



BRB Nos. 17-0518 BLA
and 17-0519 BLA

HELEN SIZEMORE)
(o/b/o and Widow of JOHN H. SIZEMORE))

Claimant-Respondent)

v.)

SHAMROCK COAL COMPANY)

and)

AMERICAN RESOURCES INSURANCE)
COMPANY)

DATE ISSUED: 08/10/2018

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order and Order Denying Reconsideration of William J. King, Administrative Law Judge, United States Department of Labor.

Tighe A. Estes (Fogler Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order and Order Denying Reconsideration (2011-BLA-05036, 2015-BLA-05186) of Administrative Law Judge

William J. King, denying benefits on a miner's claim and awarding benefits on a survivor's claim, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on February 2, 2001¹ and a survivor's claim filed on July 2, 2007.²

In a Decision and Order dated September 29, 2016, the administrative law judge first adjudicated the miner's claim.³ After crediting the miner with thirty-five years of coal mine employment,⁴ the administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and thus, was insufficient to establish a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c). The administrative law judge therefore denied benefits in the miner's claim.

The administrative law judge also considered claimant's survivor's claim.⁵ He found that the evidence did not establish the existence of complicated pneumoconiosis and claimant, therefore, could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Because the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge also found that claimant did not invoke the

¹ The miner filed his initial claim on July 31, 1991. Director's Exhibit 1. An administrative law judge denied the claim because the evidence did not establish that the miner suffered from a totally disabling respiratory or pulmonary impairment. *Id.* Upon review of the miner's appeal, the Board affirmed the administrative law judge's denial of benefits. *Sizemore v. Shamrock Coal Co.*, BRB No. 94-2827 BLA (Mar. 30, 1995) (unpub.).

² Employer's appeal in the survivor's claim was assigned BRB No. 17-0519 BLA. Although the Board assigned BRB No. 17-0518 BLA to an employer's appeal in the miner's claim, employer did not file an appeal of the miner's denied claim.

³ For a complete procedural history of the miner's claim, see *Sizemore v. Shamrock Coal Co.*, BRB Nos. 04-0681 BLA and 04-0681 BLA-A (June 7, 2005) (unpub.); *Sizemore v. Shamrock Coal Co.*, BRB No. 06-0723 BLA (Jan. 31, 2008) (recon.) (unpub.).

⁴ The record indicates that the miner's last coal mine employment was in Kentucky. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibits 6, 7. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁵ Claimant is the widow of the miner, who died on April 25, 2007. Director's Exhibit 10.

rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act.⁶ 30 U.S.C. §921(c)(4) (2012).

The administrative law judge also considered whether claimant could establish entitlement to survivor's benefits, without the benefit of the Section 411(c)(3) and Section 411(c)(4) presumptions. He found that claimant established that the miner had both clinical pneumoconiosis⁷ and legal pneumoconiosis,⁸ in the form of chronic obstructive pulmonary disease (COPD) due to cigarette smoking and coal mine dust exposure. 20 C.F.R. §718.202(a). Although the evidence did not establish that the miner's death was due to clinical pneumoconiosis, the administrative law judge found that the miner's death was due to legal pneumoconiosis. 20 C.F.R. §718.205(b). Accordingly, he awarded benefits in the survivor's claim, and subsequently denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in finding that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b).⁹

⁶ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

⁷ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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).

⁹ On July 17, 2018, employer filed a Motion to Remand the case involving the survivor's claim to the Office of Administrative Law Judges for a new hearing before a different administrative law judge based upon the Supreme Court's ruling in *Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 (June 21, 2018) that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. Employer's Motion for Remand at 1-2. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. We agree with the Director. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. *See Lucia*, 2018 WL 3057893 at *8 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board

Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.¹⁰

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. 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).

Death Due to Pneumoconiosis

Benefits are payable on a survivor's claim when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988). Because claimant did not invoke the Section 411(c)(3) or 411(c)(4) presumptions, she can establish that the miner's death was due to pneumoconiosis with proof that pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or that the miner's death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1)-(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(b)(6).

Dr. Varghese, the miner's treating physician, completed the death certificate. Dr. Varghese attributed the miner's death to COPD due to congestive heart failure, coronary artery disease and pneumonia. Director's Exhibit 10. After reviewing Dr. Dennis's autopsy report,¹¹ Dr. Varghese prepared a two-page report dated February 15, 2008,

generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). While we retain the discretion in exceptional cases to consider nonjurisdictional constitutional claims that were not timely raised, *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991), employer has not attempted to establish that this case so qualifies.

¹⁰ Because no party challenges the administrative law judge's denial of benefits in the miner's claim, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's findings in the survivor's claim that the evidence established the existence of clinical pneumoconiosis and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.*

¹¹ Dr. Dennis's diagnoses included progressive massive fibrosis, simple coal workers' pneumoconiosis, and coronary artery disease. Director's Exhibit 12. Dr. Dennis opined that the miner's death was "a comorbidity kind of situation." Director's Exhibit 66 at 359. Dr. Dennis stated that the cause of death was "an acute episode of bronchopneumonia or another heart attack, or something of this nature, that could have tipped him over the balance." *Id.* Dr. Dennis opined that the miner's death could have

wherein he opined that the miner “died of exacerbation of [COPD].” Director’s Exhibit 18A. The administrative law judge initially found that Dr. Varghese’s opinion was sufficient to establish that the miner’s “death was contributed to and hastened by his COPD” and, relying on Dr. Varghese’s opinion over the other physicians of record, awarded benefits. Decision and Order at 37.

Employer timely filed a request for reconsideration. Employer accurately noted that the United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis may be found to have hastened a miner’s death only if it does so “through a specifically defined process that reduces the miner’s life by an estimable time.”¹² *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518 (6th Cir. 2003). Because Dr. Varghese failed to explain on the miner’s death certificate or in his medical report how the miner’s legal pneumoconiosis, i.e., COPD, hastened his death through a specifically defined process that reduced the miner’s life by an estimable time, employer argued that Dr. Varghese’s opinion is not sufficient to meet the standard set forth in *Williams*. Employer’s Request for Reconsideration at 2-3.

The administrative law judge rejected this argument, indicating for the first time that he found that Dr. Varghese’s opinion established that the miner’s legal pneumoconiosis was a *direct cause* of his death. The administrative law judge therefore explained that the *Williams* standard was not applicable:

In [*Williams*], the miner’s cause of death was gastrointestinal bleeding, and possibly a pulmonary embolism, and his treating physician, Dr. Woolum, opined that his pneumoconiosis hastened his death. The Court found that his opinion was conclusory and inadequate. Of course, that is not the situation here. [The miner’s] death, as reported by his treating physician, Dr. Varghese, was due to an exacerbation of his COPD, which was in turn caused at least in part by his history of coal mine dust exposure. [The miner’s] legal

been “aided and embedded [sic] by the coal workers’ pneumoconiosis . . . and progressive massive fibrosis.” *Id.* The administrative law judge found that Dr. Dennis’s diagnosis of complicated pneumoconiosis (progressive massive fibrosis) was not credible. Order Denying Reconsideration at 3. The administrative law judge further found that his opinions were speculative and equivocal and entitled to no weight. *Id.*

¹² The Sixth Circuit has further held that a physician who opines that pneumoconiosis hastened death through a “specifically defined process” must explain how and why it did so, and ordinarily ought to explain the extent to which it did so, as expressed in a length of time. *Conley v. Nat’l Mines Corp.*, 595 F.3d 297, 303-04 (6th Cir. 2010).

pneumoconiosis did not hasten his death due to an unrelated disease process, it was a direct cause of his death.

Order Denying Reconsideration at 5. Consequently, the administrative law judge denied employer's request for reconsideration. *Id.* at 6.

Because the administrative law judge found that Dr. Varghese's opinion was sufficient to establish that the miner's COPD was "a direct cause" of his death, he was correct in stating that the standard set forth in *Williams* for determining whether pneumoconiosis has *hastened* a miner's death was not applicable. *See* 20 C.F.R. §718.205(b). Employer argues, however, that the administrative law judge still erred in his consideration of Dr. Varghese's opinion. We agree.

In his Order Denying Reconsideration, the administrative law judge summarized Dr. Varghese's opinion:

Dr. Varghese, [the miner's] treating physician, completed his death certificate, reporting that his death was due to COPD, CHF, coronary artery disease, and pneumonia. Dr. Varghese treated the miner for many years, for [COPD], as well as coronary artery disease and pneumonia. He stated in his February 15, 2008 letter that [the miner] died due to an exacerbation of his [COPD].

Decision and Order at 4.

The administrative law judge next summarily credited Dr. Varghese's opinion that the miner's death was due to an exacerbation of his COPD. Decision and Order at 5. Although the administrative law judge acknowledged Dr. Varghese's status as the miner's treating physician,¹³ the Sixth Circuit has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference.

¹³ In weighing the medical evidence of record relevant to whether a miner's death is due to pneumoconiosis, the adjudication officer "must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the adjudication officer shall take into consideration the following factors: 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). Although 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 physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Williams, 338 F.3d at 513. The Sixth Circuit has held that “the opinions of treating physicians get the deference they deserve based on their power to persuade.” *Id.*

In this case, the administrative law judge erred in not explaining how Dr. Varghese’s status as the miner’s treating physician provided him with an advantage over the other physicians in assessing the cause of the miner’s death. The administrative law judge also did not address the doctor’s explanation for attributing the miner’s death to an exacerbation of his COPD. Consequently, before according additional weight to Dr. Varghese’s opinion based upon his status as the miner’s treating physician, the administrative law judge, on remand, should initially address whether Dr. Varghese’s opinion is sufficiently reasoned, and then should weigh Dr. Varghese’s opinion consistent with 20 C.F.R. §718.104(d) and *Williams*.¹⁴ See *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

We also agree with employer that the administrative law judge erred in not addressing medical opinion evidence that conflicts with Dr. Varghese’s opinion that the miner’s COPD was a direct cause of his death. As employer accurately notes, the administrative law judge erred in stating that Dr. Westerfield did not discuss whether the miner’s COPD played any role in his death. Employer’s Brief at 16, citing Order Denying Reconsideration at 4. Although Dr. Westerfield opined that the miner’s COPD constituted a diagnosis of legal pneumoconiosis, he also opined that the miner’s coal mine dust exposure did not play any role in his death. Employer’s Exhibit 13 at 18, 24. In fact, Dr. Westerfield expressed a contrary opinion regarding the direct cause of the miner’s death, stating that:

[The miner] died a cardiac death. He had congestive heart failure. His lungs were filled with fluid. He had pulmonary edema at the time of his death, at least identified microscopically. Pneumonia was present. I can’t say for sure that the pneumonia actually caused his death, but it certainly contributed to

¹⁴ Dr. Varghese concluded his report with the following statement:

There is no reason to deny [the miner’s] black lung benefits, with the evidence of the autopsy report, so please be advised to revise judgment, look into the autopsy report and possible [sic] allow [the miner] who worked in the mines for more than thirty-five years, to have his family enjoy the black lung benefits.

Director’s Exhibit 18A at 2. Given this request, the administrative law judge, on remand, should consider whether Dr. Varghese, as the miner’s treating physician, offered his opinion in an attempt to be of assistance to the miner’s family. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 517 (6th Cir. 2003).

it, and then he had the cardiac rhythm disturbance. So the combination took him away. I think the congestive heart failure is the primary cause of death.

Employer's Exhibit 13 at 18.

The administrative law judge also failed to adequately address Dr. Caffrey's medical opinion. Dr. Caffrey, like Dr. Westerfield, opined that the miner definitely suffered "a cardiac death," explaining that the miner was an individual who previously had coronary artery bypass grafting and continued to have significant cardiac problems with chronic atrial fibrillation." Director's Exhibit 66 at 59. Moreover, although Dr. Caffrey noted that the miner had "emphysema with some COPD," he opined that it was not "a major problem." Director's Exhibit 66 at 86. Dr. Caffrey identified the miner's "major problem" as vascular disease affecting the coronary arteries, which led to congestive heart failure. *Id.* Dr. Caffrey opined that "[i]n the end [the miner] developed methicillin resistant staph aureus pneumonia which led to his death." Director's Exhibit 66 at 177.

Because the administrative law judge failed to adequately address the conflicting evidence regarding the direct cause of the miner's death,¹⁵ his analysis of the evidence does not comport with the requirements of the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."¹⁶ 5 U.S.C. §557(c)(3)(A), as incorporated into the Act

¹⁵ Although the record contains evidence calling into question Dr. Varghese's opinion that the miner's death was due to chronic obstructive pulmonary disease (COPD), there is also medical opinion evidence supportive of his opinion. For example, Dr. Broudy opined that the miner's death "was due to a combination of factors largely related to his cardiopulmonary status and COPD." Employer's Exhibit 7 at 14.

¹⁶ Our dissenting colleague effectively treats Dr. Varghese's opinion as affording claimant with a presumption that the miner's death was due to legal pneumoconiosis, i.e., COPD. For example, our colleague notes with approval the administrative law judge's questioning of Dr. Westerfield's opinion. The administrative law judge accorded less weight to Dr. Westerfield's opinion because the doctor did not adequately explain why "coal mine dust exposure *did not play any role* in the [miner's] death." *See* Order Denying Reconsideration at 4 (emphasis added). However, the issue before the administrative law judge is whether the evidence establishes that the miner's COPD was a direct cause of the miner's death, not whether coal mine dust exposure played *any role* in the miner's death. Because claimant is not entitled to the Section 411(c)(4) presumption that the miner's death was due to legal pneumoconiosis, she has the burden of proof to establish, by credible evidence, that COPD was a direct cause of the miner's death.

by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the administrative law judge's finding that the evidence established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(1). On remand, in reconsidering this issue, the administrative law judge should address the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions.¹⁷ See *Rowe*, 710 F.2d at 255.

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I dissent from the majority's decision to vacate the award of benefits to Mr. Sizemore's widow. The administrative law judge's finding that pneumoconiosis caused the miner's death is supported by substantial evidence and consistent with law, and therefore must be affirmed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹⁷ Employer argues that Dr. Varghese's opinion cannot support a finding that the miner's death was due to legal pneumoconiosis because it was based in part on the discredited autopsy report of Dr. Dennis. Employer's Brief at 14. Although the administrative law judge found that Dr. Dennis's diagnosis of complicated pneumoconiosis was not credible, employer has not explained how this determination undermines Dr. Varghese's opinion that the miner's death was due to his COPD.

The administrative law judge initially found, and employer does not contest, that the miner had pneumoconiosis in both its clinical and legal forms. Relevant to this appeal, the administrative law judge relied on the opinion of employer's expert, Dr. Westerfield, to find that the miner's "clearly established" chronic obstructive pulmonary disease (COPD) was caused by his coal mine dust exposure, and thus constituted legal pneumoconiosis.¹⁸ 20 C.F.R. §718.201(a)(2), (b) (defining legal pneumoconiosis); Decision and Order at 33-35. The administrative law judge also found that Dr. Westerfield's opinion is "uncontradicted" in this regard because the remaining medical experts either diagnosed legal pneumoconiosis or did not address whether the miner's coal dust exposure contributed to his pulmonary disease.¹⁹ *Id.*

Having found that the miner's COPD constituted legal pneumoconiosis, the administrative law judge properly considered whether COPD caused the miner's death. 20 C.F.R. §718.205.²⁰ In finding that the COPD/legal pneumoconiosis did indeed cause the miner's death, the administrative law judge credited Dr. Varghese's opinion, as set forth in his medical report and the miner's death certificate, that the miner "died of exacerbation of COPD." Decision and Order at 37. The administrative law judge was persuaded by the

¹⁸ Dr. Westerfield opined that the miner had an "injury to the lungs that can be attributed to [the] inhalation of coal mine dust" and thus "did suffer from *legal pneumoconiosis* or chronic dust disease of the lungs due to inhalation of mineral dust." Employer's Exhibit 11 at 7 (emphasis in original).

¹⁹ Dr. Cornett, the miner's treating physician, stated that his thirty-five years of coal dust exposure "undoubtedly" contributed to his lung disease. Director's Exhibit 18; Decision and Order at 26. Dr. Varghese stated that the miner's "main diagnosis was chronic obstructive pulmonary disease" and that it is "reasonable to conclude" that he also had coal workers' pneumoconiosis . . . and black lung." Director's Exhibit 18A; Decision and Order at 29. The administrative law judge found, and employer does not contest, that Dr. Caffrey, employer's consulting pathologist, "did not . . . offer any opinion on whether [the miner's] significant history of exposure to coal mine dust had a role in the development of his COPD." Decision and Order at 35. The administrative law judge similarly found, and employer does not contest, that Dr. Broudy, another of employer's experts, and Dr. Gaziano, who reviewed records at the request of the Department of Labor, did not "discuss the relationship between [the miner's] history of coal mine dust exposure and his pulmonary disease." Decision and Order at 34; Director's Exhibit 66; Employer's Exhibit 7.

²⁰ Pursuant to Section 718.205(b), a miner's death is "due to pneumoconiosis" if pneumoconiosis was "the cause" of death or a "substantially contributing cause or factor" leading to death, or if death "was caused by complications of pneumoconiosis."

fact that Dr. Varghese “had treated [the miner] for many years” specifically for COPD. *Id.* at 35-37. The administrative law judge also found that the contrary opinions of record are not credible, and therefore do not undermine Dr. Varghese’s conclusion. *Id.*

Contrary to the majority opinion, the administrative law judge fully considered the views of employer’s medical experts regarding the miner’s “direct cause of death.” He simply rejected those opinions, permissibly so, for failing to credibly address the impact, if any, that the miner’s COPD/legal pneumoconiosis had on his death. For the reasons outlined below, employer’s allegations of error – which are limited to the opinions of Drs. Varghese, Westerfield, and Cornett – do not warrant a remand of this claim.

Employer raises two arguments with respect to the administrative law judge’s weighing of Dr. Varghese’s opinion. First, employer asserts that the death certificate completed by Dr. Varghese should not be credited because, generally speaking, “it is error for an administrative law judge to accept conclusions contained in [a death] certificate *where the record provides no indication that the individual signing the death certificate possessed any . . . personal knowledge of the miner which to assess the cause of death.*” Employer’s Brief at 13 (emphasis added). The administrative law judge explicitly found, however, that Dr. Varghese “treated the miner for a number of years for various conditions, including COPD,” a fact that is confirmed by Dr. Varghese’s medical report and his treatment records. Decision and Order at 37; Director’s Exhibits 18A; 16 at 89-91.

Notably, one month before his death, the miner was admitted to the hospital for, among other things, “respiratory failure” under the care of Dr. Varghese. Director’s Exhibit 16 at 16-84. Due to his respiratory failure and deteriorating condition, the miner was transferred to an Intensive Care Unit. *Id.* After his condition deteriorated further, he was transferred back to Dr. Varghese at his family’s request, at which time Dr. Varghese “reported assessments of [COPD], end stage lung disease,” and other conditions. *Id.* at 23, *citing* Director’s Exhibit 16 at 89-91. Thus, employer’s rationale – that the death certificate “is insufficient evidence” because the record “provides no indication” of Dr. Varghese’s personal knowledge of the miner’s condition – is not grounded in the facts of this case. The administrative law judge’s finding that Dr. Varghese had a detailed understanding of the miner’s pulmonary condition is, however, based on substantial evidence and thus should be affirmed.²¹ See *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

²¹ Employer’s incorrect assertion that the record lacks any evidence of Dr. Varghese’s personal knowledge of the miner’s pulmonary condition was raised solely with respect to the credibility of the death certificate, but not Dr. Varghese’s subsequent medical report. Employer identifies no facts and raises no arguments that could be construed as otherwise challenging the weight accorded to Dr. Varghese’s opinion based on his status

Employer next concedes that “the death certificate could establish proof of causation of death” in combination with Dr. Varghese’s medical report. Employer’s Brief at 14. Employer argues, however, that Dr. Varghese’s medical report “is more problematic than the death certificate” because Dr. Varghese’s opinion was based on Dr. Dennis’s autopsy findings. *Id.* According to employer, Dr. Varghese’s opinion cannot be credited because Dr. Dennis’s opinion was not credited by the administrative law judge. Employer reasons that “it is the degree of pneumoconiosis that is important”: because Dr. Dennis mistakenly diagnosed complicated pneumoconiosis rather than simple clinical pneumoconiosis, any opinion that relied on Dr. Dennis’s findings “became similarly flawed.” *Id.* at 15.

Employer’s argument misses the mark. The administrative law judge rejected Dr. Dennis’s conclusions regarding the severity of the miner’s *clinical pneumoconiosis*, whereas Dr. Varghese’s credited opinion relates to the separate issue of whether the miner’s death was caused by his COPD, i.e., his *legal pneumoconiosis*.²² 20 C.F.R. §718.201(a) (definition of legal pneumoconiosis differs from that of clinical pneumoconiosis). Employer’s argument also ignores the administrative law judge’s finding that Dr. Varghese rendered his initial diagnosis of death due to COPD before Dr. Dennis’s autopsy findings were available to him. Decision and Order at 6. Employer has neither challenged this finding nor explained how Dr. Dennis’s diagnosis of complicated pneumoconiosis, of which Dr. Varghese was unaware at the time he completed the death certificate, could have affected Dr. Varghese’s diagnosis. Although Dr. Varghese’s later-in-time medical report includes a summary of Dr. Dennis’s autopsy observations and conclusions regarding complicated pneumoconiosis, employer has not explained how that summary undermines Dr. Varghese’s conclusions regarding a separate disease, COPD, for

as the miner’s treating physician. That finding should therefore be affirmed. *See* 20 C.F.R. §§802.211(b) (parties must raise their allegations of error with specificity), 802.301(a) (Board must limit its review to contentions of error that are specifically raised by the parties); *Cox v. Director, OWCP*, 791 F.2d 445 (6th Cir. 1986), *aff’g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

²² The administrative law judge similarly noted that employer’s arguments before him all but ignored the fact that employer’s own expert, Dr. Westerfield, diagnosed the miner with legal pneumoconiosis, in the form of coal dust-induced COPD. Thus, employer “conspicuously avoided any discussion of the significance of this finding, or whether [the miner’s] legal pneumoconiosis, as opposed to the clinical pneumoconiosis found at autopsy, played any role in his death, as reported by Dr. Varghese, his treating physician.” Decision and Order at 36 n.5.

which he had treated the miner for many years, including during the miner's terminal hospitalization.²³

Employer raises no other arguments with respect to the administrative law judge's finding that Dr. Varghese, as the miner's treating physician, had a detailed understanding of the miner's pulmonary condition and credibly attributed his death to his COPD. That finding is supported by substantial evidence and should therefore be affirmed. *Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155.

Finally, employer argues, unavailingly, that because the administrative law judge "misstated" Dr. Westerfield's opinion, "any reliance [the administrative law judge] may have put on Dr. Westerfield's opinions, or perceived lack thereof, should be disregarded by the Board." Employer's Brief at 16. Contrary to employer's argument, the administrative law judge fully considered Dr. Westerfield's opinion that the miner's death was cardiac in nature and completely unrelated to his coal dust exposure. Decision and Order at 16-19, 36. The administrative law judge permissibly found, however, that Dr. Westerfield "did not explain why . . . coal mine dust exposure did not play any role in [the miner's] death," in light of Dr. Westerfield's acknowledgement that: pulmonary/respiratory conditions were part of the "combination that took [the miner] away,"²⁴ the miner had "a significant pulmonary impairment at the end," and coal dust-

²³ Employer raises this same argument with respect to claimant's other treating physician, Dr. Cornett, asserting that her diagnosis of death due to clinical pneumoconiosis is "similarly compromised" by Dr. Dennis's autopsy findings. Employer's Brief at 14. As an initial matter, employer has not identified error that requires remand, as the administrative law judge did not credit Dr. Cornett's opinion on death causation. Decision and Order at 35-37. Moreover, because the administrative law judge found that the miner's death was due to *legal pneumoconiosis*, employer has not explained how the credibility of Dr. Cornett's opinion on *clinical pneumoconiosis* undermines that finding. See *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

²⁴ As the administrative law judge found, Dr. Westerfield attributed the "primary cause of death" to congestive heart failure, but also stated that "pneumonia contributed to it," and the "combination" of congestive heart failure, pulmonary edema, pneumonia, and cardiac rhythm disturbance "took him away." Employer's Exhibit 13 at 18. Thus, the majority's assertion that the administrative law judge did not consider Dr. Westerfield's opinion on the "direct cause of death" is in error. See pp. 10-11, *supra*. The relationship between the miner's heart failure, pulmonary conditions, and death was described by Dr. Westerfield as follows:

induced COPD/legal pneumoconiosis was a part of the miner's pulmonary condition/impairment. Decision and Order at 36; Employer's Exhibit 13 at 10, 17, 18, 22. The administrative law judge's characterization of Dr. Westerfield's opinion in this regard is consistent with the record evidence, and employer points to nothing in the record that suggests otherwise.²⁵ Therefore, the administrative law judge's determination that Dr. Westerfield's opinion is not adequately explained should be affirmed. *Rowe*, 710 F.2d at 255; *Clark*, 12 BLR at 1-155.

The administrative law judge, in his role as fact-finder, evaluates the credibility of the evidence of record, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Rowe*, 710 F.2d at 255. Moreover, the Board must limit its review to contentions of error that are specifically raised by the parties, and employer in this case has identified no error requiring remand. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because Dr. Varghese's opinion on the cause of the miner's death was found to be credible, while Dr. Westerfield's and the remaining physicians' opinions were not,²⁶ the

[Congestive heart failure] compromises the ability of the lungs to do the job, in that they will have alveolar sacs filled with fluid and not be able to exchange gas. And then over time, a chronic failure, you actually have lung damage which can be seen on x-ray.

Employer's Exhibit 13 at 17. He thus agreed that "heart failure contributed to [the miner's] additional respiratory injury." *Id.* He also stated that people like the miner "who have the double whammy of heart and lung disease get extra [pulmonary] infection from their heart not working right[.]" *Id.* at 15.

²⁵ The totality of employer's argument with respect to this finding is that Dr. Westerfield "not only . . . explained how the individual contributing factors were not the result of legal pneumoconiosis, but he explicitly stated how death occurred." Employer's Brief at 16.

²⁶ The majority would also remand for reconsideration of Dr. Caffrey's opinion on the cause of death. The administrative law judge declined to credit Dr. Caffrey's opinion because he focused primarily on whether clinical pneumoconiosis contributed to the miner's death, and did not adequately address the separate issue of whether COPD/legal pneumoconiosis contributed to death. Decision and Order at 35-36. The administrative law judge found that despite being aware that Dr. Varghese attributed the miner's death to COPD, Dr. Caffrey did not discuss whether COPD played a role in the miner's death or

administrative law judge rationally concluded that “[c]laimant has met her burden” to establish that Mr. Sizemore’s death was caused by his COPD/legal pneumoconiosis. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, (6th Cir. 2002) (whether a physician’s opinion is sufficiently reasoned is essentially a credibility matter); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002) (it is the role of the administrative law judge to make credibility determinations); Decision and Order at 37. As substantial evidence supports the administrative law judge’s credibility determinations, I would affirm his finding that the miner’s death was due to COPD/legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b)(1).²⁷

The award of benefits should therefore be affirmed.

otherwise express disagreement with Dr. Varghese’s diagnosis. *Id.* These findings are borne out by the evidence, and are unchallenged by employer on appeal. The administrative law judge’s rejection of Dr. Caffrey’s opinion should therefore be affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Further, any error in the administrative law judge’s rejection of the opinions of Drs. Cornett and Broudy on the cause of death is harmless, as their opinions, if credited, support a finding that the miner’s death was due to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Dr. Cornett stated that “coal worker’s pneumoconiosis was a major contributing factor to [the miner’s] death,” while Dr. Broudy opined that the miner’s death “was due to a combination of factors largely related to his cardiopulmonary status and COPD,” which the administrative law judge found to be legal pneumoconiosis. Director’s Exhibit 18; Employer’s Exhibit 7 at 14.

²⁷ I agree with the majority’s denial of employer’s Motion to Remand this claim for a new hearing before a new administrative law judge. Employer’s Appointments Clause argument is untimely, as it was first raised to the Board nearly eleven months after employer filed its Petition for Review and Brief. *See Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 at *8 (June 21, 2018) (new hearing required where appellant “makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party’s] case”); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal).

GREG J. BUZZARD
Administrative Appeals Judge