BRB No. 10-0702 BLA

ROSE JUNE STILTNER (Widow of ALFRED L. STILTNER)	)	
Claimant-Respondent	)	
v.	)	
HARMAN MINING CORPORATION	)	DATE ISSUED: 09/30/2011
and	)	
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 Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Barry H. Joyner (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05384) of Administrative Law Judge Joseph E. Kane (the administrative law judge), with respect to a survivor's claim filed on January 3, 2003, 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 credited the miner with 15.62 years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that claimant[2] established that the miner had clinical and legal pneumoconiosis arising from his coal mine employment at 20 C.F.R. §§718.202(a)(1), (2), (4), 718.203(b), and that pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Before the Board, employer initially filed a Motion for Summary Reversal and for Briefing Schedule to Be Suspended, alleging that the doctrine of collateral estoppel precluded an award of survivor's benefits, as a matter of law, based on the denial of benefits in the miner's claim. The Board issued an Order, construing this motion as employer's Petition for Review and supporting brief. The Board permitted employer to file a supplemental brief to address any issues not raised in its initial motion. In its supplemental and reply briefs, employer argues that the district director exceeded his authority and misapplied the regulations by creating, rather than just obtaining, evidence in the form of Dr. Perper's reports. In addition, employer maintains that the administrative law judge's decision on the merits is erroneous, based on flaws in his weighing of the medical evidence concerning the existence of pneumoconiosis and death due to pneumoconiosis. Claimant responds, asserting that collateral estoppel does not apply in this case, that the administrative law judge properly admitted Dr. Perper's opinions, and that the administrative law judge's award of benefits should be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief in which he contends that employer waived its collateral estoppel argument by failing to raise it before the administrative law judge. In addition, the Director urges

[1] The amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and revived Section 422(l) of the Act, 30 U.S.C. §932(l). However, these amendments do not apply to this claim, as it was filed before January 1, 2005.

[2] Claimant is the widow of a miner, Alfred L. Stiltner, who died on April 1, 2001. Director's Exhibit 159. Claimant initially filed an application for survivor's benefits on January 13, 2002, but later withdrew this claim. Director's Exhibits 122, 132-34 .

the Board to reject employer's argument that Dr. Perper's reports were improperly developed, because employer has not established reversible error.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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, in which the rebuttable presumption at 30 U.S.C. §921(c)(4) is not applicable, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or if claimant establishes invocation of the irrebuttable presumption of death due to pneumoconiosis. 20 C.F.R. §§718.205(c)(2), (4), 718.304. Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

I. Collateral Estoppel

The miner filed a duplicate claim on April 28, 1996, which was finally denied on April 29, 2005, by Administrative Law Judge Stephen L. Purcell, because he found that the miner did not establish the existence of pneumoconiosis.[4] No appeal was taken from this decision. Employer argues that Judge Purcell's determination precludes a finding of pneumoconiosis in the survivor's claim and, therefore, requires the denial of the

[3] The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibits 156, 157; Hearing Transcript at 37. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] Although the miner's claim was pending at the time that claimant filed her survivor's claim, the claims were adjudicated separately.

survivor's claim as a matter of law. Employer asserts that the five elements identified by the United States Court of Appeals for the Fourth Circuit as prerequisites to the application of the doctrine of collateral estoppel are present in this case.[5]

Claimant responds, arguing that collateral estoppel does not apply, as she did not have a full and fair opportunity to litigate the issue of the existence of pneumoconiosis in the miner's claim. In support of her position, claimant asserts that she was neither a party to the miner's claim, nor the miner's fiduciary representative, as her entitlement to benefits did not begin until the miner died. Employer replies and contends that, because claimant pursued her husband's claim after his death, "it is difficult to accept her argument that she was not a party to his claim." Employer's Reply to Claimant's Response to Employer's Motion for Summary Reversal at 2. The Director asserts that the Board should reject employer's contention, because it waived any collateral estoppel argument by not raising it before the administrative law judge at the hearing or in its post-hearing brief. Employer counters by arguing that, when a party does not plead an affirmative defense such as collateral estoppel, or does not properly assert it at the lower level, a court can choose to address it or raise the issue *sua sponte*, especially where there is no prejudice to the plaintiff. Employer asserts that claimant would not be prejudiced in this case, as she has not argued that employer waived collateral estoppel.

Notwithstanding employer's arguments to the contrary, we reject its assertions regarding the application of collateral estoppel, as employer waived this affirmative defense by not raising it before the administrative law judge. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Prater v. Director, OWCP*, 8 BLR 1-461 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984). While employer asserts that it raised the affirmative defense of collateral estoppel when the case was before the district director, in the two letters it references as proof, employer did not expressly plead the elements of collateral estoppel, but rather expressed a general intent to rely on affirmative defenses. *See* Director's Exhibits 169, 174. Further, once the case was transferred to the administrative law judge, employer never mentioned collateral estoppel and never submitted any evidence or argument to prove the requisite elements, either at the hearing

[5] The Fourth Circuit has held that for collateral estoppel to apply, it must be established that: (1) the issue sought to be precluded is identical to one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006); *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219 (4th Cir. 1998); *see also Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

or in its post-hearing brief. *See Collins v. Pond Creek Mining Co*., 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). Accordingly, employer may not rely on this defense for the first time before the Board. *Collins*, 468 F.3d at 217, 23 BLR at 2-400-01.

II. The District Director's Actions

A. The Administrative Law Judge's Findings

The administrative law judge noted that employer objected to the admission of two reports prepared by Dr. Perper, as they were the product of the district director's participation in the development of claimant's affirmative case, which employer deemed was improper.[6] Decision and Order at 4. The administrative law judge found that employer's interpretation of 20 C.F.R. §725.405(c) was contrary to the plain language of the regulation, which states that "the district director shall obtain whatever medical evidence is necessary and available for the development and evaluation of the claim." *Id*., *quoting* 20 C.F.R. §725.405(c).

B. Arguments on Appeal

Employer asserts that, in this case, the district director did more than obtain available evidence. Rather, employer argues that the district director exceeded his authority by developing evidence in the form of Dr. Perper's April and September 2002 reports. Relying on the Board's unpublished decisions in *Magiantini v. Rochester & Pittsburgh Coal Co*., BRB No. 04-0554 BLA (Apr. 6, 2005) and *Neumeister v. Hegins Mining Co*., BRB No. 04-0728 BLA (May 26, 2005), employer states that it is the Director's position that the district director does not have the authority to develop

[6] In conjunction with the survivor's claim filed on January 13, 2002, and later withdrawn by claimant, the district director requested that Dr. Perper offer an opinion, based on a review of the autopsy report, autopsy slides, and other medical evidence. Director's Exhibit 162. Dr. Perper prepared a report, dated April 24, 2002, in which he diagnosed clinical and legal pneumoconiosis and concluded that the miner's death was due to pneumoconiosis. Claimant's Exhibit 12. Subsequent to the withdrawal of the initial survivor's claim, the district director asked Dr. Perper to offer an opinion in the miner's claim as to whether pneumoconiosis caused, or contributed to, the miner's impairment. In a report dated September 26, 2002, Dr. Perper found that the miner's coal workers' pneumoconiosis was a contributing factor to the miner's respiratory impairment. Claimant's Exhibit 13. In his deposition on July 21, 2008, Dr. Perper indicated that his testimony was based only on evidence admissible in the survivor's claim and that his previous opinions were unaffected by this limitation. Claimant's Exhibit 11 at 6-9.

medical evidence because the word "available," as used in 20 C.F.R. §725.405(c), restricts the district director to gathering existing evidence, or evidence available from sources like hospital or treatment records. Employer also maintains that, even if claimant adopted the reports as her own, Dr. Perper considered inadmissible evidence in his report. Employer further alleges that the admission of Dr. Perper's reports prejudiced the development of its defense, as the administrative law judge did not render his evidentiary rulings until he issued his Decision and Order. Therefore, employer argues that remand is required for the administrative law judge to reconsider whether Dr. Perper's reports are admissible, and, if so, to permit employer to respond to them. Lastly, employer states that the district director's failure to include in the record the August 2006 order requiring claimant to show cause why benefits should not be denied, "raises questions about the impartiality of the district director." Employer's Supplemental Brief at 16.

Claimant responds and asserts that, because she adopted both of Dr. Perper's reports in the survivor's claim, they were properly admitted. Claimant also maintains that the cases cited by employer do not support its assertion and that the administrative law judge acted within his discretion in finding that Dr. Perper's opinions were admissible, despite his consideration of inadmissible evidence. The Director contends that the Board should reject employer's argument since employer has not demonstrated reversible error. The Director also asserts that employer's argument does not apply to Dr. Perper's September 2002 report, since it was developed in the miner's 1996 claim and neither 20 C.F.R. §725.405(c), nor the evidentiary limitations at 20 C.F.R. §725.414, apply to that claim. In addition, the Director concedes that the administrative law judge erred in finding that the district director had the authority to develop Dr. Perper's April 2002 report. The Director further maintains, however, that since claimant adopted both of Dr. Perper's reports in her claim, and they were within the evidentiary limitations, any error by the administrative law judge or the district director was harmless. The Director also states that the failure to include the August 2006 show cause order in the Director's Exhibits was harmless, as all parties, and the administrative law judge, received a copy and it played no role in the resolution of the case.

The administrative law judge is granted broad discretion in resolving procedural issues, including the admission of evidence into the record. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). A party seeking to overturn an administrative law judge's resolution of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989).

As a threshold matter, we agree with the Director that 20 C.F.R. §§725.414 and 725.405(c) do not bar the admission of Dr. Perper's September 2002 report in the survivor's claim, as it was developed in connection with the miner's 1996 claim. The evidentiary limitations set forth in 20 C.F.R. §725.414 do not apply to claims filed before January 19, 2001 and 20 C.F.R. §725.405(c) is relevant only to the development of evidence in a survivor's claim. While the September 2002 report was not automatically admissible in the current claim, claimant adopted the report and employer does not contest its admissibility under the evidentiary limitations. *See Keener v. Peerless Coal Co.*, 23 BLR 1-229, 1-241 (2007). Therefore, the administrative law judge properly admitted the September 2002 report. *See Clark*, 12 BLR at 1-153; *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-359 (1985).

Regarding the April 2002 report, as the Director concedes, the administrative law judge erred in finding that the district director had the authority to request that Dr. Perper prepare this report for submission in the survivor's claim, filed on January 3, 2003. *See* Director's Letter Brief at 6. Under the revised regulations, which became effective on January 19, 2001, the district director may obtain, in conjunction with a survivor's claim involving a responsible operator, only the "available" medical evidence. 20 C.F.R. §725.405(c). However, we agree with the Director that there is nothing in the regulations prohibiting a party from adopting and submitting medical evidence obtained by the district director, as long as it does not exceed the evidentiary limitations applicable to that party. 20 C.F.R. §725.414(a)(2)(i), (3)(i).

In addition, we hold that there is no merit in employer's assertion that it was prejudiced by the fact that the administrative law judge rendered his ruling concerning the admissibility of Dr. Perper's reports in his Decision and Order. Claimant submitted Dr. Perper's reports as part of her claim well before the hearing was held on July 28, 2007. Claimant's Exhibits 12, 13. In addition, claimant designated Dr. Perper's reports as part of her affirmative case evidence prior to, and at, the hearing, while employer submitted the reports of Dr. Naeye, Fino and Dahhan. Administrative Law Judge's Exhibits 1, 2; Hearing Transcript at 13-16, 29-33. Under these circumstances, employer has not established that its ability to defend the survivor's claim was prejudiced by the issuance of the administrative law judge's evidentiary ruling admitting Dr. Perper's reports in his Decision and Order. *See L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008)(*en banc*). The errors committed by the district director and the administrative law judge with respect to Dr. Perper's April 2002 report are, therefore, harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Further, contrary to employer's contention, the administrative law judge discussed the fact that Dr. Perper reviewed inadmissible evidence in his September 2002 report and the administrative law judge rationally concluded that consideration of this evidence did

not detract from the probative weight of Dr. Perper's opinion. *See Harris*, 23 BLR 1-104; Decision and Order at 9, 33. Finally, the fact that the district director did not include the August 2006 show cause order in the Director's Exhibits, as required by 20 C.F.R. §725.421(b) is also harmless error. *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278. All the parties received a copy of the order and the district director acknowledged in his Proposed Decision and Order that it had been issued, but explained that he "re-reviewed all of the admissible evidence submitted in the claim and determined that claimant established" entitlement to benefits. Director's Exhibit 210.

Accordingly, we affirm the administrative law judge's admission of Dr. Perper's April and September 2002 reports and reject employer's argument that the district director's handling of the August 2006 show cause order provides a basis for questioning the district director's integrity or reversing the award of benefits.

III. Merits of Entitlement

A. Section 718.202(a)(1)

1. The Administrative Law Judge's Findings

The administrative law judge indicated that the record contains five interpretations of four chest x-rays. Decision and Order at 23. The administrative law judge found that the May 8, 1999 film was negative for pneumoconiosis, as it was read as negative by Dr. Wheeler and there were no other interpretations. *Id.*; *see* Employer's Exhibit 4. The administrative law judge reported that Dr. DePonte interpreted the May 30, 2000 film as positive for pneumoconiosis and that Dr. Castle interpreted it as negative. Decision and Order at 23-4; *see* Claimant's Exhibit 1, Employer's Exhibit 2. The administrative law judge determined that, based on the fact that Dr. DePonte is dually-qualified as a Board-certified radiologist and B reader, this film was positive for pneumoconiosis. Decision and Order at 24. Because the June 28, 2000 film was read as negative by Dr. Fino, and there were no other readings, the administrative law judge found that it was negative for pneumoconiosis. *Id.*; *see* Employer's Exhibit 1. Concerning the December 19, 2000 x-ray, the administrative law judge credited the uncontradicted positive reading by Dr. Patel, who is a dually-qualified radiologist. Decision and Order at 24; *see* Claimant's Exhibit 2.

The administrative law judge noted that the x-ray interpretations found in the miner's treatment records do not diagnose pneumoconiosis, with the exception of an interpretation by Dr. Ahmed. Decision and Order at 24. However, the administrative law judge found that Dr. Ahmed's statement, that "[c]hanges could be secondary to pneumoconiosis," was equivocal and could not support a finding of pneumoconiosis. *Id.*, *quoting* Claimant's Exhibit 7.

The administrative law judge summarized the x-ray evidence at 20 C.F.R. §718.202(a)(1) and indicated that there were two films that were positive for pneumoconiosis and two films that were negative. Decision and Order at 24. The administrative law judge explained that, considering the readings by dually-qualified physicians, he found the x-ray evidence, as a whole, to be positive for pneumoconiosis. *Id*. The administrative law judge determined that, although Dr. Wheeler, a dually-qualified physician, interpreted the May 8, 1999 film as negative for pneumoconiosis, Drs. DePonte and Patel, who are also dually-qualified, interpreted the more recent films as positive. *Id*. Therefore, "[r]elying on the consistent and more recent interpretations," the administrative law judge found that a preponderance of the x-ray evidence was positive for pneumoconiosis. *Id*.

2. Arguments on Appeal

Employer asserts that the administrative law judge's determination is based on the view that more recent x-ray interpretations are more credible, but that "[t]his bare appeal to recency is inconsistent with law and ignores relevant facts." Employer's Supplemental Brief at 16. Employer states that the administrative law judge "overlooked" a June 28, 2000 film that was read as negative for pneumoconiosis. *Id*. In addition, employer argues that it is error to rely on recency when all of the x-rays were taken long after the miner's exposure to coal dust ended. Employer also maintains that the administrative law judge erred in ignoring evidence that detracted from the credibility of the positive readings, including findings by the physicians reading the x-rays. Further, employer contends that the administrative law judge did not adequately explain why the x-ray interpretations in the miner's treatment records "were not instructive when despite comprehensive evaluations of the [miner's] condition, they did not diagnose coal workers' pneumoconiosis." *Id*. at 17.

Contrary to employer's assertion, the administrative law judge did not neglect to consider the June 28, 2000 film read as negative by Dr. Fino. *See* Decision and Order at 24. Rather, he found this x-ray to be negative for pneumoconiosis, but permissibly accorded it less weight, based on the fact that Dr. Fino is not a dually-qualified reader. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Further, while the administrative law judge stated that he was relying on the interpretations of the more recent x-rays by Drs. DePonte and Patel, he also determined that "[w]hen considering the readings by dually[-]qualified doctors, however, I find the overall x-ray evidence to support a finding of pneumoconiosis." Decision and Order at 24. Relying on a physician's credentials to afford more weight to x-ray interpretations is permissible. *Adkins*, 958 F.2d at 52, 16 BLR at 2-66. In addition, the administrative law judge permissibly gave little weight to the x-ray interpretations in the miner's treatment records because he rationally determined that the x-ray readings that were silent as to the

presence or absence of pneumoconiosis were inconclusive. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 24; Director's Exhibit 206. Therefore, we affirm the administrative law judge's determination that claimant established that the miner had clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), as it is rational and supported by substantial evidence. *Adkins*, 958 F.2d at 52, 16 BLR at 2-66.

B. Section 718.202(a)(2)

1. The Administrative Law Judge's Findings

The administrative law judge determined that the opinions of Drs. Segen and Perper, both of whom concluded that the autopsy revealed coal workers' pneumoconiosis, were well-reasoned and well-documented and entitled to full probative weight. Decision and Order at 25. The administrative law judge noted that Dr. Segen, the autopsy prosector, identified multiple foci of black pigment, averaging 1-2 millimeters in diameter, and specifically reported that there was evidence of coal workers' pneumoconiosis. *Id.*; Director's Exhibit 202. In addition, the administrative law judge indicated that Dr. Perper determined, based on a review of the autopsy report and tissue slides, that the miner had coal workers' pneumoconiosis. Decision and Order at 25; Claimant's Exhibits 11 at 23, 12, 13.

The administrative law judge next considered the report in which Dr. Naeye stated, based on a review of the autopsy report and tissue slides, that the miner did not have coal workers' pneumoconiosis. The administrative law judge noted that Dr. Naeye relied on an article by Dr. Kleinerman, entitled *Pathology Standards for Coal Workers' Pneumoconiosis*, to find that "[t]he minimum criteria for the diagnosis of simple coal worker[s'] pneumoconiosis . . . require[s] that tissue damage be associated with black pigment at sites below the pleura and adjacent to small arteries and airways in the lungs." Decision and Order at 25, *quoting* Director's Exhibit 206. The administrative law judge indicated that the Department of Labor (DOL) has identified a lack of consensus among physicians as to the validity of the Kleinerman criteria. Decision and Order at 25, *citing* 65 Fed. Reg. 79,920, 79,936 (Dec. 20, 2000). The administrative law judge also found that, consistent with the DOL's findings, Dr. Perper asserted that the standards in the article are thirty years old and that, since then, there have been significant changes. Decision and Order at 25. In addition, the administrative law judge acknowledged Dr. Naeye's statement that Dr. Segen "selectively took severely damaged tissues" and noted that, in *W.B.* [*Blankenship*] *v. Clinchfield Coal Co.*, BRB No. 07-0622 BLA (May 21, 2008)(unpub.), the Board upheld an administrative law judge's decision to accord less weight to Dr. Naeye's opinion, based on this statement. *Id.*, *quoting* Director's Exhibit 206.

The administrative law judge concluded that, because Dr. Segen, the pathologist who prepared the autopsy slides, was in "the best position to determine whether the slides were representative of the extent of the pneumoconiosis he observed," Dr. Naeye's opinion was entitled to less weight. Decision and Order at 26. Consequently, relying on the opinions of Drs. Segen and Perper, the administrative law judge determined that the autopsy evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). *Id*.

2. Arguments on Appeal

Employer asserts that the administrative law judge's reasons for discrediting Dr. Naeye's opinion are irrational, as nothing in the preamble to the regulations, or Dr. Perper's report, supports them. Employer argues that Dr. Kleinerman's article discussing the pathological standards for diagnosing pneumoconiosis relates only to the diagnosis of complicated pneumoconiosis and that the standard that Dr. Kleinerman identified concerning simple pneumoconiosis is the same as that adopted in the DOL's regulations. Employer also contends that Dr. Perper did not testify that the standard applied by Dr. Naeye was outdated, but rather that it related to whether emphysema could be due to coal mine employment and to the size of lesions required to diagnose complicated pneumoconiosis. Further, employer alleges that the administrative law judge erred in relying on the Board's decision in *Blankenship* to discredit Dr. Naeye's opinion, on the ground that he questioned whether the slides provided by Dr. Segen were representative, as a substantially greater number of slides were prepared in *Blankenship*. Employer also states that this comment by Dr. Naeye was not relevant to his diagnosis and that the Board's holding in *Blankenship* did not mean that "any opinion of Dr. Naeye is per se entitled to less weight or that any comment on the representative nature of the tissue sample is per se a reason to discredit a doctor's opinion." Employer's Supplemental Brief at 18.

Employer's allegations of error are without merit. While employer claims that the standard identified in the article by Dr. Kleinerman concerning simple pneumoconiosis is the same as that identified in the DOL's regulations, it offers no proof to support this assertion and nothing in the regulations supports it, as the regulations do not set forth standards for the pathologic diagnosis of simple pneumoconiosis. *See* 20 C.F.R. §§718.106, 718.201(a)(1), 718.202(a)(2). In addition, contrary to employer's contention, Dr. Perper testified that the standard applied by Dr. Naeye was outdated and Dr. Perper cited the standards for diagnosing emphysema and complicated pneumoconiosis as reflecting recent changes.[7] *See* Claimant's Exhibit 11 at 16-18. Further, the

[7] Dr. Perper testified:

administrative law judge did not indicate that the Board has held that any opinion by Dr. Naeye was automatically entitled to less weight when he comments on the representative nature of the autopsy tissue samples. Rather, the administrative law judge permissibly relied on the Board's reasoning in *Blankenship* to find, in this case, that Dr. Segen was in the best position to identify whether the slides that he prepared were representative of the pneumoconiosis that he observed. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *see* Decision and Order at 25-26. Employer also does not explain how the difference between the number of slides prepared and examined in *Blankenship* and the number prepared in the current case would change the administrative law judge's determination concerning the quality of the slides. Additionally, Dr. Naeye's statement, that "*it is important to recognize* that Dr. Segen[,] the autopsy prosector[,] selectively took severely damaged tissues for this review," contradicts employer's assertion that this belief was not relevant to Dr. Naeye's opinion. Director's Exhibit 206 (emphasis added). Accordingly, we affirm the administrative law judge's determination that claimant established that the miner had clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2), as it is rational and supported by substantial evidence. *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-123.

C. Section 718.202(a)(4)

1. The Administrative Law Judge's Findings

Regarding Dr. Perper's opinion, that the miner had both clinical and legal pneumoconiosis,[8] the administrative law judge explained that Dr. Perper's statement, that

> [I]t's an article which is about, I believe almost 30 years or more old, and since then, there were a number of changes which the article at that time was not aware of . . . . I followed the standards as they are today, and today the standards are different . . . . [T]he normal standards are now in . . . Atlas of Pathology Disease, and . . . like in other recent textbook[s] and publication[s], for example, the standards have been modified.

Claimant's Exhibit 11 at 16-18.

[8] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This

he was aware that the miner worked twenty-seven years in coal mine employment, was consistent with his finding, since Dr. Perper relied on Dr. Rasmussen's report, which reported a history spanning that amount of time, but included gaps for military service and other employment. *Id*. The administrative law judge indicated that Dr. Perper was aware of the miner's significant smoking history and cited studies establishing a causal connection between emphysema and coal dust to support his findings. *Id*. Therefore, the administrative law judge determined that Dr. Perper's opinion, as expressed in his 2008 deposition, was well-reasoned and well-documented. *Id*.; *see* Claimant's Exhibit 11.

The administrative law judge noted that Dr. Rasmussen diagnosed coal workers' pneumoconiosis and diffuse interstitial pulmonary fibrosis. Decision and Order at 27; *see* Claimant's Exhibit 2. The administrative law judge found that the coal mine employment and smoking histories of the miner, considered by Dr. Rasmussen, were consistent with his findings. Decision and Order at 27-28. In addition, the administrative law judge determined that Dr. Rasmussen's diagnoses of clinical and legal pneumoconiosis were well-reasoned and well-documented because they were based on the medical evidence and because Dr. Rasmussen cited to articles supporting his position, that it is impossible to exclude coal dust exposure as a causal factor in claimant's interstitial fibrosis and respiratory impairment. *Id*. at 28. The administrative law judge concluded that Drs. Perper and Rasmussen's failure to specifically apportion the contributing causes of the miner's respiratory impairment was permissible because they both "unequivocally opined" that coal dust exposure and cigarette smoking caused the miner's impairment. *Id*.

The administrative law judge indicated that, while Dr. Fino diagnosed clinical pneumoconiosis, he did not make a finding as to legal pneumoconiosis. Decision and Order at 29; Employer's Exhibit 1. The administrative law judge also stated that Dr. Dahhan did not make a finding concerning clinical pneumoconiosis and that his diagnosis of chronic bronchitis, due solely to smoking, was entitled to little probative weight. *Id*.; *see* Employer's Exhibit 3. The administrative law judge explained that because Dr. Dahhan's report was from 1986, approximately fifteen years prior to the other reports in the record, he gave more weight to the more recent evidence, since pneumoconiosis is a progressive and irreversible disease. Decision and Order at 29. Further, the administrative law judge concluded that, because none of the treatment records contained

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definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

a diagnosis of either clinical or legal pneumoconiosis, they were not probative. *Id*. at 29-30.

Upon weighing the medical opinions together, the administrative law judge credited the more recent opinions of Drs. Perper and Rasmussen, diagnosing clinical and legal pneumoconiosis, over the contrary opinion of Dr. Dahhan. Decision and Order at 30. Accordingly, the administrative law judge found that claimant established that the miner had clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*.

2. Arguments on Appeal

Employer contends that the administrative law judge's finding, that claimant established that the miner had legal pneumoconiosis, cannot be affirmed.[9] Employer argues that this finding is "at odds with [Judge] Purcell's credibility findings that were not disturbed in [the miner's] claim." Employer's Supplemental Brief at 19. Employer also asserts that the administrative law judge's findings seems to confuse clinical and legal pneumoconiosis by stating that the opinions of Drs. Perper and Rasmussen were credible, as they were consistent with his findings that the x-ray and autopsy evidence was positive for pneumoconiosis. Employer maintains that the administrative law judge "overlooked" that the opinions of Drs. Perper and Rasmussen were not consistent with his findings as to the length and nature of the miner's coal mine employment. *Id*. Employer also disagrees with the administrative law judge's determination as to the miner's smoking history, since the miner's treatment records indicated that his history was much longer than that relied on by the physicians diagnosing pneumoconiosis. Further, employer argues that the administrative law judge inconsistently treated the evidence by crediting the opinions of Drs. Perper and Rasmussen, even though they could not distinguish the causes of the miner's respiratory impairment, over the opinions of Drs. Fino and Dahhan because they were either silent or less recent. Employer explains that an opinion that does not attribute a miner's impairment or disease to coal dust exposure is not silent but rather is affirmative, or substantial, evidence of the absence of pneumoconiosis.

Employer's argument, that the administrative law judge's finding, concerning legal pneumoconiosis, is at odds with the finding in the miner's claim, is a reassertion of its collateral estoppel argument, which has already been rejected. *See supra* at 6-7. There is also no merit to employer's contention that the administrative law judge's legal pneumoconiosis finding confuses clinical and legal pneumoconiosis, as employer

[9] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established that the miner had clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

misleadingly cites to the portion of the administrative law judge's opinion in which he explains how the medical opinion evidence supports his finding that claimant established the existence of clinical pneumoconiosis. *See* Decision and Order at 30. Further, as the administrative law judge rationally found, Dr. Rasmussen's statements concerning the miner's coal mine employment history were consistent with the administrative law judge's finding of 15.62 years.[10] *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 27-28.

In addition, contrary to employer's assertion, we hold that the administrative law judge acted within his discretion in finding that claimant established a smoking history of twenty-one pack years. *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 7. The administrative law judge's determination is supported by claimant's statements to the physicians of record. As the administrative law judge noted, Drs. Rasmussen and Dahhan indicated that the miner reported smoking histories of fourteen to twenty-one pack years and twenty or twenty-one pack years, respectively. Decision and Order at 7; Claimant's Exhibit 1; Employer's Exhibit 3. In addition, the administrative law judge was aware of a treatment record reporting a more extensive smoking history, but acted within his discretion in

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[10] The administrative law judge stated, "Dr. Rasmussen reported [a] coal mine employment history spanning 27 years, but with gaps for military service and other employment." Decision and Order at 27-8. Dr. Rasmussen reported:

> [The miner] served in the military between 1942 and 1946 . . . . He was also in the service for a short time in 1950.
>
> The patient worked as a bus driver for a number of years.
>
> He first worked in the coal mines, however, between 1941 and 1942, primarily as a hand loader. He hauled slate in the 1950's for about 2 years. He drove a coal truck for about 2 years in the 1960's. He worked between 1969 and 1986 sinking shafts and working as a general underground and outside laborer. He worked underground half the time and outside half the time. He worked as a brake man, motor man, face man underground, and he also worked as a mechanic at the tipple and coal truck driver. His last job was that of driving a truck hauling coal. He had to shovel to level the load. He had to change flat tires. He reports having a history of 27 years of coal mine employment, having last worked in 1986.

Claimant's Exhibit 2.

relying on the consistent reports of Drs. Rasmussen and Dahhan. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; Director's Exhibit 206; Claimant's Exhibit 4, 6.

Regarding the administrative law judge's discrediting of Dr. Dahhan's opinion, the Board has held that because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates the newer evidence from the older evidence. *See Clark*, 12 BLR at 1-155; *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). The administrative law judge rationally determined that Dr. Dahhan's opinion was entitled to diminished weight, as it was approximately fifteen years older than the other medical opinion evidence of record. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

In addition, the administrative law judge permissibly found that, "[t]o the extent that Dr. Fino's comments implicate legal pneumoconiosis, I find the comments not specific enough to support or contradict a finding of legal pneumoconiosis."[11] Decision and Order at 29; *see Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Clark*, 12 BLR at 1-155. Further, the administrative law judge acted within his discretion in crediting the opinion of Dr. Rasmussen, despite the fact that he was unable to apportion the causes of the miner's impairment. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Underwood*, 105 F.3d at 949, 21 BLR at 2-28.

Accordingly, we affirm the administrative law judge's findings that claimant established that the miner had clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(1), (2), (4) and at 20 C.F.R. §718.202(a) overall.[12] *See Compton*, 211 F.3d at 211, 22 BLR at 2-175.

[11] Dr. Fino opined that the miner's diffuse interstitial pulmonary fibrosis was not related to coal dust exposure. Employer's Exhibit 1. Dr. Fino also concluded that "whether there is or is not clinical or legal pneumoconiosis, I can state with a reasonable degree of medical certainty that coal mine dust inhalation did not cause, contribute to, or hasten this man's death." *Id*.

[12] Based on the affirmance of the administrative law judge's crediting of Dr. Rasmussen's opinion diagnosing legal pneumoconiosis and his discrediting of the contrary opinions of Drs. Fino and Dahhan, any error concerning Dr. Perper's reliance on a coal mine employment history of twenty-seven years, to diagnose legal pneumoconiosis, is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

D. Section 718.205(c)

1. The Administrative Law Judge's Findings

The administrative law judge considered the death certificate and the medical opinions of Drs. Perper, Segen, Fino and Naeye pursuant to 20 C.F.R. §718.205(c). The administrative law judge gave little weight to the death certificate, as there was no explanation or underlying documentation to support the inclusion of coal workers' pneumoconiosis as a cause of death. Decision and Order at 32. The administrative law judge gave "full probative weight" to Dr. Perper's opinion, that the miner's death was caused or hastened by interstitial coal workers' pneumoconiosis and hypoxemia associated with coal workers' pneumoconiosis and chronic emphysema. *Id*. at 32-33; *see* Claimant's Exhibit 11. The administrative law judge determined that, although Dr. Perper considered evidence outside of the record, when making the findings in his April 24, 2002 report, he subsequently testified that, based only on the admitted evidence, his opinion was unchanged. Decision and Order at 33.

The administrative law judge found that while Dr. Segen stated that the miner had coal workers' pneumoconiosis, he also concluded that the "terminal events may have been related to possibly an acute intercurrent infection." Decision and Order at 33, *quoting* Director's Exhibit 202. Thus, the administrative law judge found that the doctor's opinion did not clearly support a finding that pneumoconiosis contributed to the miner's death. Decision and Order at 33. Instead, the administrative law judge determined that it was silent on the issue and, therefore, not probative. *Id*.

Relying on the Fourth Circuit's decisions in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), the administrative law judge accorded less weight to the opinions of Drs. Fino and Naeye, because their opinions were based on premises contrary to the administrative law judge's finding that the miner had coal workers' pneumoconiosis. Decision and Order at 33-34; *see* Director's Exhibit 206; Employer's Exhibit 1. The administrative law judge acknowledged that Dr. Fino stated that, even assuming the presence of coal workers' pneumoconiosis, it did not cause, contribute to, or hasten, the miner's death. Decision and Order at 34. However, the administrative law judge found this statement to be conclusory, since it did not explain how or why pneumoconiosis did not contribute in some way. *Id*.

Consequently, crediting the opinion of Dr. Perper over the contrary opinions of Drs. Fino and Naeye, the administrative law judge determined that the claimant established, by a preponderance of the evidence, that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Decision and Order at 34.

2. Arguments on Appeal

Employer contends that the administrative law judge's reliance on *Toler*, to discredit the opinions of Drs. Fino and Naeye, was erroneous. Employer maintains that *Toler* stands for the proposition that, when a physician assumes the existence of pneumoconiosis, but still finds that death was not due to it, the administrative law judge is not barred from relying on it. Further, employer asserts that the administrative law judge mischaracterized Dr. Fino's opinion as being insufficiently explained, as Dr. Fino opined that the fibrosis contributing to the miner's death was not due to coal dust exposure, and the presence of pneumoconiosis did not influence death.

In the present case, the administrative law judge acted within his discretion as fact-finder in discrediting the opinions of Drs. Fino and Naeye regarding death causation because neither physician diagnosed the presence of clinical or legal pneumoconiosis, contrary to the administrative law judge's findings.[13] *See Scott*, 289 F.3d at 268-69, 22 BLR at 2-382-83, *Toler*, 43 F.3d at 116, 19 BLR at 2-83; Decision and Order at 33-4. Employer is correct in asserting that an administrative law judge may credit an opinion that is contrary to his finding that the miner suffers from pneumoconiosis, if the administrative law judge identifies "specific and persuasive reasons" for determining that the doctor's conclusion regarding death causation does not rest upon his or her "disagreement with the [administrative law judge]'s finding as to either or both of the predicates in the causal chain." Employer's Supplemental Brief at 21, *quoting Toler*, 43 F.3d at 116, 19 BLR at 2-83. However, employer does not acknowledge that the Fourth Circuit held that, even if an administrative law judge provided such reasons, the opinions could "carry little weight." *Toler*, 43 F.3d at 116, 19 BLR at 2-83. Therefore, we affirm the administrative law judge's finding that claimant established that the miner's death was caused, contributed to, or hastened by pneumoconiosis at 20 C.F.R. §718.205(c), as it is rational and supported by substantial evidence. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff*, 967 F.2d at 979-80, 16 BLR at 92-93.

[13] While Dr. Fino opined that even assuming the existence of pneumoconiosis, coal dust exposure did not cause, contribute to, or hasten the miner's death, the administrative law judge acted within his discretion in finding this statement to be conclusory because Dr. Fino did not explain how or why he determined that coal dust exposure was not, at least, a contributing cause. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). Therefore, the administrative law judge found that Dr. Fino's opinion as to death causation was not entitled to "probative weight." Decision and Order at 34.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge