

BRB No. 08-0783 BLA

M.B.)	
(Widow of H.B.))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 08/28/2009
PEABODY COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Brent Yonts, Greenville, Kentucky, for claimant.

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

Rita Roppolo (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2005-BLA-05370) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) with respect to a miner's claim and a survivor's claim filed pursuant to the provisions of Title

IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge noted that the miner's claim, filed on May 6, 2002, was a subsequent claim under 20 C.F.R. §725.309 and was timely filed under 20 C.F.R. §725.308.¹ The administrative law judge further found that a change in an applicable condition of entitlement was demonstrated under 20 C.F.R. §725.309(d), as the newly submitted evidence was sufficient to establish total disability under 20 C.F.R. §725.204(b)(2). On the merits, the administrative law judge credited the miner with thirty-seven years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4), 718.203 and total disability due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits in the miner's claim.

With respect to the survivor's claim, the administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203 and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in the survivor's claim.

Employer argues on appeal that the administrative law judge erred in finding that the miner's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. Employer further contends that the administrative law judge erred in finding the existence of pneumoconiosis established under Section 718.202(a)(4) and total disability due to pneumoconiosis established under Section 718.204(c). With respect to the survivor's

¹ The miner initially filed an application for benefits on July 31, 1989, which was denied by the district director on January 19, 1990, because the miner did not establish any of the elements of entitlement. Director's Exhibit 1. The miner filed a second claim for benefits on May 6, 2002. Director's Exhibit 3. The miner died on May 22, 2003, while his subsequent claim was pending before Administrative Law Judge Daniel J. Roketenetz. Claimant, the miner's surviving spouse, filed an application for survivor's benefits on September 2, 2003. Director's Exhibit 35. Judge Roketenetz issued an order on September 20, 2004, remanding the miner's claim to the district director for consolidation with the survivor's claim. The district director rendered findings of entitlement with respect to both claims. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing, which was conducted by Administrative Law Judge Daniel F. Solomon (the administrative law judge).

claim, employer asserts that the administrative law judge erred in determining that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) and that death due to pneumoconiosis was established pursuant to Section 718.205(c). Claimant has responded and urges affirmance of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that employer's allegation of error regarding the administrative law judge's finding that the miner's subsequent claim was timely filed is without merit. Employer has replied to both response briefs by reiterating its arguments and contending that the administrative law judge was required to provide judicial notice that he was going to rely upon the preamble, and the studies cited therein, when weighing the medical opinions relevant to the existence of pneumoconiosis.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. The Miner's Subsequent Claim

To establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

² We affirm the administrative law judge's findings that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309, that the miner had thirty-seven years of coal mine employment, that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that total disability was established pursuant to 20 C.F.R. §718.204(b)(2), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 3.

A. Timeliness

Employer argues that the administrative law judge erred in finding that the miner's May 6, 2002 subsequent claim was timely filed under Section 725.308, which provides in relevant part that "[a] claim for benefits . . . shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. §725.308. The administrative law judge addressed the issue of timeliness in his Decision and Order by setting forth the terms of Section 725.308 and stating, "[t]here is no evidence that this claim was untimely." Decision and Order at 4. Employer contends that Dr. Simpao's opinion, submitted in conjunction with the miner's claim filed on July 31, 1989, was sufficient to trigger the running of the three-year limitation period, as Dr. Simpao stated that the miner was totally disabled due to pneumoconiosis.⁴ Citing *Arch of Ky., Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, BLR (6th Cir. 2009), which was issued subsequent to the administrative law judge's Decision and Order, the Director maintains that Dr. Simpao's opinion was legally insufficient to trigger the running of the statute of limitations. We agree.

In *Hatfield*, the United States Court of Appeals for the Sixth Circuit adopted the position that a medical determination of total disability due to pneumoconiosis predating a prior denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits.⁵ The Board recently held that it would apply the same reasoning in all cases involving an allegation that a subsequent claim was not timely filed. *J.O v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA, slip op. at 4 (June 24, 2009). In this case, the district director's final

⁴ Dr. Simpao examined the miner on August 21, 1989, at the request of the Department of Labor and diagnosed coal workers' pneumoconiosis, emphysema and chronic bronchitis. Dr. Simpao attributed these conditions to coal dust exposure and indicated that the miner was totally disabled by all three conditions. Director's Exhibit 1.

⁵ We reject employer's contention that the Sixth Circuit's ruling on the timeliness issue in *Hatfield* was dicta in light of the court's holding that the responsible operator waived its right to controvert the claim by failing to timely respond to the initial finding of entitlement. If the Sixth Circuit had found merit in the responsible operator's contention that the miner's subsequent claim was not timely filed, an award of benefits would have been precluded regardless of the responsible operator's waiver of its right to controvert the claim. 20 C.F.R. §725.308(a). Thus, consideration of the timeliness issue was necessary to the disposition of the responsible operator's appeal.

determination, that the miner was not totally disabled due to pneumoconiosis as of January 19, 1990, necessarily repudiated the 1989 opinion of Dr. Simpao. Director's Exhibit 1. Consequently, the 1989 medical report of Dr. Simpao could not trigger the running of the three-year time limit for filing the miner's 2002 claim. *Hatfield*, 556 F.3d at 483; *J.O.*, BRB No. 08-0671 BLA, slip op. at 5. We, therefore, affirm the administrative law judge's finding that the miner's 2002 subsequent claim was timely filed. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

B. The Merits of Entitlement

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Simpao, Givens, Repsher, Renn and Tuteur. Dr. Simpao examined the miner at the request of the Department of Labor (DOL) on August 21, 1989 and July 25, 2002. In the report of his first examination of the miner, Dr. Simpao diagnosed coal workers' pneumoconiosis (CWP), emphysema and chronic bronchitis. Dr. Simpao attributed these conditions to coal dust exposure and indicated that the miner was totally disabled by all three conditions. Director's Exhibit 1. Based upon his second examination of the miner, Dr. Simpao diagnosed "CWP 1/0" caused by "multiple years of coal dust exposure," and indicated that the miner was totally disabled. Director's Exhibit 11. In response to a questionnaire appended to Form CM-988, Dr. Simpao reported that he based his diagnosis of pneumoconiosis "on the chest x-ray, EKG, arterial blood gas [test] along with symptomatology and physical findings." *Id.*

Dr. Givens was the miner's treating physician from 1974 until the miner's death in 2003. Claimant's Exhibit 1 at 4. The records of Dr. Givens's treatment of the miner include references to chronic obstructive pulmonary disease (COPD), pneumoconiosis by history, coronary artery disease and lung cancer. Director's Exhibit 43; Employer's Exhibit 5. Dr. Givens stated in a letter to a DOL claims examiner, "There is no medical question that his severe pulmonary disease increased the workload on his heart and caused his early incapacitation. It is my opinion his more than 40 year exposure to coal dust was a causative factor in his pulmonary disease." Director's Exhibit 43. In his deposition testimony, Dr. Givens indicated that the miner had clinical pneumoconiosis, COPD, obstructive and restrictive impairments, and "an element of asthma."⁶ Claimant's

⁶ "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *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). This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id.*

Exhibit 1 at 8, 16-17. With regard to the cause of the miner's COPD, Dr. Givens stated that it was "multifactorial, but there's no question that exposure to dust in the coal mine environment is a contributing factor." *Id.* at 19. Dr. Givens further stated that he relied upon the results of the miner's pulmonary function studies and blood gas studies and the miner's symptoms of shortness of breath in attributing the miner's COPD to coal dust exposure. *Id.* at 39. Dr. Givens also cited the miner's forty-year history of coal mine employment in support of his diagnosis of legal pneumoconiosis.⁷ *Id.* at 40, 48.

Dr. Repsher examined the miner on May 14, 2003 and reviewed the miner's medical records. In his written report, Dr. Repsher concluded that the miner did not have either clinical or legal pneumoconiosis. Director's Exhibit 24. Dr. Repsher indicated that because the miner's pulmonary function studies showed pure obstruction, the miner's COPD was attributable to smoking, rather than to CWP. *Id.* In a second written report based upon a review of additional medical records, Dr. Repsher reiterated his prior conclusions and stated that the diagnoses of legal pneumoconiosis set forth by Drs. Simpao and Givens were conclusory and unsupported by any scientific or medical reasoning. Employer's Exhibit 16.

In his deposition testimony, Dr. Repsher stated that although pneumoconiosis can progress after coal dust exposure ceases, it is uncommon for it to do so. Employer's Exhibit 20 at 29. In addition, Dr. Repsher indicated that the medical literature demonstrates that coal dust exposure causes a minor degree of obstruction in most miners and that, "on average, the amount of obstruction is so small that it cannot be measured in an individual." *Id.*; *see also* Employer's Exhibit 20 at 78, 86. Nevertheless, Dr. Repsher acknowledged that "there are going to be some individuals who could develop clinically significant, even disabling, COPD as a result of this airways obstruction, but it would be very uncommon." *Id.* at 30; *see also* Employer's Exhibit 20 at 73-74. He also stated that he believed that the miner's pulmonary symptoms were caused by smoking-induced COPD and coronary artery disease. *Id.* at 38. Dr. Repsher cited articles written by Attfield and Hodous that support the proposition that the effects of coal dust exposure on the lungs are negligible when compared to the effects of smoking. *Id.* at 68. However, Dr. Repsher further indicated that Attfield and Hodous did not properly interpret their own data. *Id.* at 70.

⁷ "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). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

Dr. Renn reviewed the miner's medical records and stated in his written report that the miner did not have either clinical or legal pneumoconiosis. Director's Exhibit 33. Dr. Renn indicated that the miner suffered from bronchitis and emphysema caused by smoking. *Id.* When asked at his deposition to identify what he would expect to see if the miner's pulmonary diseases were related to coal dust exposure, Dr. Renn stated, "Well, there would be radiographic evidence, number one. Number two, he would have had a different pattern in his ventilatory function studies. Number three, he would not have as severe [a] dysfunction or obstructive ventilatory defect as he did." Employer's Exhibit 19 at 59; *see also id.* at 68. Dr. Renn also cited medical literature, including material authored by Attfield and Hodous, demonstrating that coal dust exposure does not cause a clinically significant level of obstruction. *Id.* at 61-63.

Dr. Tuteur reviewed the miner's medical records and in his written report, concluded that the miner did not have either clinical or legal pneumoconiosis. Employer's Exhibit 15. With respect to the existence of legal pneumoconiosis, Dr. Tuteur further stated:

It is recognized that chronic inhalation of coal mine dust can produce airflow obstruction. It can do so even in the face of the absence of findings typical of "medical" pneumoconiosis. Yet, the frequency with which this syndrome develops due to coal mine dust inhalation is far, far smaller than the 20% risk of developing advanced [COPD] by smoking cigarettes in the manner that [the miner] did.

Id. Dr. Tuteur also indicated that the miner's pulmonary function studies, which demonstrated pure obstruction and hyperinflation, and the miner's normal blood gas studies were consistent with COPD caused by smoking. *Id.* Dr. Tuteur explained that, "[i]n contrast, when [CWP] is sufficiently advanced to produce impairment of pulmonary function, one expects to find not an obstructive impairment, but a restrictive component associated with persistent irreversible impairment of gas exchange." *Id.* Dr. Tuteur reiterated his conclusions in his deposition testimony, citing medical literature in support of his findings. Employer's Exhibit 21 at 35-37. In addition, Dr. Tuteur stated that it was his opinion that distinguishing between smoking and coal dust exposure as the causes of COPD can be done to a reasonable degree of medical certainty. *Id.* at 63. He further indicated that he attributed the miner's COPD to smoking "because of the statistical odds of a heavy cigarette smoker developing COPD versus a lifelong never smoking miner who develops it." *Id.* at 64. Lastly, Dr. Tuteur stated that the articles published by Attfield and Hodous support the conclusion that coal dust exposure has little effect on a miner's FEV1. *Id.* at 94.

Upon considering this evidence, the administrative law judge determined that Dr. Givens's opinion, that the miner had COPD due, in part, to coal dust exposure, was

documented by pulmonary function studies, blood gas studies, his observations of the miner, the miner's medical and work histories and the miner's symptoms. Decision and Order at 10. The administrative law judge stated that "[a]lthough I do not give controlling weight to Dr. Givens'[s] position just because he is the treating physician, I do note that he had the best opportunity to examine the patient." *Id.* The administrative law judge also determined that Dr. Simpao's opinion substantiated Dr. Givens's conclusions. *Id.* at 10.

Regarding the opinions of Drs. Repsher, Renn and Tuteur, that the miner did not have legal or clinical pneumoconiosis, the administrative law judge found that they were entitled to less weight than Dr. Givens's opinion because their analysis of the data was "confusing and result oriented, and is therefore not reliable." Decision and Order at 11. The administrative law judge further indicated that all three physicians gave "undue emphasis to x-ray evidence and selected aspects of the pulmonary function studies without consideration of the latent and progressive nature of pneumoconiosis." *Id.* The administrative law judge also determined that Drs. Repsher and Tuteur did not sufficiently address the definition of legal pneumoconiosis set forth in the amended regulations, particularly the accompanying comments in which the DOL cited studies showing that coal dust exposure can cause clinically significant airways obstruction and the risk of developing an obstructive impairment increases with cigarette smoking. Finally, the administrative law judge found that Drs. Repsher, Renn and Tuteur "could not rationally explain how the effects from smoking were distinguished from the effects of mining." *Id.*

The administrative law judge concluded that:

[Claimant] has established that [the miner's] obstruction arose out of coal mine employment through Dr. Givens'[s] well reasoned opinion. As set forth above, given the objective testing, 16 years of coal mine employment, and at least a 15 year smoking history, and the reliance on scientific journal articles, I find that Dr. Givens'[s] rationale is better reasoned and is more consistent with the regulations.

Decision and Order at 12 (citations omitted). The administrative law judge relied upon this finding to determine that the existence of legal pneumoconiosis was also established in the survivor's claim. *Id.* at 13-14.

Employer argues that the administrative law judge erred in determining that Dr. Givens's opinion was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Employer alleges that the administrative law judge's finding regarding Dr. Givens's diagnosis is internally inconsistent, as the administrative law judge indicated that he would not give controlling weight to Dr. Givens's opinion

based upon his status as a treating physician, but that Dr. Givens's opinion was entitled to additional weight because he had the best opportunity to examine the miner.⁸ Employer also contends that the administrative law judge erred in finding that Dr. Givens's diagnosis of legal pneumoconiosis was adequately documented by the treatment records, objective tests and the miner's history of coal mine employment. Employer further asserts that the administrative law judge did not provide valid reasons for discrediting the opinions of Drs. Repsher, Renn and Tuteur. Employer argues that the administrative law judge did not accurately characterize these opinions and did not set forth the rationale underlying his finding that they were "confusing" and "result oriented." Employer's Brief at 23, *quoting* Decision and Order at 12. Lastly, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Repsher, Renn and Tuteur based upon his own interpretation of the preamble to the amended regulations, including the medical literature cited therein. Employer further alleges that the administrative law judge was required to provide notice that he was going to rely upon this material as evidence.

Employer's allegations of error have merit, in part. With respect to the administrative law judge's decision to accord greater weight to Dr. Givens's opinion because, as the miner's treating physician, he had the best opportunity to examine the miner, employer is correct in maintaining that the administrative law judge did not explain how Dr. Givens's examinations of the miner gave him an advantage in identifying the cause of the miner's COPD over the other physicians of record. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984); Decision and Order at 10. In addition, in determining that Dr. Givens's diagnosis of legal pneumoconiosis was documented, the administrative law judge did not explain how the results of the objective studies and the miner's medical and employment histories supported Dr. Givens's attribution of the miner's COPD, in part, to coal dust exposure. *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591. Similarly, although the administrative law judge determined that Dr. Givens "better explained the effects of 37 years of mining on the respiratory condition," he did not identify the basis for this finding and it is not apparent on the face of Dr. Givens's letter or his deposition testimony. *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 11; Director's Exhibit 43;

⁸ We reject employer's allegation that the administrative law judge's finding regarding Dr. Givens's diagnosis is internally inconsistent, as the administrative law judge stated that Dr. Givens's "opinion as to legal pneumoconiosis is not accepted, but I do accept that his opinion as to legal pneumoconiosis is rational." Decision and Order at 10. When read in context, it is apparent that the administrative law judge inadvertently substituted the word "legal" for "clinical." *Id.*

Claimant's Exhibit 1. The administrative law judge also did not consider the significance of Dr. Givens's statement that his diagnosis of legal pneumoconiosis was derived from the opinions of the pulmonologists to whom he had referred the miner when a review of the record indicates that none of these physicians attributed the miner's COPD to coal dust exposure. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Director's Exhibits 40, 43; Claimant's Exhibit 1 at 50; Employer's Exhibits 1, 2, 8, 12, 14. Moreover, the administrative law judge did not address Dr. Givens's statement that although he acknowledged smoking as a contributing cause of the miner's COPD, he was not aware of the precise length of the miner's smoking history and did not know how many cigarettes the miner smoked per day. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); Claimant's Exhibit 1 at 24-25.

In light of the foregoing, we vacate the administrative law judge's finding that the existence of legal pneumoconiosis was established pursuant to Section 718.202(a)(4) and remand the case to the administrative law judge for reconsideration of Dr. Givens's opinion. In rendering his findings on remand, the administrative law judge must comply with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), *see Wojtowicz*, 12 BLR at 1-165 (1989). Specifically, the administrative law judge must determine whether Dr. Givens's diagnosis of legal pneumoconiosis is adequately reasoned and documented and must set forth the rationale underlying his findings. When weighing Dr. Givens's opinion, the administrative law judge should be mindful of relevant Sixth Circuit precedent in which the court has held that although a physician is not required to apportion between smoking and coal dust exposure as causes of a miner's obstructive impairment, he or she must render an unequivocal opinion that coal dust exposure was a contributing factor to the impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Williams*, 338 F.3d at 515, 22 BLR at 2-651; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

We affirm, however, the administrative law judge's discrediting of the opinions in which Drs. Repsher, Renn and Tuteur stated that the miner's COPD was unrelated to coal dust exposure. In their opinions, Drs. Repsher, Renn and Tuteur indicated that they excluded coal dust exposure as a causal factor because the degree of obstruction caused by coal dust exposure is not clinically significant and they cited studies in support of their respective conclusions. Employer's Exhibits 15, 19 at 59, 61-63, 68, 20 at 68, 73-74, 78, 86. In promulgating the revised definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a), DOL reviewed the medical literature on this issue and found that there was a consensus among medical experts that coal dust-induced COPD is clinically significant and that the causal relationship between coal dust and COPD is not merely rare. 65 Fed.

Reg. 79,938, 79,943 (Dec. 20, 2000); Decision and Order at 11-12. The administrative law judge's determination that the opinions of Drs. Repsher, Renn and Tuteur were entitled to diminished weight to the extent that they relied upon a position contrary to the view accepted by DOL is, therefore, rational and supported by substantial evidence. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *see also Lewis Coal Co. v. Director, OWCP [McCoy]*, 373 F.3d 570, 23 BLR 2-184 (4th Cir. 2004).

Furthermore, we find no merit in employer's contention that the administrative law judge was required to notify the parties that he would be referring to the preamble to the amended regulations when considering the medical opinion evidence relevant to the existence of legal pneumoconiosis. The preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). The preamble, and DOL's comments to the amended regulations, are relevant to the appropriate interpretation of the newly adopted regulations in that they set forth the legal and factual principles that DOL relied on in promulgating them. As such, their use cannot come as a surprise to parties involved in the litigation of black lung claims under these regulations.

Lastly, we hold that because the administrative law judge relied upon his crediting of Dr. Givens's opinion under Section 718.202(a)(4), we must also vacate the administrative law judge's finding that total disability due to pneumoconiosis was established under Section 718.204(c). The administrative law judge should reconsider this issue on remand, in light of his reconsideration of Dr. Givens's opinion in the event that he determines that the existence of pneumoconiosis has been established.

II. The Survivor's Claim

To establish entitlement to survivor's benefits pursuant to Section 718.205(c), 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. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, 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. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements

precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent*, 11 BLR at 1-27.

As an initial matter, we must vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis in the survivor's claim pursuant to Section 718.202(a)(4). The administrative law judge relied upon the findings with respect to Dr. Givens's opinion that we have vacated to determine that claimant satisfied her burden of proof at Section 718.202(a)(4). Decision and Order at 13-14. Accordingly, on remand, the administrative law judge must reconsider the issue of the existence of pneumoconiosis pursuant to Section 718.202(a)(4) in the survivor's claim, in light of his reconsideration of Dr. Givens's opinion in the miner's claim.

Regarding Section 718.205(c), employer argues that the administrative law judge erred in determining that Dr. Givens's opinion, as supported by Dr. Tuteur's opinion, was sufficient to establish that the miner's death was due to pneumoconiosis. The evidence relevant to the cause of the miner's death consists of the death certificate and the opinions of Drs. Givens, Repsher, Renn and Tuteur. The death certificate was prepared by a deputy coroner who identified the cause of death as myocardial infarction. Director's Exhibit 39. Dr. Givens stated in a letter that "[t]here is no medical question that his severe pulmonary disease increased the workload on his heart and caused his early incapacitation." Director's Exhibit 43. In his deposition testimony, Dr. Givens answered in the affirmative when asked whether the miner's death was due to cancer, Claimant's Exhibit 1 at 8-9, and whether COPD caused by coal dust exposure hastened the miner's death, Claimant's Exhibit 1 at 15, 47-48, 55, 57. Dr. Givens also noted that the miner had been diagnosed with lung cancer and stated that without his pulmonary problems, the miner "would've lasted longer and would've been able to tolerate the chemotherapy, radiation and all of those things." *Id.* at 15. Dr. Givens further reported that "this man could not tolerate any significant type of treatment because he was a pulmonary invalid." *Id.*

Dr. Repsher indicated in his written report and his deposition testimony that the miner's death was "most likely" due to his severe coronary artery disease causing an acute myocardial infarction or a fatal ventricular arrhythmia. Director's Exhibit 24; Employer's Exhibit 20. Similarly, Dr. Renn indicated in his written report that the miner's death was caused by "an adverse cardiac event." Director's Exhibit 33. When deposed, Dr. Renn disputed Dr. Givens's statement that the miner did not receive the necessary treatment for his lung cancer due to his pulmonary disease and indicated that he could not express a definite opinion as to the cause of the miner's death. Employer's Exhibit 19 at 44, 66.

In his report of his review of the miner's medical records, Dr. Tuteur concluded that the exact cause of the miner's death could not be determined. Employer's Exhibit 15. Dr. Tuteur also stated that "neither the inhalation of coal mine dust, nor the

development of coal workers' pneumoconiosis substantially contributed to the cause of [the miner's death] or hastened his death." *Id.* In his deposition testimony, Dr. Tuteur disagreed with Dr. Givens's assessment that the miner's pulmonary disease weakened his heart. Dr. Tuteur explained that the miner's pulmonary artery pressure and normal blood gas values on room air eight days before his death belied Dr. Givens's conclusion. Employer's Exhibit 21 at 68, 83. Furthermore, Dr. Tuteur disputed Dr. Givens's statement that the miner did not receive adequate treatment for his lung cancer due to his pulmonary status. *Id.* at 62. Dr. Tuteur also stated:

I agree with [Dr. Givens's] statement that because of [the miner's] advanced heart disease and his advanced chronic obstructive lung disease, the clinical course of his metastatic adenocarcinoma, unrelated to those two conditions, was shorter than it would have been had he been a healthy 40-year old person, but that has nothing to do with the inhalation of coal dust.

Id. at 98-99.

The administrative law judge considered this evidence and with respect to the death certificate, noted that "[t]here is some question whether the coroner was a physician." Decision and Order at 14. The administrative law judge further noted that there was no autopsy performed, that the miner had undergone chemotherapy and radiation treatment, and that the miner "died in his sleep." *Id.* The administrative law judge also stated that in the comments to the revised version of Section 718.205(c), the DOL indicated that there is empirical support for the proposition that a person weakened by pneumoconiosis may die more quickly from other diseases. *Id.* at 15. The administrative law judge determined that "[a]lthough Dr. Tuteur does not find pneumoconiosis in this record, he agreed that COPD shortens one's life expectancy." *Id.* The administrative law judge concluded that he accepted Dr. Givens's opinion that legal pneumoconiosis hastened the miner's death. *Id.*

Employer contends that the administrative law judge's finding cannot be affirmed, as he relied upon generalities rather than concrete evidence that pneumoconiosis actually hastened the miner's demise. Employer also argues that Dr. Givens did not provide a reasoned and documented opinion on death causation because he did not cite any medical literature and did not identify specific factors that supported his conclusion. In addition, employer maintains that the administrative law judge ignored the fact that Dr. Tuteur disputed Dr. Givens's opinion regarding the link between the miner's pulmonary disease and his heart problems. The Director asserts in response that the administrative law judge acted rationally in determining that Dr. Tuteur's opinion supported a finding that legal pneumoconiosis hastened the miner's death, as Dr. Tuteur agreed that persons with COPD do not tolerate cancer well.

Upon review of the relevant evidence, the administrative law judge's findings and employer's arguments on appeal, we vacate the administrative law judge's finding that Dr. Givens's opinion, as supported by Dr. Tuteur's opinion, was sufficient to establish that pneumoconiosis hastened the miner's death under Section 718.205(c)(5). In *Williams*, the Sixth Circuit held that in order to establish that pneumoconiosis hastened death, a physician must describe "a specifically defined process that reduces the miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-655. In the present case, the administrative law judge did not identify any portions of Dr. Givens's opinion in which he specifically described the processes by which legal pneumoconiosis contributed to the miner's heart disease or actually prevented the miner from undergoing more aggressive treatment of his lung cancer. In addition, the administrative law judge did not render a finding as to whether Dr. Givens set forth an estimable time by which the miner's legal pneumoconiosis reduced the length of his life.

Furthermore, the administrative law judge did not make a finding as to the primary cause, or causes, of the miner's death. Absent this determination, the administrative law judge could not render a rational finding as to whether legal pneumoconiosis hastened the miner's death nor could he rationally conclude that Dr. Givens's opinion was corroborated by Dr. Tuteur's statement that persons who have both COPD and cancer do not live as long as those who have only cancer. We vacate, therefore, the administrative law judge's finding that the opinions of Drs. Givens and Tuteur were sufficient to prove that pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(5). *Williams*, 338 F.3d at 518, 22 BLR at 2-655. On remand, if the administrative law judge finds that claimant has established that the miner had pneumoconiosis, the administrative law judge must make a finding as to the cause of the miner's death and reconsider whether claimant has satisfied her burden of proof under Section 718.205(c)(5).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge