. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by employer and the Director, Office of Workers' Compensation Programs, regarding the impact of the challenged regulations.

359 (1965).

Employer contends that it was irrational for the administrative law judge to accord less weight to the x-rays taken from May 1988 through October 1996 because he found that they "were interpreted by hospital physicians, not for the purposes of diagnosing pneumoconiosis, but for the purposes of diagnosing cancer and for assessing the miner's pulmonary condition relative to undergoing anesthesia and for cancer treatments." Decision and Order at 14. Employer's contention has merit. The record contains a total of twenty-three x-ray readings. The administrative law judge resolved the eleven conflicting x-ray readings dating from March 1970 to July 1982 based on a qualitative and quantitative analysis. He then accorded less weight to the remaining twelve x-ray readings of record dating from May 1988 through October 1996 because he found that these reading were "interpreted by hospital physicians, not for the purposes of diagnosing pneumoconiosis, but for the purposes of diagnosing cancer and for assessing the miner's pulmonary condition relative to undergoing anesthesia and for cancer treatments." Decision and Order at 14. While the administrative law judge correctly characterized these twelve x-ray readings as having been rendered by a "hospital physician," the record reveals that all but one reading of the twenty-three x-ray readings of record was rendered by a physician at a hospital. *See* Director's Exhibits 19, 37.[4] We thus hold that the administrative law judge selectively analyzed the x-ray evidence of record by singling out some of the readings rendered by "hospital physicians."

We hold harmless, however, the administrative law judge's error. The x-ray readings rendered from May 1988 to October 1996 do not include any classification under the International Labour Organization classification system and, therefore, are not determinative of the issue of the existence, or absence, of pneumoconiosis. 20 C.F.R. §§718.102; 718.202(a)(1). The administrative law judge's error thus cannot affect his ultimate conclusion that the preponderance of the x-ray evidence fails to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4]Dr. Silverman's positive x-ray dated July 29, 1982 was taken at his office. Director's Exhibit 37.

Employer contends that the administrative law judge erred in crediting Dr. Wecht's pathology report in finding the existence of pneumoconiosis established under 20 C.F.R. §718.202(a)(2).[5] The relevant evidence consists of the autopsy report[6] and the reports of pathologists Drs. Wecht, Naeye, Bush, Tomashefski and Morgan.[7] The

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[5]The revised regulation at 20 C.F.R. §718.202(a)(2) provides:

> A biopsy or autopsy conducted and reported in compliance with [20 C.F.R.] §718.106 may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy or biopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. A report of autopsy shall be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented.

20 C.F.R. §718.202(a)(2).

[6]The autopsy, conducted on October 27, 1996 by Drs. Goldblatt and Pisano, was restricted to the miner's chest. Director's Exhibit 18. The autopsy report, which has a cover letter dated March 27, 2000, includes the following final anatomic diagnoses: acute myelogenous leukemia; cardiomegaly (690 grams); mild calcific atherosclerotic coronary artery disease; calcific aortic valvular stenosis; macular, simple coal workers' pneumoconiosis, and pulmonary emphysema. *Id.* The clinicopathological summary states, "This 80-year-old white male died in a natural manner due to acute myelogenous leukemia. Macular, simple coal workers' pneumoconiosis is present." *Id.*

[7]Dr. Wecht reviewed the miner's medical records and the tissue slides taken at the time of the autopsy. He opined that the miner suffered from coal workers' pneumoconiosis, and died as a result of "pneumonia, a terminal complication of acute leukemia." Director's Exhibit 21. He further opined that the miner's coal workers' pneumoconiosis, which was the basis for his chronic obstructive pulmonary disease, was a substantially contributing factor in his death. *Id.* Dr. Wecht reiterated his conclusions at his April 17, 1998 deposition. Director's Exhibit 20.

Dr. Naeye opined that the lung tissue available for analyses "has none of the findings of [coal workers' pneumoconiosis]," and indicated that the miner died due to "a non-occupational disorder, acute myelogenous leukemia." Employer's Exhibit 1.

Dr. Bush reviewed the miner's medical records, autopsy and tissue slides, and opined that there was no evidence of coal workers' pneumoconiosis or any chronic dust disease related to coal mine employment. He stated that the miner's death was due to

administrative law judge determined that the autopsy prosectors' findings of anthracotic pigmentation and fibrosis with macule formation, along with their diagnosis of simple coal workers' pneumoconiosis was supported by Dr. Wecht's reviewing pathology report. He then noted that "[a]lthough Drs. Naeye, Bush and Tomashefski all state there are no findings of pneumoconiosis present, they all agree to the presence of black pigmentation in the lung tissue, and the presence of either centrilobular emphysema or some fibrosis." Decision and Order at 15. The administrative law judge accorded greater weight to Dr. Wecht's opinion as he found that it was well documented and reasoned, and was supported by the gross and microscopic findings detailed in the autopsy report. The administrative law judge also determined that Dr. Wecht's findings did not conflict with the x-ray evidence as the physician testified that micronodules less than six millimeters may not be seen on an x-ray. The administrative law judge further found that Dr. Wecht's opinion was consistent with the miner's documented physical complaints, by the fact that the miner was a non-smoker, and by the miner's long-term history of coal mine employment. The administrative law judge next found that Dr. Naeye's report was internally inconsistent and inadequately reasoned, that Dr. Bush's report was equivocal, and that Dr. Tomashefski's report was not well reasoned. He thus accorded these reports less weight. The administrative law judge also found that Dr. Morgan did not review the autopsy report, the tissue slides, or Dr. Wecht's report, and was less qualified than Drs. Wecht, Naeye, Bush and Tomashefski. He thus accorded less weight to Dr. Morgan's opinion. The administrative law judge concluded that the autopsy report, supported by Dr. Wecht's well reasoned report, outweighed the reports of Drs. Naeye, Bush, Tomashefski, and Morgan. He added, "Since I find there is no credible evidence that the autopsy report is inaccurate, I find that claimant has proven the existence of

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acute leukemia, which was not caused, contributed to, or hastened by chronic dust disease from coal mine employment. Employer's Exhibit 3.

Dr. Tomashefski reviewed the miner's medical records, autopsy, and tissue slides. He opined that acute leukemia was the underlying cause of the miner's death and gram negative sepsis was its immediate cause. He added that the miner did not have coal workers' pneumoconiosis and thus the disease neither caused nor was a contributing factor in his death. Employer's Exhibit 5. Dr. Tomashefski reiterated his conclusions at his deposition on July 22, 2000. Employer's Exhibit 7.

Dr. Morgan reviewed the miner's medical records and opined that he died due to acute leukemia which was unrelated to his inhalation of coal dust or coal mine employment. Dr. Morgan also opined that there was no evidence of coal workers' pneumoconiosis either radiographically or "on pathological examination." Employer's Exhibit 8. Employer does not challenge the administrative law judge's discrediting of Dr. Morgan's report.

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)." Decision and Order at 16. Employer contends that the administrative law judge failed to recognize that Dr. Wecht found macules measuring between three and five millimeters in diameter, *see* Director's Exhibit 21, while the autopsy prosectors found macule formation of only up to two millimeters and did not find nodules or micronodules as Dr. Wecht described, *see* Director's Exhibit 8, and that the administrative law judge failed to recognize that only Dr. Wecht diagnosed pneumonia and did not comment on the leukemic abnormalities in the tissue slides.

Employer's contentions lack merit. The administrative law judge properly characterized Dr. Wecht and Dr. Goldblatt, one of the autopsy prosectors, as having found macule formation, *see* Decision and Order at 15, and the difference between the size of the macules identified is not relevant. *See* 20 C.F.R. §718.202(a)(2). Further, the administrative law judge properly characterized Dr. Wecht as finding that the miner died as a result of pneumonia, a terminal complication of acute leukemia, *see* Director's Exhibit 21; Decision and Order at 7, and was not obligated to discredit his finding of pneumonia on the basis that no other physician made the same finding. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Moreover, while Dr. Wecht did not mention any leukemic abnormalities on the tissue slides, he stated, "Other histopathological changes are noted, which are not relevant to the diagnosis of pneumoconiosis." Director's Exhibit 21.

Employer contends that the administrative law judge erroneously determined that findings of black pigmentation in the tissue slides rendered by Drs. Naeye, Bush and Tomashefski were equivalent to diagnoses of coal workers' pneumoconiosis. Employer's contention lacks merit. The administrative law judge determined that "[a]lthough Drs. Naeye, Bush and Tomashefski all state that there are no findings of pneumoconiosis present, they all agree to the presence of black pigmentation in the lung tissue, and the presence of either centrilobular emphysema or some fibrosis." Decision and Order at 15. Contrary to employer's argument, the administrative law judge's finding does not contradict the regulation at 20 C.F.R. §718.202(a)(2) which provides that a finding in an autopsy or biopsy of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2). Further, the administrative law judge's suggestion that black pigmentation in lung tissue is an indicia of the presence of coal workers' pneumoconiosis, is not inconsistent with the definition of "clinical" pneumoconiosis provided at 20 C.F.R. §718.201(a)(1),[8] which definition the administrative

[8]20 C.F.R. §718.201(a)(1) provides:

> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of

law judge specifically discussed. *See* Decision and Order at 15.

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particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

Employer next contends that Dr. Naeye's pathology report is reasoned and documented and should have been credited. Employer argues that the administrative law judge erred in finding that Dr. Naeye did not understand or discuss the miner's medical and work histories, did not explain how the positive x-ray evidence was discounted, and failed to explain why his finding of black pigmentation was not coal workers' pneumoconiosis. Employer's contentions lack merit. The administrative law judge permissibly accorded less weight to Dr. Naeye's report because he found that it was internally inconsistent and inadequately reasoned. *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Specifically, the administrative law judge noted that while Dr. Naeye found "none of the findings of [coal workers' pneumoconiosis]" and no lesions upon reviewing the lung tissue slides, the physician noted the presence of black pigment and the formation of centrilobular emphysema. The administrative law judge could rationally determine that these findings were contradictory because the presence of black pigmentation in lung tissue is an indicia of the presence of clinical pneumoconiosis, 20 C.F.R. §718.201(a)(1), and because a finding of centrilobular emphysema arising out of coal mine employment would constitute a diagnosis of "pneumoconiosis." 20 C.F.R. §§718.201(a); 718.202; 718.203(b). Further, the administrative law judge correctly noted that Dr. Naeye did not comment on whether or not the centrilobular emphysema he saw on the tissue slides was related to the miner's coal mine employment.[9] *See* Employer's Exhibit 1. The administrative law judge also permissibly determined that Dr. Naeye's statement that "This man had enough exposure to coal mine dust to produce [coal workers' pneumoconiosis] but none of the other criteria for the diagnosis have been met," was not credible because:

> Dr. Naeye was either unaware of or did not discuss the miner's extensive history of complaints of shortness of breath and sputum production dating back to 1979. He does not explain how he discounted the positive chest x-rays of record, the gross autopsy findings, and his own tissue findings that described the presence of black pigmentation and the formation of centrilobular emphysema.

Decision and Order at 15; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

Employer also contends that the administrative law judge misinterpreted Dr. Bush's

[9]Dr. Naeye opined, however, that the miner's "centrilobular emphysema was not severe enough to produce abnormalities in lung function so the issue of whether coal mine dust had a role in its genesis is moot." Employer's Exhibit 1.

finding of *no significant* fibrotic reaction in the lung tissue to mean that there was *some* fibrotic reaction, which would support the findings of the autopsy prosectors and Dr. Wecht. Employer argues that Dr. Bush unequivocally asserted that there was no evidence of coal workers' pneumoconiosis or any chronic dust disease and that the autopsy prosectors' diagnosis of simple coal workers' pneumoconiosis was inappropriate in the absence of macules. Employer's Brief at 14; *see* Employer's Exhibit 3. Dr. Bush found that the dust pigment present on the tissue slides was "associated with polarizing particulates of silicates and associated with no significant fibrotic reaction." Employer's Exhibit 3. The administrative law judge determined that Dr. Bush's statement infers that there was "some fibrotic reaction seen which would support the findings of the prosectors and Dr. Wecht." Decision and Order at 15. We hold that the interpretation given Dr. Bush's statement by the administrative law judge was unreasonable when the statement is read in the context of the full opinion in which it was rendered. *See Piney Mountain Coal Co. v.* Mays, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). A review of Dr. Bush's opinion reveals that he distinguished his own findings from those of the autopsy prosectors and Dr. Wecht regarding the existence of coal workers' pneumoconiosis. Employer's Exhibit 3. Notwithstanding the administrative law judge's error in interpreting Dr. Bush's opinion, we hold that substantial evidence supports the administrative law judge's ultimate conclusion that the reports rendered by, *inter alia*, Drs. Naeye, Bush and Tomashefski are outweighed by the autopsy report and pathology report of Dr. Wecht, which the administrative law judge properly found to be better reasoned and documented. *Clark, supra*; *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987).

Employer next challenges the administrative law judge's weighing of Dr. Tomashefski's pathology report in finding the existence of pneumoconiosis established under 20 C.F.R. §718.202(a)(2). Employer argues that there is no evidence to support the administrative law judge's finding that Dr. Tomashefski unreasonably disregarded the miner's coal mine employment history in concluding that the fibrosis seen on autopsy was due instead to aging. Employer also argues that Dr. Tomashefski fully explained his opinion. Employer's contention lacks merit. The administrative law judge permissibly accorded less weight to Dr. Tomashefski's pathology report because none of the other physicians of record opined, as Dr. Tomashefski did, that the miner's fibrosis was not due to his coal mine employment, but was due to aging. *See generally Fuller v. Gibraltar Coal Co.,* 6 BLR 1-1291 (1984). The administrative law judge also properly found that Dr. Tomashefski's conclusions were contrary to the credible findings of the autopsy prosectors who noted the presence of coal macules on gross and microscopic examination. *Id.*

Based on the foregoing, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) as it is supported by substantial evidence, including the autopsy report and Dr.

Wecht's pathology report. We also affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202 pursuant to *Compton*. Decision and Order at 17.[10]

[10]Employer does not challenge the substance of the administrative law judge's finding at 20 C.F.R. §718.203(b). Rather, employer states that because this finding is dependent on a finding of the existence of pneumoconiosis, it should be vacated along with the administrative law judge's finding of the existence of the pneumoconiosis. Employer's Brief at 18 n.1. In light of our affirmance of the administrative law judge's finding that claimant established the existence of pneumoconiosis, we also affirm his finding that the disease arose out of the miner's coal mine employment at 20 C.F.R. §718.203(b).

Employer next challenges the administrative law judge's finding that claimant established death due to pneumoconiosis under 20 C.F.R. §718.205(c). In weighing the relevant conflicting evidence,[11] the administrative law judge initially found that the record contained no information that Dr. Saunders, who signed the death certificate, possessed any relevant qualification or had personal knowledge of the miner's condition. He thus accorded less weight to the death certificate. The administrative law judge then noted that the autopsy report, while listing the presence of macular, simple coal workers' pneumoconiosis, does not state whether the disease hastened or contributed to the miner's death. With regard to the reviewing pathologists' opinions, the administrative law judge noted that they agreed that the miner's death was caused by the effects of acute leukemia. The administrative law judge accorded

[11]The record contains the following evidence relevant to the cause of the miner's death: (1) The report from the miner's hospitalization which terminated in his demise, which includes a discharge diagnosis of gram negative sepsis; refractory acute myeloblastic leukemia; chronic obstructive pulmonary disease; hypertension and diabetes. Director's Exhibit 19. (2) The death certificate, signed by Dr. Darrell F. Saunders, Jr., which indicates that the miner died on October 26, 1996 due to acute leukemia. Director's Exhibit 17. (3) The autopsy report which states, "This 80-year-old white male died in a natural manner due to acute myelogenous leukemia. Macular, simple coal worker[s'] pneumoconiosis is present." Director's Exhibit 18. (4) Dr. Wecht's opinion which includes a finding that the miner "died as a result of pneumonia, a terminal complication of acute leukemia." Director's Exhibit 21. Dr. Wecht added that the miner's coal workers' pneumoconiosis, which was the basis for his chronic obstructive pulmonary disease, was a substantial contributing factor in his death. *Id*. (5) Dr. Naeye's report, which includes the finding that the miner died of a non-occupational disorder, acute myelogenous leukemia. He disagreed with Dr. Wecht's finding that the miner had coal workers' pneumoconiosis which contributed to his death. Employer's Exhibit 1. (6) Dr. Bush's report, which includes the finding that death was due to acute leukemia which was not caused by, contributed to or hastened by chronic dust disease from the miner's coal mine employment. Dr. Bush disagreed with the diagnosis of simple coal workers' pneumoconiosis rendered by the autopsy prosectors and Dr. Wecht, and characterized his conclusions as "similar to those in the report of Dr. Naeye (03/21/98)." Employer's Exhibit 3. (7) Dr. Tomashefski's report, which includes the finding that acute leukemia was the underlying cause of the miner's death, with gram negative septicemia its immediate cause. He added that since the miner did not have pneumoconiosis, it did not cause his death and was not a contributing factor in his death. Employer's Exhibit 5. (8) Dr. Morgan's opinion, which includes the statement that the miner "died from acute leukaemia which is entirely unrelated to the inhalation of coal dust or coal mine employment." Employer's Exhibit 8.

less weight to the opinions of Drs. Naeye and Morgan because they did not state what effect pneumoconiosis, if present, would have had on the miner's death. The administrative law judge found most persuasive Dr. Wecht's opinion that pneumoconiosis was a substantially contributing factor in the miner's death, because Dr. Wecht is a highly qualified pathologist and his report is well reasoned. The administrative law judge accorded less weight to the opinions of Drs. Bush and Tomashefski, that if pneumoconiosis were present it did not impact the miner's lung function, because he found that these reports, in contrast to the report of Dr. Wecht, were not well explained or well reasoned. The administrative law judge thus concluded that claimant established that the miner's pneumoconiosis hastened his death "under the standards imposed by" 20 C.F.R. §718.205(c) and *Shuff v. Cedar Coal Co.,* 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Decision and Order at 20.

Employer asserts that the administrative law judge should have interpreted the autopsy report as affirmatively indicating that pneumoconiosis was not a cause of the miner's death, inasmuch as it only indicates that coal workers' pneumoconiosis was present. We reject employer's assertion as the autopsy report was limited to "final anatomic diagnoses", and included no cause(s) of death. Decision and Order at 18.

Employer next offers several reasons why Dr. Wecht's opinion should not have been credited by the administrative law judge. Employer argues that Dr. Wecht presumed the existence of coal workers' pneumoconiosis based on the miner's coal mine employment history. This contention lacks merit. Dr. Wecht based his diagnosis of pneumoconiosis on his review of the medical evidence and tissue slides. *See* Director's Exhibit 21.

Employer additionally asserts that only Dr. Wecht found the presence of pneumonia and the administrative law judge should have accorded less weight to Dr. Wecht's opinion on this basis. Employer's assertion lacks merit. The administrative law judge was not required to accord less weight to Dr. Wecht's opinion because he alone opined that the miner died as a result of "pneumonia, a terminal complication of acute leukemia." Director's Exhibit 21; *see Worley, supra*. Moreover, having found that the cause of the miner's death was acute leukemia, the pertinent issue before the administrative law judge was the role played by the miner's pneumoconiosis in his death. 20 C.F.R. §718.205(c).

Employer also asserts that Dr. Wecht provided no explanation for his opinion that fibrosis may be due to coal mine employment even where there is no associated carbonaceous pigment. Employer's contention lacks merit. Dr. Wecht explained, on

cross-examination in his deposition, that fibrosis is nothing more than a scarring and one did not need the actual carbonaceous pigment within an area of fibrosis to consider the fibrosis as "having been caused by the inhalation of the pigment". Director's Exhibit 20 at 34.

Employer next argues that no evidence supports Dr. Wecht's opinion that the miner's pneumoconiosis interfered with the oxygenation of his blood and, as a result, played a part in his death. We reject employer's contention. Dr. Wecht explained in detail the basis for his opinion that the miner's pneumoconiosis made it more burdensome for his whole multi-organic system to function properly. Director's Exhibit 20 at 15-19. He further explained that this interference with blood oxygenation resulted from a physiologic impairment of lung function. Director's Exhibit 20 at 39.

Employer contends that the administrative law judge impermissibly interpreted the medical evidence when he discredited Dr. Bush's opinion on the cause of the miner's death because Dr. Bush failed to explain how a chronic lung condition, even a mild one, would not have any effect on someone whose condition had been debilitated and weakened by cancer. Employer also argues that, contrary to the administrative law judge's finding, Dr. Tomashefski fully explained that the degree of the miner's pneumoconiosis would have been so minimal that it would not have had any impact whatsoever in changing the miner's lung function. *See* Employer's Exhibit 7. We reject employer's contentions. The administrative law judge found, within his discretion, that even if the miner's pneumoconiosis was mild, *given the documented condition of the miner at the time of his death*, it was unreasonable to conclude, without further comment or discussion, that his pneumoconiosis would not have affected the miner in any way. Decision and Order at 19, 20. It is within the discretion of the administrative law judge to draw inferences from the medical record before him, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), and we hold that the administrative law judge could properly discredit the reports of Drs. Bush and Tomashefski as contrary to the miner's medical record. *See generally Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Employer argues that the administrative law judge erred in according less weight to the miner's death certificate. Dr. Saunders completed the miner's death certificate, listing the miner's immediate cause of death as acute leukemia. Director's Exhibit 17. The administrative law judge accorded less weight to the miner's death certificate because he found that Dr. Saunders did not possess "any relevant qualifications or personal knowledge of the miner's condition." Decision and Order at 18. Contrary to the administrative law judge's characterization, Dr. Saunders possessed personal knowledge of the miner's condition, having treated

the miner for leukemia prior to his death *See* Director's Exhibit 19. However, as we previously held, the administrative law judge properly accorded the most weight to Dr. Wecht's opinion because he found that it was well reasoned and supported by the miner's autopsy report showing anthracotic macules occupying five percent of the surface area of the miner's lungs. Decision and Order at 19. Given the fact that Dr. Saunders provided no explanation for his finding regarding the cause of the miner's death and because Dr. Saunders indicated that he completed the miner's death certificate before reviewing the results of the miner's autopsy,[12] we hold that the administrative law judge's errors in regard to the miner's death certificate are harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Based on the foregoing, we affirm the administrative law judge's finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205 and further affirm the award of survivor's benefits.

[12]We note that there is no indication in the record that Dr. Saunders was aware that the miner suffered from pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge