BRB No. 05-0668 BLA

BETTY J. HIXSON (Widow of DEMPSEY HIXSON) Claimant-Petitioner v. U.S. STEEL MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/20/2006 DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care), Greensburg, Pennsylvania, for claimant.

Sandra L. Binotto (Burns, White & Hickton, LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (03-BLA-0218 and 03-BLA-6162) of Administrative Law Judge Michael P. Lesniak denying benefits on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

[1]Claimant is the surviving spouse of the deceased miner who died on August 22, 2001. Director's Exhibit 10.

amended, 30 U.S.C. §901 *et seq*. (the Act).[2] This case involves both a miner's request for modification of a 1984 claim[3] and a 2001 survivor's claim.

The miner filed a duplicate claim on March 15, 1984.[4] Director's Exhibit 1. In a Decision and Order dated October 26, 1989, Administrative Law Judge George P. Morin found that the miner's continued employment appeared to be the only reason advanced for the denial of his 1973 claim. *Id.* Judge Morin found that the fact that the miner was no longer employed was "a change in circumstances which avoid[ed] a duplicate claim finding." *Id.* Judge Morin, therefore, considered the merits of the miner's duplicate claim. After crediting the miner with twenty-two and one-half years of coal mine employment, Judge Morin found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* Judge Morin also found that the miner was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* Judge Morin, however, found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000).[5] *Id.* Accordingly, Judge Morin denied benefits. *Id.*

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[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]Claimant is pursuing the miner's request for modification of his denied 1984 claim.

[4]The miner initially filed a claim for benefits on July 2, 1973. Director's Exhibit 1. The district director denied the claim on July 12, 1974. *Id.* By letter dated March 6, 1980, the district director noted that the miner had not complied with requests to submit a Reconsideration Questionnaire (CM-1088) in support of his claim. *Id.* The district director informed the miner that if he did not contact the Department of Labor within 30 days, his claim would be considered abandoned. *Id.* On March 20, 1980, the miner submitted the requested questionnaire. *Id.* The miner indicated, *inter alia*, that he was still engaged in coal mine work. *Id.* On April 22, 1982, the district director noted that the miner's Part C claim was denied prior to March 1, 1977 and had not been further pursued. *Id.*

[5]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

By Decision and Order dated April 18, 1991, the Board affirmed Judge Morin's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b) (2000) as unchallenged on appeal. *Hixson v. USX Corp.*, BRB No. 89-3927 BLA (Apr. 18, 1991) (unpublished). The Board also affirmed Judge Morin's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000). *Id.* The Board, however, vacated Judge Morin's finding that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000) and remanded the case for further consideration. *Id.*

On remand, Judge Morin found that the medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). Director's Exhibit 1. Judge Morin, therefore, denied benefits. *Id.* By Decision and Order dated April 28, 1993, the Board affirmed Judge Morin's finding pursuant to 20 C.F.R. §718.204(c)(4) (2000). *Hixson v. USX Corp.*, BRB No. 92-0789 BLA (Apr. 28, 1993) (unpublished). The Board, therefore, affirmed Judge Morin's denial of benefits. *Id.* The Board subsequently summarily denied the miner's motion for reconsideration. *Hixson v. USX Corp.*, BRB No. 92-0789 BLA (June 6, 1994) (Order) (unpublished).

The miner filed a request for modification on December 7, 1994. Director's Exhibit 1. In a Decision and Order dated October 28, 1997, Administrative Law Judge Daniel L. Leland found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* Judge Leland, however, found that that the newly submitted evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* Consequently, Judge Leland found that the evidence was insufficient to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *Id.* Judge Leland, therefore, denied the miner's request for modification. *Id.*

By Decision and Order dated January 22, 1999, the Board held that Judge Leland erred in denying the miner's request for modification because he had found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), an element of entitlement that had been previously adjudicated against the miner. *Hixson v. U.S. Steel Mining Co.*, BRB No. 98-0332 BLA (Jan. 22, 1999) (unpublished). However, in light of the Board's affirmance of Judge Leland's denial of benefits on the merits, the Board held that Judge Leland's error in failing to find a change in conditions pursuant to 20 C.F.R. §725.310 (2000) was harmless. *Id.* In affirming Judge Leland's denial of benefits on the merits, the Board affirmed Judge Leland's finding that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.*

Claimant subsequently filed an appeal with the United States Court of Appeals for the Third Circuit. Director's Exhibit 1. By Order dated April 8, 1999, the Third Circuit dismissed the miner's case for "failure to timely prosecute." *Hixson v. Director, OWCP*, No. 99-3165 (3d Cir. Apr. 8, 1999) (Order) (unpublished).

The miner filed a request for modification on April 29, 1999. Director's Exhibit 1. In a Proposed Decision and Order dated April 11, 2000, the district director denied the miner's request for modification. *Id.* At the miner's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. *Id.*

By letter dated October 10, 2001, the miner's counsel notified Judge Leland that the miner had died. Director's Exhibit 1. The miner's counsel requested that Judge Leland remand the miner's claim to the district director so that the miner's widow could pursue modification of the miner's claim and so that the miner's claim and the survivor's claim could be consolidated. *Id.* By Order dated October 12, 2001, Judge Leland ordered that the miner's claim be remanded to the district director to be associated with the survivor's claim. *Id.*

Claimant filed a survivor's claim on March 6, 2002. Director's Exhibit 2. In a Proposed Decision and Order dated March 13, 2003, the district director denied benefits in the survivor's claim. Director's Exhibit 27. On June 26, 2003, both the miner's claim and the survivor's claim were forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 32. Administrative Law Judge Michael P. Lesniak (the administrative law judge) held a hearing on June 10, 2004.

After crediting the miner with twenty-two years of coal mine employment, the administrative law judge considered the miner's request for modification. The administrative law judge found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found that the newly submitted evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that the evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge, therefore, denied the miner's request for modification. In regard to the survivor's claim, the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also denied benefits in the survivor's claim. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant also argues that the administrative law judge erred in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer

responds in support of the administrative law judge's denial of benefits in both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

This case involves the miner's request for modification of his denied 1984 claim. Modification may be based upon a mistake in a determination of fact. In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

The administrative law judge found that there was not a mistake in a determination of fact in regard to Judge Leland's previous determination that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis. *See* Decision and Order at 15. Because no party challenges the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Modification may also be based upon a change in conditions. The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000),[6] an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Leland found that the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). The Board subsequently affirmed this finding. Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was

[6]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that a miner need only prove that his pneumoconiosis is a substantial contributor to his total disability. *See Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
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> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

The administrative law judge credited the opinions of Drs. Oesterling and Morgan,[7] that the miner's total disability was not due to pneumoconiosis, over Dr. Wald's contrary opinion. Decision and Order at 16-17; Claimant's Exhibit 1; Employer's Exhibit 2. The administrative law judge, therefore, found that the newly submitted evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Claimant initially contends that employer, by conceding that the miner's pneumoconiosis satisfied the "legal definition" of the disease, acknowledged that the miner's total disability was due to pneumoconiosis. Claimant contends that "[a]ny time a

[7]In fact, Dr. Morgan's opinion is not "newly submitted evidence" since it was previously considered by Administrative Law Judge Daniel L. Leland. *See* Director's Exhibit 1.

miner has pneumoconiosis it makes a significant contribution to disability or death because its progressive nature will shorten the miner's life." Claimant's Brief at 16.

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[8] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In its post-hearing brief, employer conceded that "the medical evidence filed in prior numerous claims established the presence of pneumoconiosis arising out of coal mine employment." Employer's Post-Hearing Brief at 5. Employer, however, did not concede that claimant suffered from "legal" pneumoconiosis.[9]

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[8]"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Claimant contends that Dr. Oesterling is the only physician who applied the "proper legal definition of pneumoconiosis." Claimant's Brief at 2. Claimant argues that neither Dr. Morgan nor Dr. Wald applied the proper legal definition of pneumoconiosis. *Id.* The comments to the revised regulations state:

> The statute defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b). This broad definition encompasses not only coal workers' pneumoconiosis as that disease is contemplated by the medical community, but also any other chronic lung disease demonstrably related to coal mine employment but not typically denominated as pneumoconiosis in medical circles. Thus, the Department is making a legal distinction, rather than a medical one, by employing the phrase "legal pneumoconiosis" in order to properly implement Congress' intent.

65 Fed. Reg. 79937-79938 (Dec. 20, 2000).

Thus, physicians are not required to consider whether a diagnosis is sufficient to satisfy the definition of "legal" pneumoconiosis. It the administrative law judge, as the fact-finder, who must make that determination.

[9]There has never been a finding that the miner suffered from "legal" pneumoconiosis in this case. In his 1989 Decision and Order, Judge Morin found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). By Decision and Order dated April 18, 1991, the Board, *inter alia*, affirmed Judge Morin's finding pursuant to 20 C.F.R. §718.202(a)(1) as unchallenged on appeal. *Hixson v. USX Corp.*, BRB No. 89-3927 BLA (Apr. 18, 1991)

Moreover, even if employer had conceded the existence of "legal" pneumoconiosis, a miner is still required to establish all elements of entitlement, including establishing that total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). A finding of "legal" pneumoconiosis does not entitle a claimant to a presumption that his total disability was due to pneumoconiosis or coal dust exposure.

Because Dr. Oesterling "categorically exclude[d] obstructive lung disorders from occupationally related pathologies," claimant argues that his opinion is "inconsistent with the regulations." Claimant's Brief at 19. We disagree. Because Dr. Oesterling did not assume that coal dust exposure can never cause an obstructive lung disease, his opinion is not inconsistent with the regulations.[10] *See generally Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

Claimant next argues that the administrative law judge erred in discrediting Dr. Wald's opinion because he was not able to apportion or quantify in percentages the effects that the miner's exposure to coal dust and cigarette smoking had on his impairment. We agree. Under the existing law of the Third Circuit, a miner is not required to establish relative degrees of causal connection by pneumoconiosis and

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(unpublished). Thus, the only finding of pneumoconiosis in this case has been a finding of "clinical" pneumoconiosis.

[10]Claimant also contends that the administrative law judge erred in not addressing that Dr. Oesterling was biased in favor of employer. In support of her argument, claimant notes that Dr. Oesterling has "a considerable financial interest with [employer's counsel]." Claimant's Brief at 6. During his June 26, 2003 deposition, Dr. Oesterling acknowledged that had done ten to twelve depositions for employer's counsel in the past year and had been doing depositions for employer's counsel for the past 12-14 years. Employer's Exhibit 2 at 12-14. Dr. Oesterling testified that he charges $300 an hour for a deposition and probably $1000 for an opinion and a deposition. *Id.* at 14. Claimant's contention that the opinions submitted by employer should be discredited because employer paid for them has no merit. Absent a foundation in the record for a finding of bias on the part of a party's physicians, the fact that a party had opinions prepared for purposes of litigation is not a proper basis for discrediting those opinions. *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906 (1985); *but see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997) (holding that an administrative law judge should consider whether an opinion is, to any degree, the product of bias in favor of the party retaining the expert and paying the fee).

smoking to demonstrate that his total disability is due to pneumoconiosis. *See Bonessa, supra*; *see also Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Although Dr. Wald could not quantify the contribution of the miner's coal dust exposure to his disability, he opined that it "was a definite contributing factor in the development of and progression of his chronic obstructive lung disease and ultimate death." Claimant's Exhibit 1. On remand, the administrative law judge is instructed to address whether Dr. Wald's opinion is sufficient to establish that the miner's pneumoconiosis was a substantial contributor to his total disability.[11] *See* 20 C.F.R. §718.204(c); *Bonessa, supra*.

The administrative law judge also found that Dr. Oesterling's opinion regarding the cause of the miner's total disability was better reasoned than that of Dr. Wald. *See* Decision and Order at 16-17. Dr. Oesterling opined that the miner's pulmonary disability was due to emphysema which he attributed to cigarette smoking and bronchial asthma. Employer's Exhibit 2 at 26. Dr. Oesterling explained that asthma is typically triggered by seasonal allergies and allergies to pollens, molds and dusts. *Id.* at 36. Dr. Wald opined that the miner's disability was significantly contributed to by his underlying chronic respiratory disease. Claimant's Exhibit 1. Dr. Wald explained that the miner suffered from chronic bronchitis that created bronchial constriction leading to air trapping. *Id.* Dr. Wald opined that this was a contributing factor in the progression of his emphysema. *Id.* Dr. Wald, therefore, concluded that the miner's coal dust exposure was a definite contributing factor in the development of and progression of his chronic obstructive lung disease. *Id.*

Thus, while Drs. Oesterling and Wald agreed that the miner suffered from emphysema, Dr. Oesterling opined that the miner also suffered from asthmatic bronchitis, while Dr. Wald opined that the miner suffered from chronic bronchitis related to his coal dust exposure. Dr. Oesterling based his diagnosis of asthma on his review of the miner's medical records.[12] Employer's Exhibit 1. Dr. Wald disagreed with Dr. Oesterling's diagnosis, noting that his own review of the miner's records did not show "true bronchial

[11]The "substantially contributing cause " standard of revised Section 718.204(c) was not intended to alter the meaning of "totally disabled due to pneumoconiosis" as previously determined in decisions by the various United States Courts of Appeals under Part 718, but rather was intended to codify the courts' decisions. 65 Fed. Reg. 79946-47 (Dec. 20, 2000).

[12]Dr. Oesterling noted that the miner's April 2, 1999 discharge summary from Frick Community Hospital included a diagnosis of asthmatic bronchitis. Employer's Exhibit 1. Dr. Oesterling also noted that the miner had been treated with drugs designed to help eliminate the asthmatic component of his disease. *Id.*

asthma." Claimant's Exhibit 1. Dr. Wald explained that his diagnosis of chronic bronchitis was based "on the fact that [the miner] had reversible obstruction to airflow and wheezing that was intermittently severe on the left." *Id.* The administrative law judge did not adequately explain his basis for finding that Dr. Oesterling's opinion was better reasoned than that of Dr. Wald. *See* Decision and Order at 16-17. Moreover, while the administrative law judge noted Dr. Oesterling's status as a Board-certified pathologist, he did not explain the significance of this qualification. The administrative law judge similarly did not address the significance of the fact that Dr. Wald is Board-certified in Internal Medicine. *See* Claimant's Exhibit 2.

In considering whether the evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge also erred in weighing the previously submitted evidence. Specifically, the administrative law judge erred in considering the opinions of Drs. Morgan, Silverman, Abrons and Kupfer.[13] *See* Decision and Order at 16-17. On remand, the administrative law judge should only consider the newly submitted evidence, *i.e.*, evidence developed since the previous denial of benefits.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and remand the case for further consideration. On remand, should the administrative law judge find the evidence sufficient to establish modification under 20 C.F.R. §725.310 (2000), the administrative law judge must consider all of the evidence of record to determine whether the miner is entitled to benefits on the merits of his 1984 claim. *Nataloni*, *supra*; *Kovac*, *supra*.

The Survivor's Claim

Because the survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[14] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director,*

[13]The earlier submitted medical opinions are relevant to the issue of a change in conditions in that they can provide a baseline regarding what evidence is necessary to demonstrate a change in conditions. However, this evidence itself cannot provide the basis for the requisite change in conditions pursuant to 20 C.F.R. §725.310 (2000).

[14]Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

In his consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge stated that:

> Having reviewed all of the evidence of record, I find the opinion of Dr. Oesterling, who is a Board-certified pathologist, and who concluded that CWP did not hasten or contribute to the miner's death, to be the most persuasive and worthy of the greatest weight. In according greatest weight to the opinion of Dr. Oesterling, I rely upon his expertise as well as his reasoning in the report. I find it to be worthy of greater weight than the opinion of Dr. Wald, the summary listing of pneumoconiosis on the death certificate as rendered by Dr. Rasheed, or the 2002 report of Dr. Bursali. Dr. Bursali relied primarily on the miner's thirty years of coal mine employment in rendering an opinion regarding the cause of death. His opinion is not well-reasoned and I accord it less weight than that of Dr. Oesterling. Dr. Wald found death due to pneumoconiosis; however, unlike Dr. Oesterling, Dr. Wald did not have the opportunity to review the autopsy slides and, as he conceded, he does not have the expertise to review such evidence. Dr. Wald fails to explain how the autopsy report or slides support his conclusions. I find his explanation regarding the etiology of the

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> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

> miner's pulmonary condition not to be as persuasive as that of Dr. Oesterling.
>
> Based on the totality of the evidence of record, I find that Claimant has failed to meet her burden of proving that CWP contributed to the miner's death pursuant to §718.205(c). While it is apparent that the miner suffered from a totally disabling respiratory impairment prior to death and that his was a pulmonary death, there is no competent evidence establishing the link between his coal mine employment and his death.

Decision and Order at 17-18.

Citing *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997) and *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004), claimant contends that administrative law judge erred in failing to give proper consideration to the opinions of Drs. Bursali and Rasheed, based upon their status as treating physicians.[15] In *Soubik*, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician. *Soubik*, 366 F.3d at 226, 23 BLR at 2-101. However, the court has also indicated that automatic preferences are disfavored. *Mancia*, *supra*. Moreover, the Third Circuit has held that an administrative law judge may permissibly require a treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to a miner's death. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

In this case, the administrative law judge permissibly discredited Dr. Bursali's opinion regarding the cause of the miner's death because he found that it was not sufficiently reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Dr. Bursali opined, without explanation, that the miner's coal dust exposure "prepared [sic] and caused his demise." Director's Exhibit 17.

The administrative law judge also permissibly found that the miner's death certificate was insufficient to establish that the miner's death was due to pneumoconiosis because it was conclusory. Decision and Order at 17-18; *See generally Lango v.*

[15]The record documents that Drs. Bursali and Rasheed were the miner's treating physicians. In a report dated July 26, 2002, Dr. Bursali noted that he had known the miner since 1982. Director's Exhibit 17. The record documents that Dr. Bursali treated the miner during numerous hospitalizations from 1981 through 2001. Director's Exhibit 17. The record also documents that Dr. Rasheed treated the miner during numerous hospitalizations from 1998 through 2001. Director's Exhibits 13, 17.

Director, OWCP, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997) (The mere statement of a conclusion by a physician, without any explanation of the basis for that statement, does not take the place of the required reasoning). Because the administrative law judge provided a valid basis for discrediting the opinions of Drs. Bursali and Rasheed, we reject claimant's contention that the administrative law judge erred in failing to accord determinative weight to their opinions based upon their status as the miner's treating physicians. *Mancia*, *supra*; *Lango*, *supra*.

Claimant also argues that the administrative law judge erred in discrediting Dr. Wald's opinion that the miner's death was due to pneumoconiosis. The administrative law judge discredited Dr. Wald's opinion regarding the cause of the miner's death because, unlike Dr. Oesterling, he did not have the opportunity to review the miner's autopsy slides. The administrative law judge also discredited Dr. Wald's opinion because he failed to explain how the autopsy report or slides supported his conclusions.

In this case, Dr. Wald agreed with Dr. Oesterling that the miner suffered from emphysema. Dr. Wald and Dr. Oesterling also each attributed the miner's death to his chronic obstructive pulmonary disease, *i.e.*, emphysema.[16] Dr. Wald's disagreement with

[16]In an October 13, 2003 report, Dr. Wald stated:

> The Federal Black Lung Law defines coal workers pneumoconiosis as any respiratory disease that was caused by or substantially aggravated by coal mine employment. While this certainly would include the scar reaction described in textbooks, it also includes the inhalation of dusts if they have contributed or aggravated to [sic] an underlying problem. [The miner] had chronic bronchitis and pulmonary emphysema. We know that he did have a dust exposure based on the pathologic description by Dr. Oesterling. These irritant dusts, along with his cigarette smoking created a bronchial irritation and bronchial constriction. The chronic bronchitis also contributed to the progression of his emphysema. Therefore, I would conclude that [the miner's] exposure to coal dust was a definite contributing factor in the development of and progression of his chronic obstructive lung disease and ultimate death.

Claimant's Exhibit 1.

During a February 18, 2004 deposition, Dr. Wald explained his reason for attributing the miner's death to his coal dust exposure:

> Yes, it is true there was an acute pneumonia that was the final event, but that was on chronic respiratory disease that was enough to tip the

Dr. Oesterling focused upon the causes of the miner's emphysema. Notably, Dr. Oesterling based his opinion regarding the *etiology* of the miner's emphysema on a "review of the medical records," not upon his review of the miner's autopsy slides. *See* Employer's Exhibit 1. Dr. Oesterling's opinion that the miner's emphysema was primarily due to cigarette smoking was based upon his review of the medical reports of Drs. Bloom, Morgan and Abrons. *Id.* Dr. Oesterling's finding that the miner's form of emphysema was also caused by asthmatic bronchitis was similarly based, not upon a review of the miner's autopsy slides, but upon a review of the miner's medical records. Dr. Oesterling noted that Dr. Bursali, in a Discharge Summary dated April 2, 1999, diagnosed asthmatic bronchitis. *Id.* Dr. Oesterling also noted that the miner had been treated with drugs designed to help eliminate the asthmatic component of his disease. *Id.*

> balance. Now his chronic respiratory disease was related to his coal dust exposure. Therefore, according to the Black Lung Law, Federal Black Lung Law his death was a result of coal workers' pneumoconiosis.

Claimant's Exhibit 1.

In a report dated April 17, 2003, Dr. Oesterling stated:

> [I]t is quite evident from the sections and the limited review of the medical records that [the miner] did indeed suffer from a significant respiratory impairment due to chronic obstructive pulmonary disease, *i.e.*, panlobular emphysema. This has been complicated by aspiration which has resulted in extensive bronchopneumonia involving both upper lobes. Thus the remaining functioning portion of his lung had largely been destroyed by this inflammatory process. Based on this I would agree with the death certificate that the primary cause of death was "Respiratory failure secondary to chronic obstructive pulmonary disease." The "history of pneumoconiosis" is of no significance in this case since there is no structural change that would have produced any degree of respiratory impairment nor could the limited dust deposited in any way have impacted on his death.

Employer's Exhibit 1.

During a June 26, 2003 deposition, Dr. Oesterling opined that the miner's coal workers' pneumoconiosis did not play any role in his death. Employer's Exhibit 2 at 30. Dr. Oesterling also opined that occupational lung disease did not cause, contribute to, or hasten the miner's death. *Id.* at 31.

Thus, Dr. Oesterling's opinion regarding the etiology of the miner's emphysema was not based upon his review of the miner's autopsy slides or autopsy report. Moreover, Dr. Wald's diagnosis of chronic bronchitis was based upon clinical findings, *i.e.*, findings of reversible obstruction to airflow with wheezing that was intermittently severe on the left side. Claimant's Exhibit 1. Because the miner's chronic bronchitis contributed to his emphysema, Dr. Wald opined that the miner's coal dust exposure was a contributing factor in the development of his chronic obstructive lung disease and death. *Id.* Thus, there is no evidence of record that Dr. Oesterling or Dr. Wald relied upon the miner's autopsy findings to support their opinions regarding the cause(s) of the miner's death. Consequently, the administrative law judge erred in discrediting Dr. Wald's opinion because he did not have the opportunity to review the autopsy slides or explain how the autopsy report or slides supported his conclusions.[17] Consequently, we vacate the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remand the case to the administrative law judge for further consideration.

[17]While the administrative law judge acknowledged Dr. Oesterling's status as a Board-certified pathologist, he failed to note that Dr. Wald is Board-certified in Internal Medicine. *See* Claimant's Exhibit 2. On remand, the administrative law judge should address the respective qualifications of Drs. Oesterling and Wald and explain their significance in his weighing of the evidence.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge