BRB No. 09-0505 BLA

DIANE GOFF, RICHARD HYSLOP, AND GRAY HYSLOP o/b/o BERNICE HYSLOP (Widow of HUGH B. HYSLOP)	)	
Claimants-Respondents	)	
v.	)	
OLD BEN COAL COMPANY	)	
and	)	
	)	DATE ISSUED: 05/28/2010
PEERLESS INSURANCE COMPANY	)	
and	)	
LIBERTY MUTUAL SURETY	)	
Employer/Carrier/Surety-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimants.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for the surety.

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

PER CURIAM:

Old Ben Coal Company, through its surety, Liberty Mutual Surety (employer), appeals the Decision and Order on Third Remand – Award of Benefits of Administrative Law Judge Larry S. Merck on a miner's duplicate claim filed on April 26, 1988, and a survivor's claim filed on January 31, 1995, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is before the Board for a fourth time.[2] The procedural history of this case was set forth in *Goff. v. Old Ben Coal Co.*, BRB No. 06-0365 BLA (Jan. 30, 2007) (unpub.); *Hyslop v. Old Ben Coal Co.*, BRB No. 03-0346 BLA (Sept. 30, 2004) (unpub.) and *Hyslop v. Old Ben Coal Co.*, BRB No. 99-0710 BLA (Sept. 27, 2000) (unpub.).[3] The Board previously vacated an award of benefits issued by Administrative Law Judge Robert L. Hillyard on December 30, 2005, with respect to both the miner's claim and the survivor's claim. *Goff*, BRB No. 06-0365 BLA. The Board specifically held that the administrative law judge erred by not discussing all of the medical opinions of record relevant to a finding of the existence of pneumoconiosis based on the autopsy evidence at 20 C.F.R. §718.202(a)(2), and that he erred by not explaining why the opinion of the autopsy prosector, Dr. Heidingsfelder, was entitled to controlling weight. *Id.*, slip. op. at 5. Furthermore, to the extent that the administrative law judge's determinations as to a material change in conditions, disability causation and death due to pneumoconiosis were based on his finding of pneumoconiosis, the Board also vacated the administrative law

[1] Diane Goff, and Richard and Gray Hyslop are the adult children of Bernice Hyslop, the deceased widow of Hugh B. Hylsop, the miner, who died on September 3, 1994, and are acting as representatives of the widow's estate. Director's Exhibit 2A.

[2] By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Goff v. Old Ben Coal Co.*, BRB No. 09-0505 BLA (Mar. 30, 2010) (unpub. Order). Claimant and employer have responded and assert that Section 1556 does not apply to either the miner's claim or the survivor's claim, as they were filed prior to January 1, 2005. Based on the parties' responses, and our review, we hold that the recent amendments are not applicable, based on the filing dates of the claims.

[3] Employer has not challenged in any of the prior appeals, or in the instant appeal, the administrative law judge's conclusion that the miner had a totally disabling respiratory or pulmonary impairment, and it is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge's findings under 20 C.F.R. §§725.309 (2000),[4] 718.204(c), 718.205(c), and remanded the case for further consideration. *Id*., slip op. at 6-7.

On remand, because Judge Hillyard had retired, the case was reassigned to Administrative Law Judge Larry S. Merck (the administrative law judge), who issued his Decision and Order on Third Remand - Award of Benefits dated January 12, 2009, which is the subject of this appeal. With respect to the miner's claim, the administrative law judge determined that the autopsy evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and a material change in conditions under 20 C.F.R. §725.309 (2000). The administrative law judge further found that the evidence was sufficient to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). With respect to the survivor's claim, the administrative law judge found that the evidence was sufficient to establish that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded in both the miner's claim and the survivor's claim.

Employer appeals, asserting that the administrative law judge disregarded the Board's remand instructions and erred, as a matter of law, in failing to weigh all of the medical opinions as to whether the miner had pneumoconiosis. Employer argues that the administrative law judge mischaracterized Dr. Naeye's opinion and erred in giving it little weight as to the existence of pneumoconiosis. Employer further challenges the administrative law judge's credibility findings with respect to the conflicting evidence at 20 C.F.R. §§725.309 (2000), 718.204(c) and 718.205(c), and asserts that his decision fails to satisfy the requirements of the Administrative Procedure Act (APA). Claimants respond, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a brief unless specifically requested to do so by the Board. Employer has filed a reply to claimants' response brief, reiterating its argument that the administrative law judge did not follow the Board's remand instructions and erred in assigning less weight to its medical experts on the issues of the existence of pneumoconiosis and disability causation.

[4] The Department of Labor revised 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 (2001). All citations to the regulations, unless otherwise noted, refer to the revised regulations. The revised regulations at 20 C.F.R. §725.310 do not apply to the miner's claim, as it was pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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). After consideration of the administrative law judge's Decision and Order on Third Remand, the briefs of the parties, and the evidence of record, we conclude that substantial evidence supports the award of benefits in both the miner's claim and the survivor's claim and that there is no reversible error.

I. The Miner's Claim

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, the evidence must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his total disability was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the duplicate claim must also be denied unless the administrative law judge finds that that there has been a material change in the miner's condition since the prior denial. *See* 20 C.F.R. §725.309(d) (2000). The miner's prior claim was denied because he failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Consequently, the new evidence must establish either that the miner had pneumoconiosis or that he was totally disabled in order for claimants to have the miner's claim reviewed on the merits. *Id.*; *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) (holding under the former provision that a miner must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

A. The Existence of Pneumoconiosis

Employer asserts that the administrative law judge erred in finding that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), insofar as he limited his review under that subsection to the original report of the autopsy prosector, and the reports of two pathologists who reviewed the

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's coal mine employment was in Indiana. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

miner's autopsy slides. Employer maintains that the administrative law judge failed to follow the Board's remand instruction to discuss all the medical opinions of record. According to employer, the administrative law judge was required under the APA[6] to consider all relevant evidence as to the existence of pneumoconiosis, including the reports of physicians who prepared consultative reports, based on their review of the autopsy report. Additionally, citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), employer asserts that all forms of evidence must be weighed together under 20 C.F.R. §718.202(a), prior to concluding that the miner had pneumoconiosis. Employer's assertions of error are rejected, as they are without merit.

The Board instructed the administrative law judge on remand to "fully discuss his weighing of the medical opinions of record regarding the results of the miner's autopsy, particularly the opinions of Drs. Crouch and Long, and the extent to which the consultative opinions of record were supported by the type of objective evidence referenced in 20 C.F.R. §§718.202(a)(2) and 718.106." *Goff*, BRB No. 06-0365 BLA, slip op. at 5. The regulation at 20 C.F.R. §718.202(a)(2) states, in pertinent part:

> 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). The regulation at 20 C.F.R. §718.106(a) also provides the following requirements for an autopsy report:

> A report of an autopsy or biopsy submitted in conjunction with a claim *shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of the lung.* If a surgical procedure has been performed to obtain a portion of a lung, the evidence shall include a copy of the surgical note and pathology report of the gross and microscopic

[6] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

> examination of the surgical specimen. If an autopsy has been performed, a complete copy of the autopsy report shall be submitted to the Office.

20 C.F.R. §718.106(a) (emphasis added).

Contrary to employer's assertion, the administrative law judge followed the Board's instruction and determined that the record contains three reports by Drs. Heidingsfelder, Crouch and Naeye, which satisfy the requirements for an autopsy report under 20 C.F.R. §718.106(a). In contrast, the administrative law judge found that the record contains medical reports by Drs. Long, Murthy, Cohen, MacLennan, Gehlhausen, Selby and Tuteur, "who reviewed one or more autopsy reports but who did not review the actual tissue slides." Decision and Order on Third Remand at 7. The administrative law judge found that these medical reports "do not comply with the requirements for an autopsy report . . . as they contain no microscopic description of the lung, but merely discuss the microscopic descriptions of Drs. Heidingsfelder, Crouch or Naeye." *Id*. Thus, the administrative law judge concluded that the reports of Drs. Long, Murthy, Cohen, MacLennan, Gehlhausen, Selby and Tuteur should be considered under 20 C.F.R. §718.202(a)(4), and not 20 C.F.R. §718.202(a)(2). Because the administrative law judge properly applied the requirements of 20 C.F.R. §718.106(a), we reject employer's assertion that the administrative law judge erred in limiting his review under 20 C.F.R. §718.202(a)(2) to the three autopsy reports of Drs. Heidingsfelder, Crouch and Tuteur. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240 (2007) (*en banc*).

Employer also asserts that, even if the administrative law judge properly found that there were only three medical opinions relevant to a review of the autopsy evidence at 20 C.F.R. §718.202(a)(2), the administrative law judge nonetheless erred in finding that the existence of pneumoconiosis was established based on Dr. Heidingsfelder's autopsy report. We disagree.

The miner's autopsy was performed on September 4, 1994, by Dr. Heidingsfelder, and the gross examination revealed anthracosis and interstitial fibrosis. Director's Exhibit 3A. Dr. Heidingsfelder prepared a microscopic examination report on August 17, 1995, based on his review of the ten autopsy slides, and diagnosed the following: 1) pleural, subpleural and interstitial pulmonary fibrosis, marked; 2) pulmonary anthracosis, marked, associated with focal anthracotic macular lesions; 3) pulmonary emphysema, moderate to marked; 4) acute chronic bronchitis; 5) pneumonia; 6) pulmonary fibrohyaline nodule formations; 7) parietal pleural and epicardial surface of the heart, fibrous plaque formations; 8) lymph node showing marked anthracosis; and 9) heart showing patchy myocardial fibrous replacement and evidence of hypertrophy. Director's Exhibit 12A. Dr. Heidingsfelder reported that macroscopic and microscopic findings on autopsy showed "severe chronic lung disease consistent with environmental lung disease (Black Lung Disease)." *Id*.

Dr. Crouch reviewed the autopsy slides and prepared a report, dated April 11, 1996. Employer's Exhibit 1. He concluded that the miner was suffering from end stage fibrosis and found "no histologically discernable dust-related lung disease." *Id*. He based his opinion on the fact that the pathological changes of coal workers' pneumoconiosis were not identified. *Id*. Specifically, Dr. Crouch indicated that there were no coal dust macules, nodules or micronodules present, no evidence of focal emphysema, and no silicotic nodules were observed. *Id*.

Dr. Naeye prepared a report on April 22, 1997, based on his review of the ten autopsy slides, as well as Dr. Heidingsfelder's gross and microscopic findings.[7] Employer's Exhibit 2. He stated that "none of the characteristic findings of coal workers' pneumoconiosis" is present in the miner's lungs, namely "no anthracotic microdules and no fibrous tissue or focal emphysema independently associated with the black pigment that is present." *Id*. Dr. Naeye also noted that there was no evidence of coal workers' pneumoconiosis on the miner's x-ray reports that he reviewed. *Id*.

In weighing the three autopsy reports pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge found that Dr. Heidingsfelder's opinion was reasoned and documented and established that the miner had pulmonary anthracosis, a condition that falls within the definition of clinical pneumoconiosis at 20 C.F.R. §718.201.[8] The administrative law judge noted that, while Drs. Crouch and Naeye opined that the miner did not have characteristic signs of *coal workers' pneumoconiosis*, neither physician specifically disputed Dr. Heidingsfelder's diagnosis of pulmonary anthracosis. Decision and Order on Third Remand at 12. The administrative law judge gave little weight to Dr. Naeye's opinion as to the existence of pneumoconiosis because he found that it was "confusing" and further determined that Dr. Heidingsfelder's opinion was better documented and entitled to controlling weight.

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[7] Dr. Naeye also reviewed the medical reports of Drs. Crouch, Gehlhausen, MacLennan, Combs, Murthy and Selby, along with medical records from Wirth Hospital. Employer's Exhibits 2, 18.

[8] 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 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. 20 C.F.R. §718.202(a)(1) (emphasis added).

Contrary to employer's assertion, the administrative law judge permissibly gave little weight to Dr. Naeye's opinion because he found that Dr. Naeye offered contradictory statements as to whether the miner had anthracosis:

> Dr. Naeye's position on whether or not [the miner] had anthracosis is confusing. In his medical report, Dr. Naeye recorded the presence of black pigment, but he specifically stated that the characteristic features of pneumoconiosis were absent. In his deposition, Dr. Naeye was asked whether a finding of "anthracotic pigment or anthracosis" is the same as a finding of pneumoconiosis . . . He replied that it is not the same as pneumoconiosis, and that the inhalation of dust may cause very black lungs, which is "known as anthracosis," but absent fibrosis or focal emphysema, there would be no abnormality in lung function. Further, Dr. Naeye specifically agreed with Dr. Heidingsfelder's diagnosis of pulmonary anthracosis, and stated that the black pigment identified in the miner's lungs could be considered anthracosis. He then clarified that he was referring only to the black pigment.

Decision and Order on Third Remand at 12; Employer's Exhibit 18 at 44-47. The administrative law judge also reasonably questioned whether "Dr. Naeye's definition of pneumoconiosis is more narrow [sic] than the regulations specify." Decision and Order on Third Remand at 13. As noted by the administrative law judge, although Dr. Naeye cited to "minimal criteria" for finding the presence of an occupational lung disease, requiring black deposits of at least one millimeter in diameter in a particular location of the lung, the regulations "do not include a minimum deposit size for a finding of simple pneumoconiosis." *Id*., quoting Employer's Exhibit 2; *see* 20 C.F.R. §§718.201; 718.202. Additionally, with respect to Dr. Crouch, the administrative law judge properly found that "although he reviewed Dr. Heidingsfelder's autopsy report, [Dr. Crouch] did not specifically rebut Dr. Heidingsfelder's finding of anthracosis, but opined that the [m]iner did not have characteristic signs of pneumoconiosis." Decision and Order on Third Remand at 14.

The Board has previously held in this case that "substantial evidence supports [a finding] that employer's consulting pathologists, Drs. Naeye and Crouch, did not contradict the prosector's finding of anthracosis…." *Hyslop*, BRB No. 99-0710 BLA, slip op at 4 n.3. Based on our prior holding, and because the administrative law judge rationally explained his credibility determinations with regard to Drs. Naeye and Crouch, we reject employer's assertion of error, and affirm the administrative law judge's decision to accord these physicians' opinions less weight. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Finally, although employer contends that Dr. Heidingsfelder's autopsy findings amount to no more than a diagnosis of "anthracotic pigmentation" and that his opinion is insufficient as a matter of law to satisfy claimants' burden of proving the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), the Board has already rejected the same argument raised by employer in a prior appeal in this case. *Hyslop*, BRB No. 99-0710 BLA, slip. op. at 4 n.3. Contrary to employer's contention, Dr. Heidingsfelder not only diagnosed anthracosis but he also diagnosed a "chronic lung disease consistent with environmental lung disease" or coal dust exposure, which satisfies the definition of both clinical and legal pneumoconiosis at 20 C.F.R. §718.201. Director's Exhibit 12A; *see* 20 C.F.R. §718.201. In the absence of a valid exception to the law of the case doctrine, we adhere to our previous holding regarding Dr. Heidingsfelder's opinion.[9] *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Thus, insofar as the administrative law judge determined that Dr. Heidingsfelder's opinion was reasoned and entitled to controlling weight, based on the "thoroughness of his documentation and autopsy findings," we affirm the administrative law judge's finding that claimants have established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order on Third Remand at 14; *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990); *Clark*, 12 BLR at 1-151.

Additionally, we reject employer's assertion that, pursuant to *Compton*, the administrative law judge erred by not weighing all of the evidence together at 20 C.F.R. §718.202(a), prior to finding that the miner had clinical pneumoconiosis.[10] *See Compton*,

[9] Employer asserts that the administrative law judge erred in concluding that Dr. Heidingsfelder has "superior qualifications" because Dr. Heidingsfelder is Board-certified in Anatomical, Clinical and Forensic Pathology, while Dr. Crouch is Board-certified in Anatomic Pathology only. Employer contends that the administrative law judge erred in failing to explain "how Dr. Heidingsfelder's additional board certifications rendered his diagnosis more credible." Employer's Brief in Support of Petition for Review at 16. We consider error, if any, that the administrative law judge committed in failing to explain why he considered Dr. Heidingsfelder to be more qualified than Dr. Crouch to be harmless, as the administrative law judge cited other permissible reasons, besides the qualifications, for his decision to credit Dr. Heidingsfelder's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383 n. 4 (1983).

[10] In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit held that all types of relevant evidence under 20 C.F.R. §718.202(a) must be weighed together to determine whether a claimant suffers from pneumoconiosis. *See Compton*, 211 F.3d at 211, 22

211 F.3d at 211, 22 BLR at 2-174. The Board has long held that 20 C.F.R. §718.202(a) provides four alternative methods for establishing the existence of pneumoconiosis. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002) (*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Because the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has not issued a decision agreeing with *Compton*, we decline to apply that case herein. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the existence of pneumoconiosis was established, based on the autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). Because the newly submitted evidence established the existence of pneumoconiosis, claimants have demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[11] *See Ross*, 42 F.3d at 998, 19 BLR 2-20; Decision and Order at 15.

B. Disability Causation

With regard to the issue of disability causation, employer asserts that the administrative law judge's "erroneous review of the medical evidence related to finding pneumoconiosis . . . affected his later finding of total disability due to pneumoconiosis." Employer's Brief in Support of Petition for Review at 17. Since we have concluded that the administrative law judge properly found the existence of pneumoconiosis established, employer's argument is without merit. Furthermore, we reject employer's contention that the administrative law judge's reliance on the opinions of Drs. MacLennan and Cohen, to find that the miner was totally disabled due to pneumoconiosis, was irrational and not supported by substantial evidence.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge properly gave less weight to the opinions of Drs. Wheeler, Crouch, Selby, Tuteur, Naeye and Wiot, as to the etiology of the miner's respiratory disability, since Drs. Wheeler, Crouch Selby, Tuteur and Naeye did not diagnose pneumoconiosis and because Dr. Wiot did not consider the miner to be totally disabled. *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir.

BLR at 2-174; *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

[11] The administrative law judge permissibly concluded that since "the medical evidence in the [m]iner's previous claim is significantly older than the evidence considered in the current claim," greater weight may be given the newly submitted evidence. Decision and Order at 15; *see Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

1990); Decision and Order on Third Remand at 15. The administrative law judge correctly found that Drs. Murthy, Heidingsfelder and Long did not render opinions as to whether the miner was disabled due to pneumoconiosis. Decision and Order on Third Remand at 16.

With respect to Dr. MacLennan, employer asserts that his opinion was based solely on his review of the autopsy report and that the doctor "provided no rationale for his conclusory statement" that the miner was totally disabled by pneumoconiosis. Employer's Brief in Support of Petition for Review at 18. Contrary to employer's assertion, however, the administrative law judge found that Dr. MacLennan's January 11, 1995 report discussed, not only the autopsy report, but also the course of the miner's August 1994 hospitalization for respiratory failure and congestive heart failure. The administrative law judge observed that Dr. MacLennan had treated the miner for pneumoconiosis and reviewed x-rays, arterial blood gas studies, and the miner's work and smoking histories in reaching his opinion. Decision and Order on Third Remand at 16; Director's Exhibit 5A. We therefore affirm the administrative law judge's finding that the opinion of Dr. MacLennan was reasoned and documented and entitled to full probative weight. *Clark*, 12 BLR at 1-155.

With respect to Dr. Cohen, the administrative law judge noted correctly that the Board affirmed a prior finding that Dr. Cohen's opinion was reasoned and documented as to the issue of disability causation at 20 C.F.R. §718.204(c). *See Hyslop*, BRB No. 03-0346 BLA, slip op. at 6-7; Decision and Order on Third Remand at 17. We also conclude in this appeal that the administrative law judge acted within his discretion in finding that Dr. Cohen's opinion is reasoned and documented and sufficient to establish that the miner's total disability was due to pneumoconiosis.[12] *See McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318.

In summary, the administrative law judge followed the Board's instructions on remand and complied with the APA in setting forth his findings of fact and conclusions of law, including the underlying rationale. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Thus, we affirm, as supported by substantial evidence, the administrative law judge's determination

[12] Employer preserves its argument, which was previously rejected by the Board, that entitlement in both the miner's claim and the survivor's claim is precluded as a matter of law because the miner was totally disabled by non-respiratory conditions prior to his death. *See Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994*); Hyslop v. Old Ben Coal Co.*, BRB No. 99-0710 BLA, slip op. at 3 (Apr. 24, 2001) (Decision and Order on Motion for Recon.) (unpub.); Employer's Brief in Support of Petition for Review at 19.

that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and the award of benefits in the miner's claim. *See Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990); *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990).

II. The Survivor's Claim

To establish entitlement to survivor's benefits, claimants must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5); *Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

Employer challenges the administrative law judge's finding that the miner's death was hastened by pneumoconiosis based on "discrepancies and internal consistencies" in the opinions of Drs. Murthy, Long, MacLennan and Cohen that were not addressed by the administrative law judge.[13] Employer's Brief in Support of Petition for Review at 22. Employer specifically contends that the administrative law judge did not take into consideration the equivocal nature of Dr. Murthy's opinion, that Dr. Long did not initially diagnosis pneumoconiosis,[14] that Dr. MacLennan based his death causation opinion on a

[13] The administrative law judge determined that the opinions of Drs. Wheeler, Selby, Crouch, Tuteur, Wiot and Naeye, that the miner's death was neither caused nor hastened by pneumoconiosis, were entitled to little weight as none of these physicians diagnosed pneumoconiosis. Decision and Order on Third Remand at 19, citing *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002). The administrative law judge found that Dr. Gelhausen's statement on the death certificate, that pneumoconiosis led to the miner's death, was not documented, and that Dr. Heidingsfelder did not address the cause of the miner's death. Decision and Order at 19-20. We affirm the administrative law judge credibility determinations with regard to these physicians, as they are not challenged by the parties on appeal. *See Skrack*, 6 BLR at 1-711.

finding of cor pulmonale, and that Dr. Cohen was not of the opinion that the miner had a heart attack. Employer's Brief in Support of Petition for Review at 20-22.

Contrary to employer's assertion, the administrative law judge was not required to reject Dr. Murthy's death causation opinion on the ground that he used equivocal language in his March 25, 1988 report, in opining that the miner's lung condition "probably" and "may" have been due to a combination of smoking and coal dust exposure. Director's Exhibit 67; *see Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006). The administrative law judge properly found that Dr. Murthy's more recent report, dated January 10, 1995, indicated that he had reviewed the autopsy report and was of the definite opinion that claimant had pneumoconiosis and that coal dust exposure "most certainly [was] a contributing a cause of his death." Decision and Order on Third Remand at 21, quoting Director's Exhibit 9A.

Employer's assertions of error with respect to Dr. Cohen's opinion are also without merit. The administrative law judge thoroughly discussed Dr. Cohen's opinion. Dr. Cohen opined that the miner died as a result of end stage lung disease resulting from pneumoconiosis, repeated episodes of pneumonia, right-sided heart failure and possible congestive heart failure. Claimant's Exhibit 1. After noting that Dr. Cohen did not believe that the miner had a heart attack, the administrative law judge accurately quoted from Dr. Cohen's report that, even if a heart attack caused the miner's death, that heart attack "would only have been the final pathway cause[d] by enormous stress of his end-stage pulmonary process." Decision and Order at 21. The administrative law judge reasonably found that Dr. Cohen's opinion was reasoned and documented and entitled to controlling weight, based on his review of "extensive data." Decision and Order on Third Remand at 21.

We consider employer's assertions of error with regard to the credibility of the medical experts to be little more than a request that the Board reweigh the evidence,

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[14] Employer asserts that the administrative law judge erred in crediting Dr. Long's opinion, that the miner's death was hastened by pneumoconiosis. Employer's Brief in Support of Petition for Review at 21. Contrary to employer's contention, the administrative law judge did not credit Dr. Long's opinion. The administrative law judge specifically found that Dr. Long "reviewed only the autopsy report" and, therefore, her opinion was entitled to less weight at 20 C.F.R. §718.205(c), in comparison to the opinions of Drs. Murthy, MacLennan and Cohen, who based their conclusions on more extensive medical evidence. Decision and Order at 21.

which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Whether a physician's opinion is adequately reasoned and documented is committed to the discretion of the administrative law judge. *See Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (en banc). Because the administrative law judge accurately set forth the findings of Drs. Murthy and Cohen and concluded, within his discretion, that they provided reasoned and documented opinions that the miner's death was hastened by pneumoconiosis, we affirm, as supported by substantial evidence, the administrative law judge's finding that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and the award of benefits in the survivor's claim.[15]

[15] Because we affirm the administrative law judge's reliance on the opinions of Drs. Murthy and Cohen to find that the miner's death was due to pneumoconiosis, it is not necessary the we further address employer's assertions of error with respect to the administrative law judge's crediting of Dr. MacLennan's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order on Third Remand - Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge