BRB No. 08-0168 BLA

E.A. (Widow of H.A.) Claimant-Respondent v. VIRGINIA IRON, COAL AND COKE COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/30/2008 DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (06-BLA-5740 and 06-BLA-5741) of Administrative Law Judge Daniel F. Solomon on a subsequent miner's claim and 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).[1] The administrative law judge accepted employer's stipulation to the existence of pneumoconiosis, that the pneumoconiosis arose from coal mine employment, and that the miner was a truck driver for more than ten years.[2] The administrative law judge found that the miner's subsequent claim was timely filed, and that the stipulation of the existence of pneumoconiosis arising out of coal mine employment established a change in one of the applicable conditions of entitlement in the miner's claim. *See* 20 C.F.R. §725.309(d). The administrative law judge found that the evidence established the existence of complicated pneumoconiosis arising out of coal mine employment, thereby entitling claimant to the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Alternatively, the administrative law judge found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, he awarded benefits on the miner's claim. Turning to the survivor's claim, the administrative law judge found the evidence sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c), and he awarded benefits on the survivor's claim.

On appeal, employer asserts that the administrative law judge erred in finding that the miner's subsequent claim was timely filed. Employer also challenges the administrative law judge's finding of complicated pneumoconiosis and his alternate finding of total disability due to pneumoconiosis. Further, employer asserts that the administrative law judge erred in finding that the miner's death was due to

[1] Claimant is the widow of the miner, who died on May 6, 2005. Director's Exhibit 9. The miner's application for benefits, filed on September 22, 1987, was denied by the claims examiner in 1988, because the miner did not establish that his pneumoconiosis arose out of coal mine employment or that he was totally disabled. Director's Exhibit 1. The miner filed the instant claim for benefits on March 23, 2005. Director's Exhibit 3. Claimant filed her survivor's claim on May 26, 2005. Director's Exhibit 2.

[2] The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

pneumoconiosis.[3] The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's timeliness finding. Claimant responds, urging affirmance of the awards of benefits. Employer has replied, restating its position.[4]

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).

Miner's Claim

Timeliness of the Subsequent Claim

Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308(a), provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis. . . ." 30 U.S.C. §932(f). The terms of 20 C.F.R. §725.308 require that the medical

[3] We affirm the administrative law judge's finding that the evidence established the existence of simple pneumoconiosis arising our of coal mine employment, and thus established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309, as this finding is not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Employer argues that it was improper for the administrative law judge to issue his Decision and Order without using the claimants' names and maintains that although the claimants in this case are "H.A." and "E.A." the administrative law judge's Order awarded benefits to "W.K." and "B.K." Decision and Order at 25. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the issue was not properly raised by employer, citing 20 C.F.R. §802.211(b). The Director also contends that the argument lacks merit because employer has not demonstrated how the use of initials harmed it in this case. We agree that employer has not demonstrated that it suffered prejudice because of the use of initials in this case. *See Lafferty v. Cannelton Indus.*, 12 BLR 1-190 (1989); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985). Further, in view of our decision that these claims must be remanded for further consideration, the administrative law judge should ensure that on remand the Order reflects the proper claimants.

determination be "communicated to the miner or a person responsible for the care of the miner. . . ," and further provide a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c).

The administrative law judge found that the miner's subsequent claim was timely filed, relying on the Board's decisions in *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990) and *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990), that the statute of limitations applies only to the initial claim filed. In *Sewell Coal Co. v. Director, OWCP* [*Dempsey*], 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008), the United States Court of Appeals for the Fourth Circuit, vacated a finding that a subsequent claim was timely filed, based on the *Faulk* and *Andryka* rationale, holding that the statute of limitations in Section 725.308(a) applies to all claims.

In view of the court's holding in *Dempsey*, we hold that the administrative law judge erred in finding that the statute of limitations did not apply to the instant subsequent claim. Because the administrative law judge did not address whether the instant claim was time barred, and because we must remand this case for further consideration of the merits of entitlement, the administrative law judge is instructed to first consider the issue of timeliness on remand. *See Dempsey*, 523 F.3d 257, 24 BLR 2-128; *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

Complicated Pneumoconiosis

Employer asserts that the administrative law judge ignored relevant evidence and applied an improper legal standard in finding complicated pneumoconiosis established. Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for

the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

In considering the record evidence, the administrative law judge noted that claimant had not "offered a qualifying x-ray" under Section 718.304(a). Decision and Order at 14. Pursuant to Section 718.304(b), the administrative law judge found that Dr. Perper's autopsy and biopsy diagnosis of complicated pneumoconiosis was substantiated by Dr. Sides's autopsy opinion, and by CT scan results that were obtained under Section 718.304(c). The administrative law judge considered Dr. Perper's "pathological to radiological equivalency determination," and found that the lesions noted by Drs. Perper and Sides "would equate to a 1.0 cm lesion on x-ray." *Id*. at 15. He accorded less weight to the contrary opinions of Drs. Naeye and Fino, that the miner did not have complicated pneumoconiosis, because Dr. Naeye failed to address the size of the miner's lung lesions, and because Dr. Fino's opinion was vague and internally inconsistent. *Id*. at 16-17. In weighing all of the evidence together to find the existence of complicated pneumoconiosis established, the administrative law judge found that the autopsy evidence was more probative on the issue of complicated pneumoconiosis than the x-ray and CT scan evidence. *Id.* at 18.

Employer contends that the administrative law judge misconstrued the evidence and did not resolve the dispute over the size of the lesions on autopsy. We agree. In evaluating the evidence, the administrative law judge stated that "the size of the lesions found on autopsy vary from Dr. Perper's finding of masses exceeding 1.5 cm to Dr. Sides' finding of 2.8 cm." Decision and Order at 15. Dr. Sides, the pathologist who performed the miner's autopsy, reported in his external examination of the miner's body that "Two linear red-purple scars, each approximately 2.8 cm. in greatest dimension, extend over the right lateral thorax." Claimant's Exhibit 5. After reviewing the microscopic slides of the miner's lung tissue, Dr. Sides noted a "dilemma" in determining the cause of the miner's fibrosis, and concluded that "usual interstitial pneumonia is favored although the possibility of underlying fibrosis associated with the patient's occupational history of coal mining cannot be excluded." *Id.*

We agree with employer that the administrative law judge erred in his characterization of Dr. Sides's opinion. The pathologist did not find "lesions" measuring 2.8 centimeters; rather, he found external scars of this size on the miner's thorax. Because the administrative law judge relied on this improper characterization of Dr. Sides's opinion to find the existence of complicated pneumoconiosis established, we

must vacate his findings pursuant to Section 718.304(b).[5] *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer argues that the administrative law judge confused Dr. Perper's findings on the wedge biopsy with his findings on autopsy, and mistook the physician's use of the term "lung sections" as referring to the size of the actual lesions. Employer also asserts that the administrative law judge erred in accepting Dr. Perper's statement that the autopsy showed sections that were "consistent with complicated pneumoconiosis," which it asserts is insufficient to establish the existence of the disease.[6]

Since Dr. Perper referred to 1.5 centimeter sections in addressing both the wedge biopsy and the autopsy, there is no support for employer's assertion that the administrative law judge confused Dr. Perper's opinion regarding the wedge biopsy and autopsy. Further, we reject employer's assertion that the administrative law judge erred by considering Dr. Perper's statements of "consistent with complicated pneumoconiosis" to be diagnoses of complicated pneumoconiosis. The administrative law judge was considering these statements in the context of Dr. Perper's entire report, in which Dr. Perper provided definitive diagnoses of "complicated pneumoconiosis" and "progressive massive fibrosis." Claimant's Exhibit 4. However, on remand, the administrative law judge should consider Dr. Perper's use of the term "lung sections" and explain whether this is the same as a lesion, and he must consider the differing statements made by Dr.

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[5] Employer contends that the record does not contain evidence of a 2.8 centimeter lesion diagnosed by CT scan. Employer's Brief at 19, n.4. A review of the record supports employer's argument.

[6] Dr. Perper considered slides from the miner's *wedge lung biopsy* and stated that "[s]ome of the lung sections measure up to 1.5x1.0 cm. and are therefore consistent with complicated coal workers' pneumoconiosis (Progressive massive fibrosis). . . ." Claimant's Exhibit 4. In evaluating the slides from the *autopsy*, Dr. Perper stated that "[s]ome of the lung sections measure up to 1.0 cm. and therefore are consistent with complicated coal workers' pneumoconiosis (Progressive massive fibrosis)." *Id.* Later in his opinion, where he addressed the severity of the miner's pneumoconiosis, Dr. Perper stated:

> The autopsy findings revealed severe coal workers (sic) pneumoconiosis of the complicated type with areas of pneumoconiotic fibro-anthracosis with birefringent silica crystals. The solid areas of pneumoconiosis exceeded 1.5 cm.

Id.

Perper regarding the size of the findings on autopsy, *i.e.*, "up to 1 cm." and "solid areas of pneumoconiosis exceeded 1.5 cm." Claimant's Exhibit 4. In order to establish invocation of the presumption contained at Section 718.304, the opacity, if seen on x-ray, must be *greater than* one centimeter in diameter. 20 C.F.R. §718.304(a); *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-100.

Employer also asserts that the administrative law judge erred by accepting Dr. Perper's statement that a one centimeter opacity diagnosed by autopsy is equivalent to a one centimeter opacity diagnosed by x-ray. The administrative law judge noted Dr. Perper's statement that "an actual pathological lesion of 1.0 cm or larger [is] sufficient to qualify for a nodule of complicated coal workers (sic) pneumoconiosis (Progressive Massive Fibrosis) and equivalent with a radiological lesion of the same size." Claimant's Exhibit 4; Decision and Order at 15. The administrative law judge is required to perform an equivalency determination, pursuant to *Blankenship* and *Scarbro*. Contrary to employer's contention, the administrative law judge did not err in applying the formula provided by Dr. Perper, and he may consider it on remand.

Employer also alleges error in the administrative law judge's finding that Dr. Perper's opinion outweighed Dr. Naeye's opinion.[7] In finding Dr. Naeye's opinion entitled to less weight, the administrative law judge stated that "Dr. Naeye dismisses the conclusion of complicated pneumoconiosis, not on the basis of the size of the lesions, but on the composition and etiology." Decision and Order at 15. The administrative law judge stated that Dr. Naeye's "logic does not foreclose the possibility that coal mine employment could be a causal factor in the development of lesions found in the miner's lung," and he found the physician's conclusion "unnecessarily focused on a single cause theory, dismissing the possibility that coal mine employment, along with other factors,

[7] Dr. Naeye reviewed the autopsy and other physicians' reports. In a 2006 report, Dr. Naeye diagnosed very mild simple coal workers' pneumoconiosis. Employer's Exhibit 1. In a 2007 letter, he stated, "It is certainly true that sizable areas of fibrosis are present in the lung tissues of this man. It is equally true that they do not meet the diagnostic criteria for PMF." Employer's Exhibit 4. Dr. Naeye explained that the lesions "are comprised *almost entirely* of old, dense collagen..(sic) It is not arranged in the haphazard, chaotic pattern that is characteristic of PMF;" that the pigmentation is not as dense as is characteristic of PMF; that the necrosis "so characteristic of PMF lesions" is completely absent in the lesions in this case; and that the "Number of birefringent crystals small enough to be fibrogenic are to small to have caused the dense fibrosis in the lesions." *Id*. Therefore, Dr. Naeye concluded that the lesions in the miner's lungs were "most likely the result of a bacterial infection (pneumonia) that took place and healed and some years before he died." *Id.*

contributed to the miner's respiratory impairment and development of lesions." *Id.* at 16. The administrative law judge concluded his discussion of Dr. Naeye's opinion stating:

> Etiology of pneumoconiosis need not be a mutually exclusive proposition. It is plausible, if not the situation in the case at hand, that *both* a bacterial infection, along with coal mine dust exposure, as well as other factors not accounted for, contributed to the development of the miner's development of pneumoconiosis, simple or complicated.

Id. at 17-18.

We agree with employer that the administrative law judge's statement that, "It is plausible, if not the situation in the case at hand, that *both* a bacterial infection, along with coal mine dust exposure, as well as other factors not accounted for, contributed to the development of the miner's development of pneumoconiosis, simple or complicated," *Id.* at 17-18, without explanation or reference to medical evidence to support it, constitutes an improper medical determination by the administrative law judge. *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986). Moreover, as employer contends, Dr. Naeye explained that while "sizeable" areas of fibrosis were present, the fibrotic lesions were not lesions of pulmonary massive fibrosis or complicated pneumoconiosis. Employer's Exhibit 4; Employer's Brief at 22. The administrative law judge's focus on the size of the lesions does not adequately address this aspect of the doctor's opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Scarbro*, 220 F.3d 250, 22 BLR 2-93. However, we reject employer's assertion that the administrative law judge's evaluation of Dr. Naeye's opinion was an example of the administrative law judge shifting the burden of proof to employer to disprove the existence of pneumoconiosis. On remand, the administrative law judge must reevaluate Dr. Naeye's opinion in accordance with our holdings.

Employer also asserts that the administrative law judge erred by mischaracterizing Dr. Fino's opinion.[8] The administrative law judge accorded little weight to Dr. Fino's opinion that the miner did not have complicated pneumoconiosis, finding his opinion to be internally inconsistent. The administrative law judge explained:

[8] Dr. Fino found no x-ray evidence of pneumoconiosis, but diagnosed coal workers' pneumoconiosis based on Dr. Naeye's report, and opined that the miner did not suffer from complicated coal workers' pneumoconiosis. While Dr. Fino initially stated that the miner had no respiratory impairment, Employer's Exhibit 5 at 15-16, he later stated that by October 2004, the miner was experiencing a significant ventilatory impairment. *Id.* at 28.

> Dr. Fino is firm in his belief that the miner did not exhibit pneumoconiosis based on radiological evidence. However, based on other evidence, the medical reports of Drs. Naeye, Perper, and Sides, and notwithstanding his own findings based on radiological evidence, it is Dr. Fino's opinion, to a reasonable degree of medical certainty, that the miner had a coal mine dust-related lung disease. However, when asked later in the same deposition whether the miner had a ventilatory impairment related to coal mine dust-related disease, Dr. Fino stated that he did not.

Decision and Order at 16. The administrative law judge noted that the miner's hospital admissions during 2004 and 2005 were for respiratory impairments and found that "the physical record is obvious that the miner could not have worked. Respiratory deficits are the reason for the hospitalization and treatment. For this reason I attribute less weight to Dr. Fino's opinion." *Id.* The administrative law judge noted that Dr. Fino acknowledged the presence of pneumoconiosis, but that "he discount[ed] any degree of respiratory impairment," and he found "this distinction inconsistent and patently false," stating that the "presence of pneumoconiosis implies an impairment." *Id.* The administrative law judge also stated that he discounted Dr. Fino's opinion regarding complicated pneumoconiosis because assessing the autopsy report was "outside the scope of his expertise." Decision and Order at 17.

The administrative law judge's analysis of Dr. Fino's opinion is not supported by substantial evidence. The administrative law judge's analysis does not account for Dr. Fino's statement that the miner suffered a ventilatory impairment by 2004. Employer's Exhibit 5 at 28. Moreover, the administrative law judge's statement that "The presence of pneumoconiosis implies an impairment," Decision and Order at 16, as a basis for according less weight to Dr. Fino's opinion is in error. The presence of pneumoconiosis does not imply the existence of an impairment. *See generally United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); 20 C.F.R. 718.201.

Employer argues that in weighing all of the evidence regarding complicated pneumoconiosis, the administrative law judge overlooked the fact that the x-ray evidence was negative for complicated pneumoconiosis. This argument lacks merit. In weighing the evidence together, the administrative law judge addressed the x-ray readings, but reasonably found that autopsy evidence was more probative on the issue of the existence of pneumoconiosis. Decision and Order at 18; *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). However, in view of the errors in the administrative law judge's findings pursuant Section 718.304, we must vacate his finding that claimant established invocation of the irrebuttable presumption, and instruct the administrative law judge to reconsider this issue on remand.

Chronic dust disease

Employer argues that the administrative law judge erred by failing to determine separately whether the evidence established that the miner's disease was a chronic dust disease of the lung, prior to considering the cause of the complicated pneumoconiosis. We disagree.

In *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007), the Fourth Circuit stated that a miner who is found totally disabled due to pneumoconiosis pursuant to Section 718.304, is not automatically entitled to benefits. Rather, the miner must independently establish that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Mitchell*, 479 F.3d at 339, 24 BLR at 2-32. However, there is no requirement that the administrative law judge make a separate determination under Section 718.304 as to whether the miner's disease was a chronic disease of the lung. *See* 20 C.F.R. §718.304.

Cause of Pneumoconiosis

Employer argues that the administrative law judge's analysis pursuant to Section 718.203 is not explained. Further, employer asserts that the administrative law judge does not support his conclusion that claimant could have both interstitial pneumonitis and complicated pneumoconiosis.

In view of our decision to vacate the administrative law judge's finding of complicated pneumoconiosis, we also vacate his related causation finding, and instruct him to reconsider this issue, if reached.

Total Disability and Disability Causation

The administrative law judge evaluated the evidence and found it sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and that the miner's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer asserts that the administrative law judge's analysis of the evidence pursuant to 20 C.F.R. §718.204(b) ignored relevant evidence and improperly relied on lay testimony. Employer also asserts that the administrative law judge erred by failing to consider the exertional requirements of the miner's job.

As employer asserts, in finding total disability established, the administrative law judge erred in finding no evidence questioning the validity of the 1987 pulmonary function study. Decision and Order at 19. A review of the record indicates that Dr. Fino invalidated this test for poor effort. Employer's Exhibit 5. Accordingly, we vacate the

administrative law judge's Section 718.204(b) disability finding. However, we reject employer's assertion that the administrative law judge ignored other pulmonary function studies showing no impairment. The administrative law judge considered the other pulmonary function study that was in evidence. Employer's Exhibit 3; Decision and Order at 19-20.

Employer argues further that the administrative law judge found total disability established without considering the physical demands of the miner's job, and that he substituted his opinion for that of the physicians. In considering the evidence pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that the opinions of Drs. Fino and Naeye "stand in direct contradiction to the weight of the evidence demonstrating that the miner was repeatedly seen and treated for shortness of breath, COPD, persistent hypoxia, and pulmonary fibrosis." Decision and Order at 20. The administrative law judge referred to numerous hospital and treatment reports that were not part of the evidence in the miner's claim. *Id.* at 20 n.38.

Because the administrative law judge considered evidence that was not in the record of the miner's claim, we vacate the administrative law judge's disability finding pursuant to Section 718.204(b)(iv). *Fetterman*, 7 BLR 1-688. On remand, in analyzing the evidence pursuant to Section 718.204(b)(2)(iv), the administrative law judge must determine whether the physicians who stated that the miner could perform his usual coal mine employment were aware of the exertional requirements of his usual coal mine employment. *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991).

However, we reject employer's assertion that the administrative law judge erred by relying on lay testimony in this case. While the administrative law judge noted claimant's testimony regarding the miner's shortness of breath and the decline in his physical condition, and affidavits from the miner's children that were not admitted into the record, Decision and Order at 20, this testimony was not the basis for his disability finding. Decision and Order at 20-21.

Pursuant to Section 718.204(c), employer challenges the administrative law judge's finding that the miner's disability was due to pneumoconiosis. The administrative law judge found that the treatment records of Drs. Vaughn, Solomon, and Louthan documented the miner's impaired respiratory function due to several causes, including coal workers' pneumoconiosis. Decision and Order at 21. The administrative law judge accorded greater weight to the opinion of Dr. Perper, that the miner's disability was due to coal mine employment, which the administrative law judge found to be reasoned and corroborated by the medical evidence of record. He discounted the contrary opinions of Drs. Fino and Naeye, because they did not conclude that the miner was disabled. *Id.*

As employer asserts, by considering the treatment records of Drs. Vaughn, Solomon, and Louthan, the administrative law judge erred by considering medical reports that were not in evidence in the miner's claim. *Fetterman*, 7 BLR 1-688. Moreover, we have vacated the administrative law judge's disability findings pursuant to Section 718.204(b)(2). Accordingly, we vacate the administrative law judge's disability causation finding pursuant to Section 718.204(c). On remand, absent a finding of good cause, the administrative law judge's findings on the miner's claim must be based solely on evidence previously admitted into the miner's claim record. *See* 20 C.F.R. §§725.414, 725.456(b)(1).

Consequently, we vacate the administrative law judge's alternative findings pursuant to Section 718.204(b) and Section 718.204(c).

Survivor's Claim

Employer asserts that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. In order to establish entitlement to benefits in 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, or the presumption relating to complicated pneumoconiosis, set forth 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 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).

The administrative law judge found Dr. Perper's opinion, that the miner's death was due to pneumoconiosis, substantiated by the death certificate signed by Dr. Solomon, the miner's treating physician; medical records diagnosing fibrosis and hypoxemia; and hospital records showing treatment for respiratory problems. Decision and Order at 22. The administrative law judge discounted Dr. Fino's contrary opinion because he minimized the existence of pneumoconiosis, he is not a pathologist, and he did not inspect the lung tissue slides. In addition, the administrative law judge found Dr. Fino's opinion regarding the existence of pneumoconiosis to be "internally inconsistent," and entitled to less weight. *Id.* The administrative law judge accorded less weight to Dr. Naeye's opinion. He stated that Dr. Naeye's findings were in direct conflict with Dr. Helms's surgical pathology findings and Dr. Sides's opinion; he found that the death certificate conflicted with Dr. Naeye's opinion; and that the hospital records demonstrated a history of treatment for respiratory related problems. The administrative law judge also found that "Dr. Naeye does not adequately address the existence of the

miner's emphysema as a chronic respiratory condition and a possible factor in hastening the miner's death." Decision and Order at 23.

The record contains the miner's death certificate, signed by Dr. Solomon, who stated that the immediate cause of death was acute worsening of respiratory failure, due to recurrent pulmonary thromboli, due to coal workers' pneumoconiosis. Director's Exhibit 7. The autopsy, limited to the miner's lungs, was performed by Dr. Sides, whose final diagnosis was fibrosing interstitial pneumonia with patchy areas of severe interstitial fibrosis; patchy areas of intra-alveolar hemorrhage; prominent associated anthracosis; and emphysema, particularly marked in the upper lobes. In his comments, Dr. Sides noted the scattered anthracotic or carbonaceous pigment, and stated:

> Due to the patchy nature of the fibrosis which is suggestive of temporal heterogeneity in the fibrotic disease process, usual interstitial pneumonia is favored although the possibility of underlying fibrosis associated with the patient's occupational history of coal mining cannot be excluded.

Director's Exhibit 9; Claimant's Exhibit 4.

In a surgical pathology report, Dr. Helms examined the specimen from the miner's wedge biopsy. She diagnosed "Fibrosing interstitial pneumonia most consistent with usual interstitial pneumonia with prominent associated anthracosis." Director's Exhibit 9.

Dr. Perper reviewed medical records and opined that coal workers' pneumoconiosis was a "major cause and hastening factor" in the miner's death. Claimant's Exhibit 4. Dr. Naeye reviewed the miner's medical records and diagnosed very mild simple coal workers' pneumoconiosis, and opined that the miner's "developing acute lobular pneumonia" "was the likely direct cause of his death." Employer's Exhibit 1. Dr. Fino diagnosed coal workers' pneumoconiosis, and he stated that the miner died due to a respiratory problem. He opined that the miner's mild pneumoconiosis played no role in the miner's death. Employer's Exhibit 3 at 28-30.

Employer asserts that although the administrative law judge recognized that a death certificate is not substantial evidence, he then used it to undermine Dr. Naeye's opinion. We agree. Because Dr. Solomon did not explain how pneumoconiosis was connected to the miner's death, his opinion is insufficient, standing alone, to support the administrative law judge's conclusion. *Sparks*, 213 F.3d at 192, 22 BLR at 2-263. Employer also contends that although the administrative law judge stated that the opinions of Drs. Naeye and Helms were in direct conflict, the administrative law judge did not identify what Dr. Helms reported. We agree. Since the administrative law judge's comments and analysis of Dr. Helms's opinion at page twenty-three of the administrative law judge's decision are incomplete, we vacate the administrative law

judge's decision to discount Dr. Naeye's opinion based on its alleged conflict with Dr. Helms's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Employer also challenges the administrative law judge's finding that Dr. Sides's opinion supports Dr. Perper's opinion regarding the cause of the miner's death. Dr. Sides provided final anatomic diagnoses, with comments, but he did not provide an opinion regarding the cause of the miner's death. *Sparks*, 213 F.3d 186, 22 BLR 2-251. Moreover, the 2.8 centimeter scar described by Dr. Sides, which the administrative law judge found to "undermine" Dr. Naeye's opinion, Decision and Order at 24, was part of the doctor's external examination. Claimant's Exhibit 5. Consequently, the administrative law judge has not sufficiently explained his finding that Dr. Sides's opinion supports Dr. Perper's opinion. *Wojtowicz*, 12 BLR at 1-126.

Employer also challenges the administrative law judge's finding that Dr. Naeye's opinion is "less rational" than that of Dr. Perper, and his finding that Dr. Naeye did not adequately address the existence of the miner's emphysema as a possible factor in the miner's death. Employer asserts that the administrative law judge "accept[ed] that there is an interrelationship between the emphysema and pneumoconiosis." Decision and Order at 24. We reject employer's assertion that, in finding Dr. Naeye's opinion was "less rational" than Dr. Perper's opinion, the administrative law judge substituted his opinion for that of the physicians. However, the administrative law judge's statement that "there is an interrelationship between the emphysema and pneumoconiosis," without further explanation, and the administrative law judge's decision to accord less weight to Dr. Naeye's opinion because he did not "adequately address" the miner's emphysema, may not be affirmed, absent an articulated finding that the miner's emphysema constituted pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Wojtowicz*, 12 BLR at 1-162.

We, therefore, vacate the administrative law judge's finding that the evidence establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). On remand, the administrative law judge must reconsider whether the evidence establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).[9]

[9] We note that survivor's benefits may be awarded pursuant to 20 C.F.R. §718.304, if complicated pneumoconiosis is established in the survivor's claim. 20 C.F.R. §718.205(c)(3).

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge