

BRB No. 06-0899 BLA

RACHEL MOSLAK )  
(Widow of JOSEPH MOSLAK) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
J.R. SALES COMPANY, a/k/a )  
J.R. SALES, INCORPORATED )  
 )  
and )  
 ) DATE ISSUED: 08/29/2007  
OLD REPUBLIC INSURANCE COMPANY )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Daniel W. Rullo (Barbera, Clapper, Beener, Rullo & Melvin, LLP), Somerset, Pennsylvania, for claimant.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (05-BLA-5479) of Administrative Law Judge Richard A. Morgan rendered on a survivor’s claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant is the widow of the miner who died on November 6, 2003. Director’s Exhibits 11, 13. Claimant filed her survivor’s claim on December 2, 2003. Director’s Exhibit 1. The district director awarded benefits on October 6, 2004. At employer’s request, the matter was forwarded to the Office of Administrative Law Judges, and the parties agreed to a decision on the record. In his Decision and Order issued on July 28, 2006, the administrative law judge accepted employer’s stipulation that the miner worked at least fifteen years in coal mine employment and that he suffered from clinical pneumoconiosis, as established by the autopsy evidence. Decision and Order at 3-4. The administrative law judge found that claimant was entitled to a presumption that the miner’s pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). However, the administrative law judge also determined that the evidence failed to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

Claimant appeals, asserting that the administrative law judge erred in admitting into the record two medical reports by Dr. Oesterling dated March 29, 2004 and June 21, 2004 “that went beyond slides and autopsy protocol,” and a report by Dr. Fino, that claimant contends has “exceeded employer’s permissible submission of medical reports” pursuant to 20 C.F.R. §725.414(a)(1), (a)(3)(i). Claimant’s Brief at 2. Claimant asserts that because the case was submitted for a decision on the record, the Board has the same ability as the administrative law judge to assess the credibility of the witnesses, and should find that she is entitled to benefits. Claimant contends that the administrative law judge ignored that employer’s experts were biased, and that he erred by not assigning controlling weight to the opinion of the miner’s treating physician, Dr. Gray, and the opinion of the autopsy prosecutor, Dr. Goldblatt, that the miner’s death was hastened by pneumoconiosis. The Director, Office of Workers’ Compensation Programs (the Director), has filed a limited brief addressing claimant’s evidentiary challenges. The Director contends that the administrative law judge properly admitted Dr. Oesterling’s reports into the record, and that he properly redacted those portions of Dr. Fino’s medical opinion that referred to medical evidence not admitted into the record.

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.<sup>1</sup> 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).

*Evidentiary Issues:*

At the outset, we address claimant’s evidentiary challenge to the administrative law judge’s admission of the reports of Drs. Oesterling and Fino. The record reflects that on December 1, 2005, a telephone conference was held, at which time the parties agreed to cancel the hearing and proceed with a decision on the record. The administrative law judge heard objections to the admission of evidence. The exhibits proffered by employer included a biopsy report by Dr. Oesterling dated March 29, 2004, identified as Employer’s Exhibit 1; a report by Dr. Oesterling dated June 21, 2004, wherein the doctor rendered his opinion on the cause of the miner’s death based on his review of the autopsy slides, identified as Employer’s Exhibit 2; a consultative medical report by Dr. Fino dated August 19, 2005, identified as Employer’s Exhibit 3; treatment and hospitalization records, identified as Employer’s Exhibits 4 and 5; and a transcript of a deposition of Dr. Oesterling dated August 4, 2004, identified as Employer’s Exhibit 7.<sup>2</sup> Claimant objected only to the admission of Employer’s Exhibit 3, Dr. Fino’s report, on the ground that Dr. Fino had reviewed evidence contained in the prior miner’s claim that had not been made a part of the record in the instant survivor’s claim.

In his Ruling and Order (R&O) issued on December 1, 2005, the administrative law judge advised that he was admitting Director’s Exhibits 1-40, Claimant’s Exhibits 1-5, and Employer’s Exhibits 1-5 and 7 into the record. The administrative law judge specifically admitted Dr. Oesterling’s March 29, 2004 report as employer’s one permissible biopsy report pursuant to Section 725.414(a)(3)(i). R&O at 2. The administrative law judge also admitted Dr. Oesterling’s June 21, 2004 review of the autopsy slides as rebuttal evidence under Section 725.414(a)(3)(ii) or, in the alternative, as evidence proffered in excess of the evidentiary limitations but admitted under the good cause exception at 20 C.F.R. §725.456(b)(1).<sup>3</sup> *Id.* He then admitted Dr. Fino’s opinion

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<sup>1</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner’s most recent coal mine employment occurred in Pennsylvania. *Shupe v. Director*, OWCP, 12 BLR 1-200 (1989) (*en banc*).

<sup>2</sup> Employer’s Exhibit 6 was the deposition transcript of Dr. Gray, which was withdrawn by employer as a copy of the transcript had already been submitted by claimant.

<sup>3</sup> The administrative law judge found good cause to admit Dr. Oesterling’s review of the autopsy slides and his deposition testimony because the miner’s remains were

as an affirmative medical report under Section 725.414(a)(3)(i), noting that portions of Dr. Fino's report which referenced "some data not in evidence, must be redacted." *Id.* The administrative law judge specifically determined that the redacted data was not critical to Dr. Fino's opinion as to whether pneumoconiosis hastened the miner's death, and therefore, that Dr. Fino's opinion was entitled to consideration. R&O at 2. Lastly, the administrative law judge admitted Dr. Oesterling's deposition testimony as employer's second affirmative medical report pursuant to Section 725.414(c). *Id.*

On appeal, claimant asserts that employer's submissions have exceeded the evidentiary limitations. We disagree. Contrary to claimant's assertion, the administrative law judge properly admitted Dr. Oesterling's report dated March 29, 2004 as employer's one affirmative biopsy report allowed under Section 725.414(a)(3)(i).<sup>4</sup> The administrative law judge also properly admitted Dr. Oesterling's report, containing his review of the autopsy slides, into the record, albeit as rebuttal evidence. However, we agree with the Director that the administrative law judge's "conclusion that Dr. Oesterling's report could not constitute affirmative evidence was incorrect." Director's Brief at 4. A pathologist who provides an opinion based on his or her macroscopic review of the autopsy slides has provided a "report of autopsy" for purposes of Section

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"disposed before the employer was aware of any claim filed by the widow, [and] the former had no opportunity to have an autopsy conducted by its own experts." Ruling and Order (Dec. 1, 2005) at 2.

<sup>4</sup> The revised regulation at 20 C.F.R. §725.414 provides that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative case. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit one piece of evidence in rebuttal of each piece of evidence submitted as the opposing party's case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit one piece of rehabilitative evidence. *Id.* Notwithstanding these limits, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Each x-ray, autopsy or biopsy report, pulmonary function study, blood gas study, or medical report referenced in a medical report must either be admissible under the 20 C.F.R. §725.414(a) limits, or be admissible as a hospitalization or treatment record under 20 C.F.R. §725.414(a)(4). 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). "Good cause" is required to exceed the numerical limits. 20 C.F.R. §725.456(b)(1). "A physician's written assessment of a single objective test, such as a chest [x]-ray or a pulmonary function test, shall not be considered a medical report for the purposes of [Section 725.414]." 20 C.F.R. §725.414(a)(1).

725.414.<sup>5</sup> See *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-233 (2007) (*en banc*). Thus, contrary to the administrative law judge's finding, Dr. Oesterling's report was equally admissible as an affirmative autopsy report, see *Keener*, at 1-235-6. However, any error committed by the administrative law judge in referencing Dr. Oesterling's opinion as an affirmative autopsy report or a rebuttal autopsy report is harmless in this instance as the opinion was properly admitted into the record.<sup>6</sup> See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With respect to Dr. Oesterling's deposition testimony, we see no error in the administrative law judge's decision to admit that testimony as one of employer's two affirmative medical reports, along with Dr. Fino's opinion. Section 725.414(c) provides that a physician who has not prepared a written "medical report" as defined at Section 725.414(1) may offer testimony with respect to the condition of a miner, and that the testimony is admissible as a "medical report," if the party proffering such testimony has not exceeded its limit of two affirmative medical reports allowed by Section 725.414(a)(3)(i). See 20 C.F.R. 725.414(c). In this instance, because employer only proffered one affirmative medical report by Dr. Fino, the deposition testimony of Dr. Oesterling was permissibly admitted into the record by the administrative law judge as employer's second affirmative medical report allowed under Section 725.414(c)

Furthermore, contrary to claimant's assertion, the administrative law judge was not required to exclude Dr. Fino's opinion because the physician referenced medical evidence that had not been admitted into the record. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting) (*aff'd on recon.*) (complete exclusion of relevant evidence is disfavored). When presented with a situation where an otherwise admissible medial opinion reviews or discusses evidence that is deemed inadmissible under Section 725.414, the administrative law judge should attempt to ascertain the degree to which the physician's opinion is tainted by his review of that evidence. If the opinion is tainted, the administrative law judge has options available to him including exclusion of the report, redacting the objectionable content,

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<sup>5</sup> On December 14, 2005, the regional solicitor for the Department of Labor advised the administrative law judge that the Director had changed its position on the definition of an "autopsy report" relevant to 20 C.F.R. §725.414. Director's Exhibit 18.

<sup>6</sup> Claimant asserts that employer submitted "two medical reports of Dr. Oesterling that went beyond slides and autopsy protocol[.]" Claimant's Brief at 2. We disagree. In his report dated March 29, 2004, Dr. Oesterling reviewed only tissue samples from the miner's bronchoscopic biopsy. Employer's Exhibit 1. Likewise, in his autopsy report dated June 21, 2004, Dr. Oesterling based his opinion on a review of twenty-seven histologic slides. He did not reference any additional evidence. Employer's Exhibit 2.

asking the physician to submit a new report addressing only the admissible evidence, or factoring in the physician's reliance upon the inadmissible evidence when deciding what weight, if any, to accord the opinion. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris*, 23 BLR at 1-108.

In this case, the administrative law judge properly followed the dictates of *Brasher* and *Harris*. *See Brasher*, 23 BLR at 1-148 n.8; *Harris*, 23 BLR at 1-108. He correctly identified the options available for addressing Dr. Fino's report, and permissibly determined that Dr. Fino's opinion, relevant to whether pneumoconiosis hastened the miner's death, had not been tainted by his review of medical data that fell outside the parameters of admissible evidence under Section 725.414. The administrative law judge concluded that it was possible to simply redact those portions of Dr. Fino's report that referenced inadmissible evidence in determining the weight to accord Dr. Fino's opinion under Section 718.205(c). We refuse to disturb the administrative law judge's determination as it was a matter within his sound discretion. *See Brasher*, 23 BLR at 1-148 n.8; *Harris*, 23 BLR at 1-108. Consequently, we reject claimant's assertions of error with regard to the administrative law judge's evidentiary rulings, and we affirm his findings pursuant to 20 C.F.R. §715.414.

#### *Merits of Entitlement*

Because we affirm the administrative law judge's evidentiary rulings, we turn our attention to claimant's arguments on the merits. Claimant asserts that the administrative law judge ignored the bias of employer's experts, and that he erred by not assigning controlling weight to the opinions of the miner's treating physician and the autopsy prosector as to whether pneumoconiosis hastened the miner's death. After considering the administrative law judge's Decision and Order, the evidence of record, and the briefs of the parties, we affirm the administrative law judge's denial of benefits, as his findings pursuant to Section 718.205(c) are supported by substantial evidence.

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor's claim filed on or after January 1, 1982, as in the instant claim, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the irrebuttable presumption provided at 20 C.F.R. §718.304 is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing

cause of the 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 this case, the record reveals that a chest x-ray conducted on January 17, 2003, less than ten months prior to the miner's death showed a 2.5-3.0 centimeter mass in the left upper lobe. Claimant's Exhibit 3. A lung biopsy was performed on February 7, 2003. Claimant's Exhibit 4. In a February 13, 2003 progress note, the miner's treating physician, Dr. Gray, reported that the biopsy showed no malignancy and that the miner remained asymptomatic. Employer's Exhibit 4. Dr. Gray indicated that the mass appeared to be a pleural plaque, and recalled that the miner had reported some exposure to "asbestos for about three years while he was in the Navy." *Id.* In a progress note dated May 14, 2003, Dr. Gray reported that the miner was seen for a routine visit for problems of coronary artery disease, hypertension, pneumoconiosis, and hyperlipidemia. *Id.* Dr. Gray stated that "he remains, much to my surprise, almost completely asymptomatic except for some angina on vigorous exertion." *Id.*

Hospital records from the Windber Medical Center indicate that the miner was doing well until August 2003, when he began to lose weight and experience muscle pain and weakness. Employer's Exhibit 5. A bronchoscopy was performed and revealed metastatic lung cancer. *Id.* The miner underwent radiation and chemotherapy and was later admitted to the hospital on November 3, 2003 in acute renal failure. *Id.* Coal workers' pneumoconiosis was listed among several diagnosed conditions on a November 4, 2003 medical summary. *Id.* The miner subsequently died on November 6, 2003. Employer's Exhibit 5. Dr. Gray prepared a narrative summary of the miner's terminal hospitalization, identifying the cause of the miner's death as metastatic pulmonary cancer. *Id.* The miner's death certificate, signed by Dr. Gray, listed the immediate cause of death as advanced metastatic pulmonary cancer, with other significant conditions identified as severe coronary artery disease and coal workers' pneumoconiosis. Director's Exhibit 13.

An autopsy conducted by Dr. Goldblatt revealed squamous cell carcinoma of the lung, severe atherosclerotic coronary artery disease, pulmonary emphysema, and simple coal workers' pneumoconiosis. Director's Exhibit 14. Dr. Goldblatt testified at a deposition held on January 11, 2005. Claimant's Exhibit 1. He noted that the amount of cancer seen in the lungs was amazingly small. He opined that that the miner's lungs were in a weakened state because of the coal workers' pneumoconiosis, and that the pneumoconiosis could have masked the cancer, thereby delaying the diagnosis and treatment of the cancer. Claimant's Exhibit 1, pp. 38-46. He concluded that coal workers' pneumoconiosis "has hastened, has contributed to and may have been a significant cause of [the miner's] death." *Id.* at p. 46. Although he conceded that the miner's simple coal workers' pneumoconiosis was not the direct or immediate cause of death, Dr. Goldblatt opined that the cause of death was multi-factorial, including

squamous cell carcinoma of the lung that metastasized throughout the body, coal workers' pneumoconiosis, and severe atherosclerotic coronary artery disease. Claimant's Exhibit 1. Dr. Goldblatt stated:

Overall the disease mechanism began with the development of cancer and the cancer led to a cascade of events which led to his demise. And if we look at the cancer itself, there are many reasons why someone may get cancer of the lung. But in [this] case based on history which I was provided, the most compelling reason was the fact that he worked as a coal miner for 20 years and the fact that silica has been designated as a carcinogen and he was exposed to this carcinogen for 20 years.

Claimant's Exhibit 1, p. 52.

Dr. Oesterling, a Board-certified pathologist, issued a report, dated March 29, 2004, in which he reviewed "limited material available" from a "bronchoscopic biopsy." Employer's Exhibit 1. Dr. Oesterling stated that the miner had experienced bronchogenic squamous cell carcinoma of the lung with evidence of centrallobular emphysema and possible progression to panlobular emphysema. He noted that the biopsy specimen included aggregates of smoker's macrophages, and stated that cigarette smoke inhalation was "a well established etiologic agent in the evolution of both the afore-mentioned disease processes." Employer's Exhibit 2. Dr. Oesterling further stated:

Based on the material made available, this gentleman's death in all probability is the result of his squamous cell carcinoma, although with this limited tissue, other causes cannot be excluded. However, mine dust would appear to be unrelated to lifetime difficulties and would not appear to have hastened, contributed to or caused his demise. As for the association of mine dust with carcinoma of the lung, I have enclosed at the conclusion of the photos a reference from page 878 of the "Pathology of the Lung," edited by William M. Thurlbeck and Andrew M. Churg concerning cancer in coal workers. I believe the paragraph is self explanatory and clearly with evidence of apparent exposure to cigarette smoke, this gentleman's cancer must be attributed to that etiologic agent. Thus, mine dust has not been a factor in the evolution of these disease processes.

Employer's Exhibit 2.

In a supplemental report, dated June 21, 2004, Dr. Oesterling reviewed the miner's autopsy slides and diagnosed that the miner had mild to moderate coal workers' pneumoconiosis, which resulted in limited structural damage to the lung. He opined that without structural damage, there would not have been any lifetime disability based on the

disease process. He also opined that based on the tissue change, without significant structural change, coal dust exposure did not cause or hasten the miner's death. Employer's Exhibit 2. Dr. Oesterling concluded:

It is unfortunate that this autopsy was limited to the examination of the chest organs since a better evaluation of the metastatic change would have been beneficial in proving the role of his squamous cell carcinoma in producing this gentleman's death. However I believe it is quite safe to infer that was the primary cause of his death and in any event I would restate with reasonable medical certainty that coalworkers' (sic) pneumoconiosis was not a factor in this gentleman's primary lifetime respiratory symptomatology nor did it in any way hasten, contribute to or cause his death.

Employer's Exhibit 6.

Dr. Fino prepared a report on August 19, 2005 based on his review of the medical record. Dr. Fino acknowledged that while there was pathologic evidence of coal workers' pneumoconiosis, he found no objective or clinical evidence indicating that the miner suffered from any type of lung disease, including pneumoconiosis, as evidenced by the miner's "good" breathing as recently as May 14, 2003, less than six months prior to the miner's death. Employer's Exhibit 3. As noted by the administrative law judge, Dr. Fino specifically stated:

The autopsy is not of sufficient magnitude to determine the cause of death. It only included the lungs and that is good for telling us what was within the lungs. Also noted was evidence of coal workers' pneumoconiosis. However, it is more important to review the terminal hospitalization in this case to really gauge what resulted in this man's passing away. Although there was little cancer in the lungs, there was evidence of metastatic cancer outside of the lungs, primarily to the bone and liver. The patient was extremely dehydrated and had kidney failure at the time of this hospitalization. He was dying as a result of the lung cancer.

He had a uniformly fatal condition, that is, metastatic lung cancer. Coal mine dust inhalation played absolutely no role in this man's death. He would have died as and when he did had he never stepped foot in the mines.

Finally, I would note that there is no causal association between the inhalation of coal dust and cancer of the lung. Lung cancer is clearly caused by cigarette smoking. Occupational exposure to the various dusts

that can be found in the coal mine does not cause or contribute to a lung cancer....(citations to medical literature omitted).

Decision and Order at 13, citing Employer's Exhibit 3. Thus, it was Dr. Fino's opinion that coal dust exposure did not cause or hasten the miner's death.

In weighing the conflicting medical opinion evidence as to whether the miner's death was hastened by pneumoconiosis, the administrative law judge assigned controlling weight to the opinions of Drs. Oesterling and Fino, as compared to the opinions of Drs. Gray and Goldblatt. Claimant asserts that the administrative law judge erred in crediting Dr. Oesterling's opinion because claimant alleges that Dr. Oesterling is biased. In support of his allegation of bias, claimant points to the fact that Dr. Oesterling's opinion is at odds with the findings of the autopsy prosector and the miner's treating physician, which opinions claimant contends must be given deference.

Claimant's assertions of error have no merit. Contrary to claimant's contention, the administrative law judge was not required to discredit employer's experts on the ground that they work exclusively for employer and their opinions are in conflict with the findings of the miner's treating physician and the autopsy prosector. Without specific evidence indicating that a report prepared for one party is unreliable, an administrative law judge should consider that report to be as reliable as the other reports of record. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). Allegations of bias must be supported by specific evidence present in the record. *Melnick*, 16 BLR at 1-36. As claimant has not substantiated her allegations of bias with specific evidence in the record, other than alleging that employer's physicians must be biased because they disagree with the findings of claimant's experts, we see no error in the administrative law judge's decision to credit the opinions of Drs. Oesterling and Fino as establishing that the miner's death was not hastened by pneumoconiosis. *Id.*

Moreover, contrary to claimant's argument, while the United States Court of Appeals for the Third Circuit, wherein jurisdiction for this claim arises, has held that a treating physician's opinion is assumed to be more valuable than that of a non-treating physician, the court has also indicated that automatic preferences are disfavored. *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997). The administrative law judge must examine the opinions of all of the physicians on their merits and make a reasoned judgment about their credibility, with proper deference given to the examining physicians' opinions, when warranted<sup>7</sup> See 20 C.F.R. §718.104(d); *Mancia*, 130 F.3d at 591, 21 BLR at 2-239;

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<sup>7</sup> Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and treating physician whose report is

*Lango*, 104 F.3d at 577, 21 BLR at 2-20-21; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

In this case, the administrative law judge properly found that Dr. Gray's opinion was entitled to less weight since the doctor made contradictory statements as to whether the miner had any respiratory problems during the last year of his life that would support Dr. Gray's opinion that the miner's disabling pneumoconiosis hastened his death. Decision and Order at 9-10. The administrative law judge did not find Dr. Gray's statement that the miner "complained of dyspnea on exertion which was progressive to the end of his life" to be credible, as that statement was not borne out by Dr. Gray's own progress notes, which failed to identify any respiratory complaints by the miner prior to his death.<sup>8</sup> Decision and Order at 10, 15. Thus, the administrative law judge permissibly found that Dr. Gray's opinion lacked proper documentation to support his conclusions. See *Lango*, 104 F.3d at 577, 21 BLR at 2-20-21; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, the administrative law judge properly found that Dr. Gray was less qualified than the other physicians of record to render an opinion as to the cause of the miner's death, since he "lacks the pulmonary expertise of Dr. Fino, and the pathological qualifications of Drs. Oesterling and Goldblatt." Decision and Order at 15; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

We also reject claimant's contention that the administrative law judge erred in his treatment of the opinion of the autopsy prosector. In this case, the administrative law

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admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

<sup>8</sup> Dr. Gray attempted to address this discrepancy by suggesting that his notations were only meant to report the absence of any new complaints. Claimant's Exhibit 5. However, as the administrative law judge noted: "Dr. Gray did not simply report the absence of any new complaints. To the contrary, on several of the recent progress notes, Dr. Gray affirmatively reported that the miner 'denies dyspnea' (6/18/02), 'remains completely asymptomatic' (2/13/03), 'his breathing has been good' (5/14/03)." Decision and Order at 10, citing Employer's Exhibit 4.

judge accepted Dr. Goldblatt's pathological finding that the miner suffered from coal workers' pneumoconiosis, and that the miner died as a result of metastatic lung cancer. However, the basis for Dr. Goldblatt's opinion, that the miner's death was hastened by pneumoconiosis, was his belief that coal dust (silica) exposure was a carcinogen, and therefore, a causative factor for the development of the miner's lung cancer. In considering the weight to accord the conflicting medical opinion evidence at Section 718.205(c), the administrative law judge stated:

In the absence of an opinion by an oncologist, the reasoned and documented opinion by a Board-certified pulmonologist, such as Dr. Fino, is more probative in evaluating the possible role of pneumoconiosis in the miner's death due to metastatic lung cancer, and in analyzing whether or not there is a link between pneumoconiosis and the miner's metastatic lung cancer.

Decision and Order at 10.

Although we are mindful that an autopsy prosector's opinion may be given deference as to the cause of the miner's death, *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002), in this instance, the administrative law judge reasonably explained his decision for rejecting the underlying premise of Dr. Goldblatt's death causation opinion, which is that coal dust exposure is a causative factor for the development of lung cancer. We see no error in the administrative law judge's decision to assign Dr. Goldblatt's opinion less weight in comparison to Dr. Fino, who the administrative law judge found had "unequivocally opined that there was no such connection, and cited extensive medical literature to support his conclusion." Decision and Order at 15. Because the administrative law judge permissibly determined that Dr. Fino's opinion was reasoned and deserving of controlling weight based on his superior credentials, *see Hicks*, 138 F.3d at 536, 21 BLR at 2-341, we decline to disturb the administrative law judge's credibility determination pursuant to Section 718.205(c).

Furthermore, claimant incorrectly states that "[i]t is clearly within the province of the Benefits Review Board to give greater weight to the opinions of Dr. Gray and Dr. Goldblatt," Claimant's Brief at 34. The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge. *Clark*, 12 BLR at 1-151; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Because the administrative law judge's credibility determinations were within his discretion, *see Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1997), and they are supported by substantial evidence, we

affirm his finding that the miner's death was not hastened by pneumoconiosis. We therefore affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §718.205(c).

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge