BRB No. 07-0181 BLA

V. N. (Widow of D. N.) Claimant-Respondent v. DAUGHERTY COAL COMPANY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/26/2007 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (05-BLA-0026) of Administrative Law Judge Adele Higgins Odegard on a survivor's claim 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).

The procedural history of this claim, which was filed on December 7, 1999, reflects that it was originally assigned to Administrative Law Judge Robert J. Lesniak, and then to Administrative Law Judge Gerald M. Tierney, who each, in turn, remanded the case to the district director for further evidentiary development. Following the additional evidentiary development, in October 2004, the district director issued a proposed Decision and Order awarding benefits. Employer contested this determination and requested a hearing, which was held on May 10, 2006 before Judge Odegard (the administrative law judge).

In a decision dated October 16, 2006, the administrative law judge credited the miner with thirty-seven years of coal mine employment[1] and found that claimant[2] established that the miner had legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) related to coal dust exposure, pursuant to 20 C.F.R. §§718.202(a)(4), 718.203. The administrative law judge further found that claimant established that the miner's legal pneumoconiosis hastened his death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that Judges Lesniak and Tierney abused their discretion by remanding this case for further evidentiary development, prior to its assignment to the current administrative law judge. Employer further contends that the administrative law judge erred in her analysis of the medical opinion evidence relevant to the issues of the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the cause of the miner's death pursuant to 20 C.F.R. §718.205(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging

[1] The record indicates that the miner's coal mine employment occurred in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] Claimant is the miner's widow. The miner died on November 29, 1999, when he was removed from mechanical ventilation following surgery for a perforated ulcer, which developed while he was being treated for metastatic lung cancer. Director's Exhibits 12, 13, 65.

rejection of employer's argument that Judges Lesniak and Tierney abused their discretion in remanding the case to the district director.

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

Initially, we decline to address employer's contention that Judges Lesniak and Tierney abused their discretion in ordering that the case be remanded for further evidentiary development, prior to its assignment to the current administrative law judge.[3] Employer waived the opportunity to challenge these remand orders by failing to contest them below. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995). As the Director contends, the record does not reflect that employer either objected to, or sought reconsideration of, either of the orders of remand. In addition, at the May 10, 2006 hearing before the administrative law judge, employer did not object to the admission of

[3] As noted above, claimant filed her claim for survivor's benefits on December 7, 1999. Director's Exhibit 1. On April 19, 2000, the district director awarded benefits. Director's Exhibit 26. Employer requested a hearing, and the claim was assigned to Administrative Law Judge Robert J. Lesniak. Director's Exhibit 28. After five scheduled hearings were cancelled, the claim was instead set for a decision on the record, at claimant's request. Director's Exhibit 45. However, by Order dated February 23, 2003, Judge Lesniak remanded the claim to the district director for further evidentiary development, as the evidence in the record could not support claimant's burden of establishing pneumoconiosis by a preponderance of the evidence. Director's Exhibit 49.

Following the development of additional evidence, the district director again awarded benefits. Director's Exhibit 53. Employer requested a hearing, and the claim was reassigned to Administrative Law Judge Gerald M. Tierney, who conducted a hearing on February 23, 2004, at which claimant and employer appeared, but at which no testimony was taken and no documents were presented. Director's Exhibits 54, 55, 58. Subsequently, by Order dated June 25, 2004, Judge Tierney also remanded the claim to the district director for further evidentiary development, because the record revealed that, in requesting that claimant's treating physician provide a supplemental opinion, the district director had provided the physician with incorrect information. Director's Exhibit 60. After a new medical opinion was obtained, in October 2004 the district director issued a proposed Decision and Order awarding benefits. Employer contested this determination and requested a hearing, and the case was assigned to Administrative Law Judge Adele Higgins Odegard. Director's Exhibit 70.

the medical reports developed on remand. Moreover, employer had the opportunity to respond to the newly developed medical evidence with additional evidence of its own, including deposition testimony from both of claimant's physicians. The Board reviews procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). As employer has not shown how it was prejudiced by the procedural rulings below, we will not further consider employer's contention that both Judge Lesniak and Judge Tierney abused their discretion in ordering that the claim be remanded for additional evidentiary development. *See Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84, 1-90-91 (1994); *see generally Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991).

Turning to the merits of this claim, to establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). 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); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In evaluating the medical evidence at 20 C.F.R. §718.202(a), the administrative law judge initially found there was no properly classified[4] positive x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), no autopsy or biopsy evidence at 20 C.F.R. §718.202(a)(2), and that none of the presumptions described at 20 C.F.R. §718.202(a)(3) were applicable to this claim. Decision and Order at 9-10. In evaluating the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge found that the evidence was unclear as to whether the miner had clinical pneumoconiosis, but that claimant established the existence of legal pneumoconiosis in the form of COPD due to coal dust exposure. Decision and Order at 16-17.

[4] A chest x-ray must be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization to establish the existence of pneumoconiosis. 20 C.F.R. §718.102(b).

In so finding, the administrative law judge noted that Drs. Schwarzenberg and Kanj opined that the miner's COPD was due to both coal mine dust exposure and smoking, while Drs. Fino and Renn opined that the miner's COPD was due entirely to smoking. Decision and Order at 10-13; Director's Exhibits 10, 11, 13, 29, 30, 51, 65, 66, 68; Employer's Exhibits 1-4. The administrative law judge credited the opinions of Drs. Schwarzenberg and Kanj, but declined to credit the contrary opinions of Drs. Fino and Renn, finding them to be unreasoned. Decision and Order at 13-16. Thus, the administrative law judge concluded that the statements by Drs. Schwarzenberg and Kanj "are sufficient to establish that the miner had pneumoconiosis, as defined by the regulation" at 20 C.F.R. §718.201. Decision and Order at 16. The administrative law judge noted that, although the miner was not diagnosed with pneumoconiosis until after his death, the miner's medical treatment prior to his diagnosis with cancer was consistent with treatment for a coal dust-related pulmonary disease. The administrative law judge noted further that the miner's treatment records for cancer reflected that he had underlying pulmonary disease, unrelated to his cancer. The administrative law judge also considered that the West Virginia Occupational Pneumoconiosis Board (WVOPB) had awarded the miner state benefits for pneumoconiosis. The administrative law judge concluded that the evidence of record established that the miner's underlying disease was related, at least in part, to coal dust exposure. Decision and Order at 16. Finally, the administrative law judge found that, having established that the miner had thirty-seven years of coal mine employment, claimant was entitled to the rebuttable presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and she found that the opinions of Drs. Fino and Renn were insufficient to rebut the presumption. Decision and Order at 16-17.

Employer initially contends that the administrative law judge erred in finding the opinions of Drs. Schwarzenberg and Kanj sufficient to support a finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 5. Employer's argument has merit. As we will set forth, the administrative law judge did not consider the quality of the documentation and reasoning underlying Dr. Schwarzenberg's and Dr. Kanj's opinions, or whether Dr. Schwarzenberg affirmatively linked the miner's COPD to coal dust exposure. 20 C.F.R. §718.202(a)(4); *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

The administrative law judge noted Dr. Schwarzenberg's statement that the miner was referred to him by The Black Lung Clinic, where he had been diagnosed with "Black Lung." The administrative law judge further noted the physician's statements that he believed the miner had pneumoconiosis, that he had treated the miner almost exclusively for black lung and its sequelae, and that the miner had received state awards from the WVOPB, based on its physicians' review of x-rays that they found to be consistent with occupational pneumoconiosis. Decision and Order at 11-13; Director's Exhibits, 66, 68. The administrative law judge also considered Dr. Schwarzenberg's deposition testimony

that, while he lacked any objective evidence to allow him to diagnose coal workers' pneumoconiosis, his clinical findings were consistent with "some kind of obstructive lung disease." Decision and Order at 12; Employer's Exhibit 2. The administrative law judge also noted Dr. Schwarzenberg's concession that part of this obstructive disease was due to smoking. Decision and Order at 11-13; Employer's Exhibit 2.

In finding Dr. Schwarzenberg's opinion to be sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that it was not unusual that Dr. Schwarzenberg did not, himself, formally diagnose the miner with pneumoconiosis, and that the record reflected that "Dr. Schwarzenberg recognized that the Miner had some type of obstructive impairment," had treated him with bronchodilating agents and steroids, and had testified that "such treatments could be appropriate for coal workers' pneumoconiosis." Decision and Order at 13. The administrative law judge also found that "although Dr. Schwarzenberg has indicated that at least a portion of the Miner's [COPD] is attributable to smoking, he has not concluded that the Miner's [COPD] is attributable wholly to that source." Decision and Order at 13; Employer's Exhibit 2. Finally, the administrative law judge noted that Dr. Schwarzenberg had treated the miner for a substantial period of time, and concluded that "Dr. Schwarzenberg's opinion that the Miner had pneumoconiosis, based upon a long history of direct observation and treatment, therefore, is due some respect." Decision and Order at 13-14.

As employer correctly asserts, the administrative law judge's finding that Dr. Schwarzenberg's "statements are sufficient to establish that the Miner had pneumoconiosis, as defined in the regulation" is not supported by the evidence of record. Employer's Brief at 9; Decision and Order at 16. The administrative law judge has selectively analyzed Dr. Schwarzenberg's opinion. *See Wright v. Director, OWCP*, 7 BLR 1-475 (1984).

First, Dr. Schwarzenberg stated in his deposition that the miner had come to him with a diagnosis of pneumoconiosis, and that he had no objective evidence to make such a diagnosis. Rather, Dr. Schwarzenberg stated that he had only clinical findings consistent with "some kind of obstructive lung disease." Employer's Exhibit 2 at 19. Thus, there is no factual basis in the record for the administrative law judge's conclusion that the physician's "opinion that the Miner had pneumoconiosis [was] based upon a long history of direct observation and treatment." Decision and Order at 14; Employer's Exhibit 2 at 12, 19.

In addition, while, as the administrative law judge noted, Dr. Schwarzenberg stated that his treatment of the miner with bronchodilators and steroids was consistent with treatment for pneumoconiosis, Employer's Exhibit 2 at 16, Dr. Schwarzenberg also stated that the miner's clinical findings could be consistent with a cigarette smoke-

induced lung disease, and that the same medications were the primary treatments for cigarette smoke-induced disease. Employer's Exhibit 2 at 19, 21. Finally, while the administrative law judge correctly noted that Dr. Schwarzenberg did not conclude that cigarette smoking was the sole cause of the miner's COPD, the administrative law judge did not identify where Dr. Schwarzenberg stated that the miner's COPD was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" in accordance with the regulatory definition of legal pneumoconiosis. 20 C.F.R. §718.201(a)(2). Thus, the record does not support the administrative law judge's finding that Dr. Schwarzenberg's opinion is sufficient to establish that the miner had pneumoconiosis, as defined in the regulation. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997)(defining substantial evidence as such evidence that a reasonable mind could accept as adequate to support a conclusion); *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999)(holding that the administrative law judge must determine whether evidence is reliable, probative and substantial before relying on it); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Moreover, as employer contends, the administrative law judge failed to determine whether Dr. Schwarzenberg's opinion is sufficiently documented to support claimant's burden of proof, as required by 20 C.F.R. §718.202(a)(4), which sets forth that:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. Any such finding *shall be based on objective medical evidence* . . . . (emphasis added)

An administrative law judge must evaluate the quality of a physician's opinion by considering the qualifications of the physician, the physician's reasoning, the physician's reliance on objectively determinable symptoms as established science, and the detail of analysis. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32. Thus, on remand, the administrative law judge must reconsider Dr. Schwarzenberg's statements, that he had no objective evidence to allow him to make a diagnosis of pneumoconiosis, and that he had only clinical findings consistent with "some kind of obstructive lung disease," in light of the specific requirement at 20 C.F.R. §718.202(a)(4).

In evaluating the opinion of Dr. Kanj, the administrative law judge found that Dr. Kanj had demurred on the issue of whether the miner had coal workers' pneumoconiosis, conceding that his diagnosis was based on a history of the disease reported by the miner and that there was no objective basis for such a diagnosis. The administrative law judge further found, however, that Dr. Kanj stated unequivocally that the miner had COPD, which Dr. Kanj believed to be due to a combination of dust

exposure and cigarette smoking. Decision and Order at 11, 14; Employer's Exhibit 3 at 8, 11, 16. As employer asserts, however, the administrative law judge failed to determine whether Dr. Kanj's opinion is sufficiently documented to support claimant's burden of proof, as required by 20 C.F.R. §718.202(a)(4). Dr. Kanj stated that his diagnosis of pneumoconiosis was based on a history of the disease reported by the miner, and that there was no objective basis for such a diagnosis. Dr. Kanj also stated that he had not reviewed any pulmonary function studies and that it was simply his belief that coal dust contributed to the miner's COPD, because "anyone who gets enough . . . exposure" to coal dust is "subject to have complications." Employer's Exhibit 3 at 16. In addition, Dr. Kanj stated that the miner's COPD could have been due entirely to coal dust, or entirely to smoking. Employer's Exhibit 3 at 15-17. The administrative law judge must consider these additional statements by Dr. Kanj in determining whether Dr. Kanj's opinion represents substantial evidence of the existence of pneumoconiosis.[5] *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Tackett*, 7 BLR at 1-706.

Claimant bears the burden of proof to establish the existence of pneumoconiosis by a preponderance of the evidence, including that the miner's pneumoconiosis was significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996). Contrary to the administrative law judge's approach, claimant may not establish this element of entitlement by use of the rebuttable presumption at 20 C.F.R. §718.203(b). Decision and Order at 16-17. As discussed above, the administrative law judge did not adequately consider the opinions of Drs. Schwarzenberg and Kanj in determining that they were sufficient to meet claimant's burden. In addition, the administrative law judge's reliance on the medical and hospital treatment records, to support her conclusion, is not rational in light of the administrative law judge's earlier finding that the medical and hospital treatment records contained no basis for the diagnoses of coal workers' pneumoconiosis listed therein. Decision and Order at 10 n.11. Similarly, the administrative law judge's reliance on the WVOPB award is not rational, given the administrative law judge's concession, consistent with employer's contention, that the WVOPB awards were based on standards that differ from the federal standards for establishing entitlement to benefits. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 16. Moreover, contrary to the administrative law judge's statement, the WVOPB awards are not "based on evidence *of record* which it determined reliable." (emphasis added).

[5] There is no merit to employer's additional argument, however, that simply because Dr. Kanj stated that he could not quantify the relative contributions by coal dust exposure and cigarette smoking, his opinion is insufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2). *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003).

Decision and Order at 16. Rather, the awards reflect that they are primarily based on x-ray readings that are *not* contained in the record. *See* 20 C.F.R. §725.477(b); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

There is also merit to employer's argument that the administrative law judge erred in her evaluation of the medical opinions of Drs. Fino and Renn. The administrative law judge selectively analyzed these opinions. The administrative law judge dismissed Dr. Fino's opinion, that the miner did not have coal workers' pneumoconiosis or any coal dust-related disease of the lungs, but suffered from COPD due to smoking, because Dr. Fino's opinion was "marred by inaccuracies and poor assumptions." Decision and Order at 15. Specifically, the administrative law judge found that Dr. Fino had incorrectly "presumed that there was no X-ray evidence of pneumoconiosis," when the WVOPB x-ray evidence "at least suggests coal workers' pneumoconiosis;" he had relied on an exaggerated smoking history, ending in 1988 rather than 1979, as found by the administrative law judge; and he had further relied on "very limited medical tests of unknown reliability," including a non-conforming pulmonary function study and blood gas studies administered during the miner's cancer treatment. Decision and Order at 14-15.

As employer correctly contends, contrary to the administrative law judge's conclusion, a review of Dr. Fino's written opinion and deposition testimony reveals that the physician specifically recognized the positive x-ray findings by the WVOPB, but explained that he was reluctant to rely on the WVOPB x-ray evidence because the x-rays were not properly classified for the existence of pneumoconiosis, and he accurately concluded that the record contains no other positive x-ray readings. Director's Exhibit 29; Employer's Exhibit 1 at 8-9. Moreover, Dr. Fino specifically explained that negative x-rays alone do not rule out the existence of pneumoconiosis, but are one factor to consider when evaluating a patient. Employer's Exhibit 1 at 10. In addition, the record does not reflect that Dr. Fino relied upon an inaccurate smoking history to conclude that the miner's COPD was not related to coal dust exposure. Rather, in his deposition, Dr. Fino specifically acknowledged that the miner may have quit smoking in 1979, not 1988, but concluded that the miner's smoking history was nonetheless "significant." Employer's Exhibit 1 at 10. Furthermore, while Dr. Fino concluded that one of the pulmonary function studies he reviewed was non-conforming, the physician explained the degree to which the study remained informative, as well as why he felt the pulmonary function study evidence, as a whole, was consistent with smoking-related disease. Finally, contrary to the administrative law judge's finding, Dr. Fino specifically acknowledged that the miner's blood gas studies were administered during his treatment for lung cancer, and opined that the various abnormalities revealed were consistent with lung damage due to smoking and lung cancer. Director's Exhibit 29; Employer's Exhibit 1 at 11. The administrative law judge erred in failing to address these aspects of Dr. Fino's opinion in concluding that Dr. Fino's opinion was "marred by inaccuracies and

poor assumptions." *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Tackett*, 7 BLR at 1-706; Decision and Order at 15.

The administrative law judge also assigned little weight to the opinion of Dr. Renn, that there is no objective evidence that the miner had coal workers' pneumoconiosis or any coal dust-related disease of the lungs, but that he suffered from COPD due to smoking. Decision and Order at 15. The administrative law judge found, in part, that Dr. Renn's opinion, that the x-ray and computerized tomography (CT) scan evidence of record did not reveal any opacities that would suggest coal workers' pneumoconiosis, conflicted with the WVOPB x-ray evidence. Decision and Order at 15-16. The administrative law judge found that while Dr. Renn's reluctance to rely on the WVOPB x-ray findings was understandable, as the x-ray readings were not classified by the International Labour Organization (ILO) standard, the WVOPB's findings were not based on negative x-ray evidence. Decision and Order at 16 n.17. (emphasis in original). Contrary to the administrative law judge's conclusion, however, the fact that the WVOPB x-ray readings were not ILO-classified renders them insufficient to establish pneumoconiosis. *See* 20 C.F.R. §718.102(b). Therefore, the administrative law judge erred in discrediting Dr. Renn's opinion on the ground that his conclusion, that there was no x-ray or CT scan evidence in the record upon which to base a diagnosis of pneumoconiosis, conflicted with the WVOPB evidence.[6] *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Tackett*, 7 BLR at 1-706; Decision and Order at 15-16; Employer's Exhibit 4 at 10.

The United States Court of Appeals for the Fourth Circuit has held that an administrative law judge must adequately explain her reasons for crediting certain evidence and discrediting other evidence. *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, 439; 21 BLR 2-269, 2-272 (4th Cir. 1997). Because the administrative law judge conducted a selective analysis of the medical opinion evidence to conclude that the miner's COPD was due at least in part to coal dust exposure, and further failed to accurately characterize and assess the opinions provided by Drs. Fino and Renn for their conclusions that the miner's COPD was entirely due to smoking, we vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), and remand this case for further consideration and discussion of all the relevant medical opinion evidence.

[6] In addition, as we noted earlier, the x-rays utilized by the West Virginia Occupational Pneumoconiosis Board are not in the record of this claim.

Employer next challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.205(c), that the medical evidence of record established that the miner's death was due to pneumoconiosis. As noted above, 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); *Sparks*, 213 F.3d at 190, 22 BLR at 2-259. The administrative law judge's findings regarding death due to pneumoconiosis at 20 C.F.R. §718.205(c) are largely dependent on her finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), which we have vacated. Therefore, we also vacate the administrative law judge's findings regarding death due to pneumoconiosis at 20 C.F.R. §718.205(c), and instruct the administrative law judge to reweigh the relevant evidence on remand.

In addition, employer's allegations of error with respect to the administrative law judge's weighing of the medical evidence at 20 C.F.R. §718.205(c) have merit. Specifically, in finding that only Dr. Kanj provided reliable evidence on the issue of the cause of the miner's death, the administrative law judge mischaracterized and selectively analyzed the opinions of Drs. Fino and Renn, that the miner died solely due to lung cancer and septic shock caused by a perforated ulcer. Decision and Order at 20.

The administrative law judge accorded little weight to Dr. Fino's opinion because she found that Dr. Fino did "not address the issue of whether the Miner's underlying lung disease hastened his cardiopulmonary arrest after the withdrawal of the ventilator." Decision and Order at 20. The administrative law judge instead found that Dr. Fino merely stated in his report that "the miner died from lung cancer" and stated in his deposition testimony the miner "died because he had a terminal lung cancer and then ruptured his stomach." Decision and Order at 20. The administrative law judge additionally found Dr. Fino's opinion was "substantially inaccurate," and thus not well reasoned, because Dr. Fino stated that the miner had "perforated his stomach" or "ruptured his stomach," when the miner had actually suffered from a perforated duodenal ulcer. Decision and Order at 20 n.19. A review of the record does not support the administrative law judge's determinations.

First, as employer contends, contrary to the administrative law judge's conclusion, in his deposition, Dr. Fino clearly opined that the miner's lung disease did not hasten his death, stating that: the miner's clinical course would have been the same even if he had no underlying lung disease; that even assuming a preexisting lung disease, it would not have made any difference in when the miner died because he was overwhelmingly infected and dying as a result of the stomach perforation and lung cancer; that the miner's clinical course was no different from that of patients with lung cancer and stomach perforations who had never worked in the mines; and that there was no evidence that the miner's life was shortened by coal mine dust inhalation. Employer's Exhibit 1 at 15-19. The administrative law judge's decision does not reflect her consideration of the entirety

of Dr. Fino's opinion. *See Wright*, 7 BLR at 1-475. In addition, while Dr. Fino stated that the miner had "perforated his stomach" or "ruptured his stomach," Dr. Fino also referred to the miner's condition as a "perforated ulcer" and explained that this perforation had caused the miner's stomach contents to spill into his abdominal cavity, resulting in infection. Employer's Exhibit 1 at 14. Thus, substantial evidence does not support the administrative law judge's conclusion that Dr. Fino's opinion was "substantially inaccurate" and entitled to little weight because he characterized the miner's condition as a "perforated stomach," rather than as a perforated duodenal ulcer. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326.

Finally, employer contends that the administrative law judge erred in discrediting Dr. Renn's opinion as based, in part, on incorrect facts. Employer's contention has merit. The administrative law judge noted Dr. Renn's testimony that he disagreed with Dr. Kanj's opinion, that the miner might have had a chance to survive his post-operative course. The administrative law judge also noted Dr. Renn's explanation that, because the miner was not being treated for sepsis after he was removed from the ventilator, he would not have survived the perforated ulcer in any event. Decision and Order at 20. The administrative law judge then discredited Dr. Renn's opinion because she found that the physician's testimony conflicted with Dr. Kanj's statement that the miner was being treated with antibiotics after his removal from the ventilator, and thus, was based on incorrect facts and was not well reasoned. Decision and Order at 20.

As employer asserts, Dr. Renn acknowledged Dr. Kanj's statement that the miner was being continued on antibiotics after his removal from the ventilator, but noted that it was unclear whether Dr. Kanj was correct. Employer's Exhibit 4 at 14. While the record contains a laboratory report indicating that the miner's gentamycin level was measured at two o'clock on the morning of his death, Director's Exhibit 13, as Dr. Renn noted, there is nothing in the record, including Dr. Kanj's own hospitalization records and discharge (death) summary, specifically supporting Dr. Kanj's statement that treatment for infection was continued after the miner was withdrawn from the ventilator. Employer's Exhibit 4 at 12-13. We acknowledge that as the miner's treating physician, Dr. Kanj could have knowledge of treatment that was not specifically reflected in the medical records. However, Dr. Kanj specifically stated that his memory of the miner was "very vague" and that he had relied on his records to formulate his opinion. Director's Exhibit 51 at 5. Thus, as employer contends, under the facts of this case, the administrative law judge's discrediting of Dr. Renn, solely because his opinion conflicts with Dr. Kanj's statement, that antibiotics were being continued after the miner was removed from the ventilator, is not rational. *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Tackett*, 7 BLR at 1-706. On remand, the administrative law judge must consider the totality of Dr. Renn's opinion and the evidence on which it rests.

In sum, we remand this case for the administrative la judge to reconsider whether the relevant evidence establishes that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203 and, if so, whether pneumoconiosis was a substantially contributing cause of his death pursuant to 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

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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JUDITH S. BOGGS
Administrative Appeals Judge