BRB Nos. 09-0696 BLA
and 09-0697 BLA

PAULINE STILTNER (Widow of and on behalf of CLAUDE STILTNER)	)	
Claimant-Respondent	)	
v.	)	
WESTBURY COAL MINING PARTNERSHIP	)	
and	)	DATE ISSUED: 09/20/2010
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits in Miner's Claim and Award of Benefits in Survivor's Claim of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits in Miner's Claim and Award of Benefits in Survivor's Claim (2006-BLA-5124 and 2006-BLA-6197) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), rendered on a miner's subsequent claim, filed on February 14, 2001, and a survivor's claim, filed on May 9, 2002, 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] The administrative law judge found that the miner had thirty-three years of coal mine employment, as stipulated by the parties, and adjudicated both claims pursuant to the regulations at 20 C.F.R. Part 718. With respect to the miner's subsequent claim, the administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2) and (4) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). With respect to the survivor's claim, the administrative law judge also concluded that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner's and the survivor's claims.

On appeal, although employer does not challenge that the miner had clinical pneumoconiosis, employer contends that the administrative law judge erred in also finding that claimant established the existence of legal pneumoconiosis. Employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c), asserting that the administrative law judge was barred from relying on the opinion of Dr. Foglesong to establish that the miner was totally disabled due to pneumoconiosis, as that opinion was rendered in conjunction with the miner's prior claim. Employer maintains that benefits must be denied in the survivor's claim as a matter of law. Employer also argues that liability for benefits in this case should transfer to the Black Lung Disability Trust Fund (the Trust Fund), as the district director's failure to timely act on employer's motion to compel a physical evaluation of the miner, prior to his death, deprived employer of the opportunity to adequately defend against the case, resulting in a violation

[1] Pauline Stiltner, claimant, is the widow of the deceased miner, Claude Stiltner, who died on February 19, 2002. Director's Exhibits 24, 26.

of due process. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, urging the Board to reject employer's arguments pertaining to transfer of liability and the weight that may be accorded Dr. Foglesong's opinion. The Director takes no position on the merits of the award in the survivor's claim. Employer has filed a reply brief, reiterating its contentions that the administrative law judge erred in his consideration of the medical evidence in the miner's claim.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. PROCEDURAL HISTORY

The miner filed his current subsequent claim on February 14, 2001.[4] Director's

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. By Order dated April 8, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments on this case. *Stiltner v. Westbury Coal Mining Partnership*, BRB Nos. 09-0696 BLA, 09-0697 BLA (Apr. 8 2010) (unpub. Order). The Director, Office of Workers' Compensation Programs (the Director), and employer have responded, and they correctly assert that the amendments do not apply to this case, as both the miner's claim and the survivor's claim were filed prior to January 1, 2005.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

[4] The miner initially filed an application for benefits on May 18, 1987, which was denied by the district director on September 23, 1987, because the evidence was insufficient to establish any of the requisite elements of entitlement. ALJ Exhibit 3. The miner filed a subsequent claim on December 5, 1991, which was denied by Administrative Law Judge Bernard J. Gilday, Jr., on September 30, 1994, because the evidence did not establish the existence of pneumoconiosis or disability causation. ALJ Exhibit 2. The Board affirmed Judge Gilday's denial of benefits on August 30, 1995. *Stiltner v. Westbury Coal Co.*, BRB No. 95-0770 BLA (Aug. 30, 1995) (unpub.). *Id*. The miner filed a petition for modification on October 30, 1995, which was denied by Administrative Law Judge Donald W. Mosser on November 15, 1999, because the evidence did not establish a change in conditions or a mistake in determination of fact.

Exhibit 2. The district director notified employer of the claim on February 27, 2001, and employer filed a timely controversion. Director's Exhibits 14, 15. Employer scheduled the miner for an examination on May 2, 2001, but the miner did not appear. On May 25, 2001, employer asked the district director to either dismiss the claim as abandoned or, in the alternative, grant employer an extension of ninety days to complete its medical development and issue an order compelling the miner to attend an examination. Director's Exhibit 18. Employer repeated its request on August 13, 2001. Director's Exhibit 19. The district director did not respond. Thereafter, the miner died on February 15, 2002. Director's Exhibit 26.

In a letter dated February 19, 2002, the district director advised claimant of her right to file a survivor's claim, and further noted that "we neglected to respond" to the letter from employer's counsel regarding the miner's failure to attend an examination scheduled with Dr. Altmeyer on May 2, 2001. Director's Exhibit 21. The district director indicated that the processing of the miner's claim would be delayed "until we know [employer's] position." *Id*. Claimant filed her survivor's claim on May 9, 2002. Director's Exhibit 24. The district director notified employer of the survivor's claim on May 20, 2002, and employer filed a timely controversion. Director's Exhibits 29, 33. Employer also requested that it be dismissed from liability for benefits because it had not been given the opportunity to examine the miner prior to his death. Director's Exhibit 33. The district director denied employer's request to be dismissed from liability, but granted employer an additional thirty days to obtain and review the miner's autopsy slides. Director's Exhibit 34. On August 15, 2002, the district director issued a Proposed Decision and Order awarding benefits in the miner's claim, and employer requested a hearing. Director's Exhibits 37, 39. The district director denied benefits in the survivor's claim on April 1, 2003, and claimant requested a hearing. Director's Exhibits 52, 55. The cases were consolidated by the district director and forwarded to the Office of Administrative Law Judges (OALJ).

A hearing was held before Administrative Law Judge Joseph Kane on December 3, 2003, at which time employer argued that it was prejudiced by the district director's failure to act on its motion to compel an examination, and requested that either the miner's claim be dismissed as abandoned or that it be dismissed from liability for benefits.[5] December 3, 2003 Hearing Transcript at 11-13. In his Order of Remand dated

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Id. The miner took no further action with regard to the denial until he filed the current subsequent claim on February 14, 2001.

[5] The administrative law judge admitted Director's Exhibits 1-57 into the record but, as discussed, *infra*, those exhibits did not contain the complete record of the miner's prior claims. Director's Exhibit 1.

November 29, 2004, Judge Kane found that claimant established "good cause" for the miner's failure to appear at the hearing, due to the fact that the miner had been hospitalized on the day he was scheduled to appear. Order of Remand at 3. Thus, Judge Kane denied employer's request for dismissal of the miner's claim and rejected its request for transfer of liability to the Trust Fund. *Id*. However, Judge Kane found the examination conducted by Dr. Kaufman on May 14, 2001, at the request of the Department of Labor (DOL), was incomplete, and remanded the case to the district director to satisfy his obligation under the Act. *Id*. The district director obtained a supplemental report from Dr. Kaufman and both claims were returned to the OALJ and assigned to Judge Phalen (the administrative law judge), who held a hearing on August 1, 2008. The administrative law judge issued his Decision and Order awarding benefits in both claims on May 19, 2009, which is the subject of this appeal.

II. ARGUMENTS ON APPEAL

A. Denial of Due Process

Employer asserts that the district director's delay in responding to its motion to dismiss the claim or compel the miner to appear for a medical examination deprived employer of the ability to adequately defend against the claim. Brief in Support of Petition for Review at 27-28. Employer asserts that the administrative law judge's finding that claimant established "good cause" for the miner's failure to appear at employer's scheduled examination does not address "the implications of . . . the effect of the delay in DOL's ruling on [its] due process rights." *Id*. at 28. Thus, employer contends that it should not be held liable for the payment of benefits.

The Director agrees that "the district director erred in not issuing an order directing the miner to appear for a rescheduled examination or face the dismissal of his claim as abandoned."[6] Director's Brief at 11-12. However, the Director contends that this error does not rise to the level of a due process violation, because "as a practical matter, the district director's omission made no difference," as the only issue for adjudication in the miner's claim was causation of disability and "employer has presented no evidence or argument that a medical examination would have enabled its doctor(s) to provide a more credible opinion on this one issue." *Id*. at 12. The Director contends that employer "had ample opportunity to develop evidence to mount its defense" and submitted the opinion of Dr. Rosenberg, addressing that issue, based on a review of all of

[6] The record does not indicate whether employer actually set a date for a rescheduled examination or was simply waiting for a response to its motion from the district director.

the available evidence.[7] *Id*. Additionally, the Director asserts that because the administrative law judge "did not base his weighing of the evidence on whether the various doctors examined the miner," employer has not demonstrated how it was prejudiced by the district director's failure to respond to employer's motion to compel an examination. *Id*. at 13.

A fundamental requirement of due process is the opportunity to be heard to ensure a fair disposition of the case. *Grannis v. Ordean*, 234 U.S. 385 (1914). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has applied "a straightforward test for determining whether an employer has been denied due process by the government's processing of a claim: did the government deprive the employer of 'a fair opportunity to mount a meaningful defense to the proposed deprivation of its property.'" *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183, 21 BLR 2-545, 2-559-60 (4th Cir. 1999) (citation omitted). The Fourth Circuit emphasized that it "is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Borda*, 171 F.3d at 183, 21 BLR at 2-560. The Fourth Circuit also recognized in *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), that "[t]he Due Process Clause does not require the government to insure the lives of black lung claimants" and not every administrative error rises to the level of a violation of due process. *Lockhart*, 137 F.3d at 807, 21 BLR at 2-319.

In this case, employer has not provided a specific argument explaining how it was prejudiced by the fact that it did not obtain a more recent examination of the miner, in the months preceding his death. The record also does not support a conclusion that employer was deprived of the opportunity to mount a meaningful defense to the miner's subsequent claim or the survivor's claim. Following the miner's death, when the district director became aware of his error, he extended the time for the employer to review and submit evidence. Director's Exhibit 34. Employer submitted a January 7, 2004 medical report by Dr. Rosenberg, in which the doctor reviewed the miner's treatment and hospitalization records, the results of chest x-rays, pulmonary function studies and arterial blood gas studies, the reports of other physicians and the miner's autopsy report, and provided opinions on all of the relevant issues in the miner's claim and the survivor's claim. Employer's Exhibit 3. Although the administrative law judge ultimately assigned Dr. Rosenberg's opinion less weight, employer does not assert that this was the result of Dr. Rosenberg's inability to examine the miner prior to his death. Because employer has not

[7] The Director also notes that employer "could have obtained a second medical record review from another physician," but chose not to do so. Director's Brief at 13. Therefore, "if [employer] chose not to develop its case as fully as was possible, the fault is not the Director's." *Id*.

demonstrated in this appeal how it was specifically prejudiced by the district director's failure to act on its motion to compel a physical examination, we reject employer's assertion that it should not be held liable for payment of any benefits awarded in this case. *See Borda*, 171 F.3d at 183, 21 BLR at 2-559-60; *Lockhart*, 137 F.3d at 807, 21 BLR at 2-319; *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

B. Admission of Evidence

Employer also contends that it was denied due process when the administrative law judge, in his Decision and Order, admitted the medical evidence from the prior miner's claim, without giving the parties prior notice of his intent to do so. The administrative law judge stated:

> I note that when the District Director forwarded these claims to the OALJ on July 1, 2003, the entire claim file was not forwarded. Director's Exhibit 1, a compilation of underlying claim documents, was forwarded and it included the following: April 19, 1994 hearing transcript; Judge Gilday's decision and order issued September 30, 1994; Benefits Review Board's decision and order issued August 30, 1995; June 16, 1999 hearing transcript; and Judge Mosser's decision and order issued November 10, 1999. A request was made to the District Director – OWCP Columbus, Ohio for the remainder of the claim file, and the undersigned's office received said documentation on March 12, 2009. The documentation received was not separated into claims nor was it numbered. To aid in reference to said documentation, the undersigned's staff separated and numbered the documentation as follows: ALJX 3 is the living miner's first claim (pages 1-57) and ALJX 2 is the living miner's second claim (pages 1-265). Because DX 1 was admitted in all three hearings and because DX 1 contains documents which are based on the information and evidence received by the undersigned's office on March 12, 2009, I hereby admit ALJX 2 and ALJX 3 into evidence in these matters.

Decision and Order at 4 n.10.

Citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008), employer contends that the administrative law judge erred in failing to notify the parties of the contents of the evidentiary record, prior to issuing his decision. However, the facts of *Preston* are distinguishable from this case. In *Preston*, the Board required an administrative law judge to give prior notice to the parties of his intent to admit or exclude evidence pursuant to 20 C.F.R. §725.414. *Id*. As noted by the Director, the administrative law judge's actions in this case did not concern 20 C.F.R. §725.414 and

his actions in supplementing the evidentiary record were mandated by 20 C.F.R. §725.309.

Pursuant to 20 C.F.R. §725.309(d)(1), an administrative law judge is required to admit any evidence submitted with any prior claim as part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim. *See* 20 C.F.R. §725.309; 65 Fed. Reg. 79973 (Dec. 20, 2000). We agree with the Director that, based on the plain language of the regulation, employer was, or should have been, aware that all of the evidence from the miner's prior claims must be admitted and considered in conjunction with the subsequent claim, once the threshold issue of a change in an applicable condition of entitlement is established. *See Jordan v. Director, OWCP*, 892 F.2d 482, 487-88, 13 BLR 2-184, 2-192 (6th Cir. 1989) (parties are deemed to have constructive knowledge of published federal regulations). Since employer was a party to the miner's prior claims, employer was apprised of the content of the complete medical record in this case. Thus, the administrative law judge's action in obtaining a complete copy of the record in this case did not violate employer's due process rights, and we reject employer's request for transfer of liability to the Trust Fund.

C. Disability Causation

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

Initially, we affirm, as unchallenged by the parties on appeal, the administrative law judge's finding, based on his review of the evidence as a whole, that the miner had thirty-three years of coal mine employment and suffered from clinical pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (2), (4), 718.203, and that claimant has demonstrated a change in one of the conditions of entitlement adjudicated against the miner in his prior claim pursuant to 20 C.F.R. §725.309. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We also affirm, as unchallenged, the administrative law judge's determination that the miner suffered from a disabling obstructive respiratory impairment. *See Coen*, 7 BLR at 1-33. Thus, the question presented on appeal is whether the administrative law judge permissibly found that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), based on his review of the merits of the claim.

Employer asserts that the administrative law judge's conclusion, that the medical opinions established the existence of pneumoconiosis, cannot be reconciled with the administrative law judge's conclusion that those opinions failed to establish the required link between the miner's chronic obstructive pulmonary disease (COPD) and his coal dust exposure. Employer asserts that the administrative law judge made an erroneous assumption that the miner's COPD was due to coal dust exposure, equivalent to a finding of legal pneumoconiosis, which adversely affected his consideration of the evidence relevant to the issues of disability causation pursuant to 20 C.F.R. §718.204(c), in the miner's claim, and death causation pursuant to 20 C.F.R. §718.205, in the survivor's claim. Employer challenges the weight accorded the conflicting medical opinions and maintains that the administrative law judge's credibility findings are not explained, as required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).[8]

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered all of the evidence as to whether the miner was totally disabled due to pneumoconiosis. The newly submitted evidence is briefly summarized as follows. Dr. Kaufman examined the miner on May 14, 2001, at the request of the DOL. Director's Exhibit 6. He noted that the miner worked for forty years in coal mine employment and smoked cigarettes for twenty years, quitting twelve years prior to the examination. *Id*. He further noted that a chest x-ray demonstrated "upper lung zone parenchymal opacities which could indicate the presence of underlying pneumoconiosis." *Id*. Dr. Kaufman opined that the miner's arterial blood gas study showed a moderate degree of hypoxemia, while his pulmonary function study showed severe airway obstruction. *Id*. He diagnosed severe chronic COPD and coal workers' pneumoconiosis. *Id*. Dr. Kaufman submitted a supplemental report dated October 14, 2005, in which he opined that "the available data would support that the [miner] was totally disabled on the day of my evaluation [on May 14, 2001]." Director's Exhibit 62. As to the issue of causation, he stated:

> I know of no way to accurately apportion the degree of disability that would relate to cigarette smoking and emphysema versus the amount that would be related to his coal dust exposure. There is no question that his

[8] The Administrative Procedure Act (APA) provides that every adjudicatory decision must 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

> coal dust exposure adversely affected his pulmonary function. The coal dust exposure likely severely aggravated his underlying emphysema.
>
> His smoking history is quite significant[,] but so is his coal dust exposure. It would be my opinion [that,] while he suffered from emphysema and coal workers' pneumoconiosis[,] he was most likely totally disabled with the coal dust having a very significant adverse affect [sic] on his health and pulmonary function.

Id.

In a letter dated July 26, 2002, Dr. Schreck indicated that he was the miner's treating physician for twenty years, and stated that the miner suffered from severe lung disease and that he had pneumoconiosis, referencing copies of various records and lab work that his office had sent to the DOL over the past year. Director's Exhibit 32.

In a report dated January 7, 2004, Dr. Rosenberg stated that he reviewed the miner's treatment records, hospitalization records, the results of chest x-rays, pulmonary function studies and arterial blood gas studies, the report of Dr. Adamo, submitted in the previous claim, along with the 2001 report of Dr. Kaufman, submitted in the underlying subsequent claim and the autopsy report. Employer's Exhibit 3. Dr. Rosenberg opined that the miner was totally disabled as a result of COPD, and that his pulmonary impairment did not result from coal dust inhalation. *Id*. He attributed the miner's disabling pulmonary impairment to emphysema caused by an extensive history of smoking. *Id*. He further noted that while the miner's prior x-rays did not establish the presence of pneumoconiosis, the autopsy showed "mild, simple pneumoconiosis." *Id*. He opined that this minimal coal workers' pneumoconiosis was "insufficient to have contributed to or caused the miner's COPD." *Id*.

The administrative law judge also weighed the medical opinions developed in conjunction with the miner's prior claims, by Drs. Schreck, Foglesong, Ploysongsang, Rosenberg and Adamo. The prior claim evidence is briefly summarized as follows. The record contains a December 13, 1991 letter by Dr. Schreck, indicating that the miner was totally disabled based on "chronic lung disease and other lung diseases that are currently active." ALJ's Exhibit 2. Dr. Foglesong examined the miner on January 9, 1992, and diagnosed a severe obstructive respiratory impairment suggesting "pneumoconiosis(black lung)" and right mid-lung infiltrates. Director's Exhibit 6. Dr. Foglesong attributed the etiology of both conditions to a combination of coal dust exposure and cigarette smoking. *Id*. Dr. Ploysongsang examined the miner on January 8, 1993 and diagnosed coronary artery disease and emphysema caused by smoking, resulting in a fifty percent whole body impairment. *Id*.

There are three medical reports by Dr. Rosenberg, dated June 7, 1993, September 1, 1994 and April 30, 1997, in which he diagnosed totally disabling emphysema, with no evidence of coal workers' pneumoconiosis. ALJ Exhibit 2. Dr. Adamo examined the miner on May 23, 1997, and diagnosed severe chronic COPD primarily "of the emphysematous variety," along with coal workers' pneumoconiosis. Director's Exhibit 42. He opined that it would be difficult to apportion the miner's total disability, but stated that seventy to eighty percent of his disability was related to "COPD/emphysema" and twenty to thirty percent was related to coal workers' pneumoconiosis. *Id*.

In resolving the conflict in the medical opinion evidence pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that Dr. Schreck offered no opinion as to whether the miner was totally disabled due to pneumoconiosis. Decision and Order at 25. The administrative law judge gave Dr. Rosenberg's newly submitted opinion less weight because he found that Dr. Rosenberg failed to explain his rationale for excluding coal dust exposure as a causative factor for claimant's disabling respiratory impairment, and because Dr. Rosenberg made statements that were inconsistent with the preamble to the revised regulations. *Id*. The administrative law judge also found that the prior opinions of Drs. Rosenberg and Ploysongsang were not credible, as they based their medical conclusion, that claimant was not totally disabled due to pneumoconiosis, in part, on their belief that claimant did not have clinical pneumoconiosis, contrary to the administrative law judge's finding. *Id*. at 26. The administrative law judge found Dr. Kaufman's opinion, diagnosing total disability due to pneumoconiosis, to be less probative and entitled to "less weight" because Dr. Kaufman "substantially understated" the miner's smoking history. *Id*. at 25. In contrast, the administrative law judge found the opinions of Drs. Adamo and Foglesong, submitted in conjunction with the prior claim, to be reasoned and documented, and sufficient to establish that the miner was totally disabled due to pneumoconiosis. *Id*. at 26. Thus, the administrative law judge found that claimant satisfied her burden of proof pursuant to 20 C.F.R. §718.204(c) and was entitled to benefits based on the miner's subsequent claim.

Employer contends that, insofar as Judge Gilday gave less weight to Dr. Foglesong's opinion as to the existence of pneumoconiosis and disability causation in his September 30, 1994 decision, those findings were binding on the administrative law judge in his consideration of the miner's subsequent claim. Brief in Support of Petition for Review at 17-18. There is no merit to this assertion. The regulation at 20 C.F.R. §725.309(d) specifically provides that "no findings made in conjunction with a prior claim, except those based on a party's failure to contest an issue . . ., shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4); *see* 65 Fed. Reg. 79973 (Dec. 20, 2000); *Williams Mountain Coal Co. v. Director, OWCP* [*Compton*], 328 F. App'x 243 (4th Cir. 2009). Employer contends that the source of the miner's pulmonary or respiratory impairment was resolved in the prior litigation, and since the miner did not suffer from additional coal dust exposure, all successive claims

should be barred. *Id*. Employer's argument amounts to a request to apply the principle of *res judicata* to deny all subsequent claims related to the miner. The Fourth Circuit, however, has specifically held that *res judicata* does not apply in a subsequent claim, where the issue is claimant's physical condition at entirely different times. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996) (*en banc*).

Employer contends that the administrative law judge erred in giving less weight to Dr. Rosenberg's opinion, as to the issue of disability causation, because the administrative law judge considered Dr. Rosenberg's statements concerning the role of coal dust exposure in causing an obstructive respiratory impairment to be "inconsistent with the regulations." Decision and Order at 25. We disagree. Dr. Rosenberg opined that the degree of pneumoconiosis found on autopsy was too minimal to have contributed to the development of claimant's disabling obstructive respiratory impairment. Employer's Exhibit 3. To support his conclusion that claimant's respiratory disability was unrelated to coal dust exposure, Dr. Rosenberg explained that while coal dust exposure can cause obstruction, "there is no evidence that severe disabling COPD occurs in relationship to coal mine dust, absent the presence of complicated [coal workers' pneumoconiosis]." *Id*. As noted by the administrative law judge, however, the regulations do not require a finding of complicated pneumoconiosis before a miner may show that he has a disabling chronic obstructive pulmonary disease attributable to coal dust exposure. *See* 65 Fed. Reg. 79,951 (2000) ("The statute contemplates an award of benefits based upon proof of pneumoconiosis as defined in the statute (which encompasses simple pneumoconiosis), and not just upon proof of complicated pneumoconiosis."). Thus, to the extent that Dr. Rosenberg relied upon a premise, that simple coal workers' pneumoconiosis does not cause disabling obstructive respiratory impairments, to reach his causation opinion in this case, and that premise is contrary to the science relied upon by the DOL in promulgating the regulations, which concludes that simple coal workers' pneumoconiosis may cause disabling obstructive respiratory disorders, we affirm the administrative law judge's decision to assign Dr. Rosenberg's opinion less weight pursuant to 20 C.F.R. §718.204(c). *See Sewell Coal Co. v. Triplett*, 253 F. App'x 274, 277 (4th Cir. 2007) (unpub.); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *Freeman United Coal Mining v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). Additionally, because the administrative law judge has broad discretion in assessing the credibility of the medical experts, we affirm the administrative law judge's finding that Dr. Rosenberg did not credibly explain his rationale for excluding coal dust exposure as a causative factor for the miner's respiratory disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151.

Lastly, we reject employer's contention that the administrative law judge erred in relying on the causation opinions of Drs. Adamo and Foglesong. Contrary to employer's assertion on appeal, the administrative law judge correctly stated that a claimant need only establish that pneumoconiosis was a contributing cause of the miner's disability. *See* 65 Fed. Reg. 79946 (Dec. 20, 2000); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Freeman*, 272 F.3d at 482, 22 BLR at 2-280; *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 577, 22 BLR 2-107, 2-122 (6th Cir. 2000); *see also Gross v. Dominion Coal Corp*., 23 BLR 1-8 (2004) (a medical opinion that pneumoconiosis "was one of two causes" of total disability met the "substantially contributing cause" standard at 20 C.F.R. §718.204(c)).

As noted by the administrative law judge, "[i]n addition to his examination, [Dr. Adamo] reviewed [the miner's] records, a report by Dr. Rosenberg, and employment, smoking and past medical histories." Decision and Order at 9; *see* Director's Exhibit 42. The administrative law judge permissibly found that Dr. Adamo's opinion, apportioning seventy to eighty percent of the miner's disability to COPD and twenty to thirty percent to clinical pneumoconiosis was "well-reasoned and well-documented." Decision and Order at 26; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151. Additionally, with respect to Dr. Foglesong, the administrative law judge found that he considered the miner's work, medical and smoking histories, as well as the miner's symptoms, positive chest x-ray and objective study results, in reaching his medical conclusions. Decision and Order at 24. The administrative law judge permissibly found that Dr. Foglesong's opinion, attributing the miner's severe impairment to a combination of coal dust and smoking, was "sufficiently well-reasoned and well-documented" and entitled to probative weight.[9] *Id*.; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151; Decision and Order at 26. Thus, because the administrative law judge

[9] Contrary to employer's contention, the administrative law judge was not precluded from finding Dr. Foglesong's disability causation opinion reasoned and documented because Judge Gilday choose to assign the same opinion less weight in his September 30, 1994 denial of benefits. Brief in Support of Petition for Review at 17-18. The Director correctly notes that Judge Gilday did not find Dr. Foglesong's opinion unreasoned or undocumented, but chose not to credit it because Dr. Foglesong's credentials were not in the record. *See* 1994 Decision and Order – Denying Benefits at 13. Moreover, insofar as claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 by establishing the existence of pneumoconiosis, the administrative law judge was required to consider the evidence submitted in the prior claim, and conduct a *de novo* weighing of the evidence. *See* 20 C.F.R. §725.309; 65 Fed. Reg. 79973 (Dec. 20, 2000); *Williams Mountain Coal Co. v. Director, OWCP*, 328 F. App'x 243 (4th Cir. May 27, 2009).

acted within his discretion in rendering his credibility determinations, and substantial evidence supports his finding that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), we affirm the award of benefits in the miner's claim.[10] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-326; *Gross*, 23 BLR at 1-8.

B. The Survivor's Claim

Employer also contends 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(c). In order to establish her entitlement to survivor's benefits, claimant must demonstrate, by a preponderance of the evidence, that the miner's 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 and before January 1, 2005, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the miner's hospitalization records from Doctor's Hospital preceding his death, as well as his death certificate, which lists the immediate cause of death as "sepsis due to bactermia serratia marcesens and pneumonia."[11] Director's Exhibit 26. The administrative law judge found that, because the hospitalization records do not diagnose pneumoconiosis, they do not establish death due to pneumoconiosis. Decision and Order at 28. He further found that the death certificate does not establish death due to pneumoconiosis. *Id*.

[10] In light of our affirmance of the administrative law judge's finding that claimant's disabling respiratory impairment was due, in part, to clinical pneumoconiosis, we need not address employer's argument regarding the existence of legal pneumoconiosis.

[11] The hospitalization records referenced a history of black lung and the miner's employment as a coal miner. Director's Exhibit 35. Dr. Razvi, the physician who treated the miner immediately preceding his death, diagnosed sepsis, hypotension, pneumonia and respiratory failure. *Id*.

The administrative law judge also considered the opinion of Dr. Anker, the autopsy prosector, along with the opinions of Drs. Schreck, Rosenberg and Kaufman.[12] The administrative law judge found that Dr. Anker offered no opinion as to the cause of the miner's death because "she did not state that the anthracosis/pneumoconiosis was a direct cause of the Miner's death or hastened the Miner's death." Decision and Order at 27. The administrative law judge found that, although Dr. Schreck diagnosed pneumoconiosis, he "[did] not indicate that pneumoconiosis was the direct cause of the Miner's death or that pneumoconiosis hastened the [m]iner's death." *Id*. at 27-28. As such, the administrative law judge found that Dr. Schreck's letter and treatment notes do not establish death causation at 20 C.F.R. §718.205(c). The administrative law judge assigned Dr. Rosenberg's opinion little weight because he found that the basis for Dr. Rosenberg's opinion was unclear. *Id*. at 28. The administrative law judge also found that Dr. Kaufman did not offer an opinion as to the cause of the miner's death under 20 C.F.R. §718.205(c). *Id*. at 27.

Although the administrative law judge concluded that none of the physicians who diagnosed pneumoconiosis opined that coal dust exposure caused or hastened the miner's death, he further stated:

> This is a circumstance, however, that raises an issue concerning what is required for a judge to reach an opinion even though that opinion has not been directly stated, but is substantiated piecemeal to draw inferences from that existing evidence when compiled. In the case at hand, the inference is that there is no room for any other conclusion but that coal workers' pneumoconiosis hastened the [m]iner's death.

Decision and Order at 28. The administrative law judge found that the reports of Drs. Adamo, Schreck, Kaufman and Anker "track years of declining health centered, inter alia, on [the miner's] failing respiratory condition, in which even the best evidence finds

[12] In her February 19, 2002 autopsy report, Dr. Anker diagnosed severe emphysematous changes, anthracosis and simple coal workers' pneumoconiosis, diffuse pleural adhesions and bilateral pleural effusions, consolidated pneumonia in the right upper lobe and small pulmonary emboli. Director's Exhibit 27. In a July 26, 2002 correspondence, Dr. Schreck stated that "[the miner] died earlier this year. He had pneumoconiosis." Director's Exhibit 41. In his January 7, 2004 report, Dr. Rosenberg opined that the miner's death "was unrelated to his coal workers' pneumoconiosis" but was due to "sepsis due to his pneumonia." Employer's Exhibit 3. Dr. Kaufman submitted an October 14, 2005 supplemental report, after the miner's death, in which he stated that, "[t]here is no question that [the miner's] coal dust exposure adversely affected [the miner's] pulmonary function." Director's Exhibit 62.

as a cause of the sepsis." *Id*. at 29. Citing the opinion of the United States Court of Appeals for the Third Circuit in *Hill v. Director, OWCP*, 562 F.3d 264, 24 BLR 2-177 (3d Cir. 2009), the administrative law judge concluded that "common sense" warranted a conclusion that the miner's death "was hastened by his frequently diagnosed and long term-development of severe COPD, which was in part due to his coal workers' pneumoconiosis." *Id*. Accordingly, the administrative law judge concluded that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Employer contends that the administrative law judge's finding of death due to pneumoconiosis, under 20 C.F.R. §718.205(c), is contrary to law and rests on mistakes of fact. We agree. The cause of the miner's death is a medical determination, and "competent medical evidence" is required, pursuant to 20 C.F.R. §718.205(c), to establish that the miner's death was due to, substantially caused by, or hastened by pneumoconiosis. *See* 20 C.F.R. §718.205(c), (d); *Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). In the absence of competent medical evidence, the administrative law judge does not have authority or discretion to draw inferences or act as a medical expert and conclude that a miner died due to pneumoconiosis. *See generally Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

In addition, the administrative law judge's reliance on *Hill* to award survivor's benefits is misplaced, as the Fourth Circuit has held that for an administrative law judge to credit a physician's opinion, that pneumoconiosis hastened a miner's death, the physician must sufficiently explain the causal connection between the disease and the resulting death and must identify the basis for his or her opinion. *Sparks*, 213 F.3d at 190, 22 BLR at 2-259; *Shuff*, 967 F.2d 977, 979-80, 16 BLR at 2-92-93. Because the administrative law judge specifically found that no physician of record has opined that pneumoconiosis caused, substantially contributed to or hastened the miner's death, we hold that the evidence is insufficient, as a matter of law, to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), an essential element of entitlement in a survivor's claim. *Id*. Thus, we reverse the award of benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed with respect to the miner's claim but reversed with respect to the survivor's claim.

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