

BRB No. 08-0325 BLA

A.F.W.)
(Widow of R.G.W.))
)
Claimant-Respondent)
)
v.)
)
BUFFALO MINING COMPANY)
) DATE ISSUED: 01/27/2009
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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-6583) of Administrative Law Judge Daniel F. Solomon awarding benefits on a 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). This case involves a survivor's claim filed on July 8, 2003¹ and is before the Board for the second time. In the initial

¹ The miner initially filed a claim for benefits with the Social Security Administration (SSA) on June 29, 1973. Director's Exhibit 1. The SSA denied the claim on September 24, 1973 because the miner was still working in the coal mines. *Id.* After the miner elected Department of Labor (DOL) review of his claim, DOL issued an Order on April 10, 1984, wherein it found that the miner would be entitled to receive benefits if

decision, the administrative law judge, after crediting claimant with thirty-seven years of coal mine employment,² accepted the parties' stipulation that the miner suffered from pneumoconiosis arising out of his coal mine employment. The administrative law judge also found that the evidence established 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.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in finding that Dr. Bush's report could not constitute an "autopsy report" for purposes of the evidentiary limitations set forth at 20 C.F.R. §725.414. [*A.F.W.*] v. *Buffalo Mining Co.*, BRB No. 06-0808 BLA (July 20, 2007)(unpub.). The Board, therefore, held that the administrative law judge erred in excluding Dr. Bush's report from the record. *Id.* The Board further held that the administrative law judge erred in his consideration of evidence from the living miner's claims because it had not been specifically designated by the parties as evidence pursuant to 20 C.F.R. §725.414. *Id.* In regard to the merits, the Board held, *inter alia*, that the administrative law judge had not fully addressed whether Dr. Racadag's opinion constituted a reasoned opinion. *Id.* The Board, therefore, remanded the case to the administrative law judge for further consideration. *Id.*

On remand, the administrative law judge admitted Dr. Bush's report into the record as employer's affirmative autopsy report. However, the administrative law judge again found that the evidence established 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.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant

he terminated his coal mine employment within one year. *Id.* However, because the miner was still engaged in coal mine employment on April 10, 1985, his 1973 claim was denied.

The miner filed a second claim on September 18, 1989. Director's Exhibit 2. The district director denied benefits on February 28, 1990. *Id.* There is no indication that the miner took any further action in regard to his 1989 claim.

² The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

to 20 C.F.R. §718.205(c). Neither claimant³ nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis.⁴ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be 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). 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); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

³ Claimant is the widow of the deceased miner, who died on June 20, 2003. Director's Exhibit 16.

⁴ Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

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

20 C.F.R. §718.205(c).

In this case, six physicians, Drs. Racadag, Stoll, Naeye, Bush, Rosenberg, and Hippensteel, addressed the cause of the miner's death. Each of these physicians attributed the miner's death to lung cancer.⁵ Although five of the six physicians, Drs. Racadag, Naeye, Bush, Rosenberg, and Hippensteel, diagnosed coal workers' pneumoconiosis, they disagreed as to the role, if any, that the disease played in the miner's death.⁶ Dr. Racadag, the autopsy prosector, opined that "pneumoconiosis contributed as [a] hastening role in miner's death because it made his breathing difficult." Director's Exhibit 19. However, Drs. Naeye, Bush, Rosenberg, and Hippensteel each opined that the miner's pneumoconiosis did not play any role in his death. Director's Exhibit 20; Employer's Exhibits 1-5.

On remand, the administrative law judge credited Dr. Racadag's opinion, that the miner's pneumoconiosis hastened his death, over the contrary opinions of Drs. Naeye, Bush, Rosenberg, and Hippensteel. The administrative law judge credited Dr. Racadag's opinion over those of Drs. Naeye and Bush because he found that Dr. Racadag's opinion, unlike those of Drs. Naeye and Bush, was "well-reasoned, complied with the evidentiary limitations on evidence, and [was] substantiated by the evidence as a whole." Decision and Order on Remand at 10. The administrative law judge accorded less weight to the opinions of Drs. Rosenberg and Hippensteel because they did not address whether pneumoconiosis contributed to, or hastened, the miner's death. The administrative law judge also accorded less weight to their opinions because they did not review the miner's autopsy slides. The administrative law judge, therefore, found that the medical evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁷

⁵ Drs. Stoll, Naeye, Bush, Rosenberg, and Hippensteel explicitly opined that the miner's death was due to lung cancer. Dr. Racadag provided a list of several pulmonary diagnoses (including coal workers' pneumoconiosis and lung cancer) and opined that these "conditions probably contributed to the [miner's] suffering and demise." Director's Exhibit 18.

⁶ Dr. Stoll did not diagnose coal workers' pneumoconiosis. See Director's Exhibit 22. Dr. Stoll completed the miner's death certificate. Dr. Stoll attributed the miner's death to metastatic lung cancer. Director's Exhibit 16. In the section requesting a listing of "[o]ther significant conditions contributing to death but not resulting in the immediate cause," Dr. Stoll listed chronic obstructive pulmonary disease and atrial fibrillation. *Id.* Dr. Stoll did not relate the chronic obstructive pulmonary disease to coal mine dust exposure.

⁷ We note that the administrative law judge, on remand, stated that the "central issue in this case [was] whether the miner's respiratory impairment caused, contributed to, or in any way, hastened the death of the miner." Decision and Order on Remand at

Employer argues that the administrative law judge committed numerous errors in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Dr. Racadag

Employer initially contends that the administrative law judge erred in his consideration of Dr. Racadag's opinion. Dr. Racadag performed the miner's autopsy. In his autopsy report, Dr. Racadag listed six pathological diagnoses, including coal workers' pneumoconiosis and squamous cell carcinoma. Director's Exhibit 18. In his autopsy report, Dr. Racadag indicated that these "conditions probably contributed to the [miner's] suffering and demise." *Id.* In a subsequent questionnaire, Dr. Racadag opined that the miner's pneumoconiosis hastened his death "because it made his breathing difficult." Director's Exhibit 19.

Employer argues that Dr. Racadag's opinion that coal workers' pneumoconiosis "probably" contributed to the miner's death cannot be credited because it is "speculative." Employer's Brief at 8. We disagree. The Board instructed the administrative law judge to take into account Dr. Racadag's use of the word "probably" and the administrative law judge did so on remand. The administrative law judge found that, viewed as a whole, Dr. Racadag's "less than absolute opinion" on the cause of death was "merely cautionary" and was not speculative or equivocal. Decision and Order on Remand at 9. The administrative law judge's finding is supported by substantial evidence. Although Dr. Racadag initially noted that several different lung diseases "probably" contributed to the miner's death, Director's Exhibit 18, the doctor subsequently opined, without any equivocation, that the miner's pneumoconiosis hastened his death. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); Director's Exhibit 19.

Employer further argues that the administrative law judge erred in finding that Dr. Racadag's opinion was better reasoned and, therefore, entitled to more weight than the

16. However, the relevant issue in this case is whether the miner's pneumoconiosis was of a sufficient degree to have impaired his breathing, and if so, whether it hastened the miner's death from lung cancer. In this case, there is no dispute that the miner suffered from pneumoconiosis and that the miner suffered from breathing difficulties before his death. However, this alone is not sufficient to support a finding of death due to pneumoconiosis. A physician's assertion that, just because a miner had pneumoconiosis, it must have hastened his death, is conclusory and, therefore, inadequate to support a finding of death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625, 2-655 (6th Cir. 2003).

contrary medical opinions of record. Whether a medical report is sufficiently reasoned is for the administrative law judge as the fact-finder to decide. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). However, the administrative law judge's findings must be supported by substantial evidence in the record. 33 U.S.C. §921(b)(3).

In this case, the administrative law judge accorded greater weight to Dr. Racadag's opinion because the doctor was "intimately familiar with the final events and circumstances surrounding the miner's death." Decision and Order on Remand at 10. Employer contends that the administrative law judge's characterization of Dr. Racadag's opinion is not supported by the record. We agree. Dr. Racadag's sole reference to the miner's history is contained in a single paragraph in his autopsy report. It provides that:

[The miner] is a 74 year old caucasian male retired coal miner who was admitted at Logan Regional on May 17, 2003 under the service of Dr. Pathom, thru [sic] the ER after being seen by Dr. Gosien. He was complaining of weakness, weight loss, poor appetite and right sided chest pain. His regular doctor is at the Veterans Hospital. Chest x-ray revealed a mass in the left upper lobe of the lung which on biopsy revealed a non-small cell carcinoma. He smoked 1-2 packs for 60 years. He died in Florida according to the family.

Director's Exhibit 18 at 1.

Thus, Dr. Racadag's statements in his autopsy report do not reveal an intimate familiarity with the final events and circumstances surrounding the miner's death. Moreover, as employer notes, the administrative law judge did not explain how Dr. Racadag's knowledge of the final events and circumstances of the miner's death was superior to that of the other physicians of record. Employer accurately notes that Drs. Naeye and Bush also had access to the records from the miner's final hospitalization.

The administrative law judge also found that Dr. Racadag's assessment, that the miner's pneumoconiosis hastened his death because it made his breathing more difficult, was "substantiated by [the opinion of] Dr. Stoll, the miner's treating physician." Decision and Order on Remand at 10. Dr. Stoll, however, did not opine that the miner's pneumoconiosis caused any breathing difficulty, and did not opine that the miner's pneumoconiosis contributed, in any way, to his death.⁸ Director's Exhibits 16, 20. Consequently, the administrative law judge erred in finding that Dr. Racadag's opinion was supported by that of Dr. Stoll.

⁸ As previously noted, Dr. Stoll did not diagnose pneumoconiosis.

The administrative law judge also accorded greater weight to Dr. Racadag's opinion because he found that the "evidentiary record demonstrates that the miner was weakened, beyond a negligible degree, *by the presence of pneumoconiosis.*" Decision and Order at 11 (emphasis added). Although the administrative law judge noted that the miner's hospital records indicated that the miner suffered from shortness of breath and that claimant testified that the miner suffered from shortness of breath, the administrative law judge failed to cite to any evidence supportive of a finding that the miner's shortness of breath was attributable to his pneumoconiosis. Consequently, the administrative law judge's analysis does not comport with 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 in 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 v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The administrative law judge also found that there was a "significant discrepancy between the findings of Drs. Racadag and Naeye as to the size of the macules present in the miner's lungs."⁹ Decision and Order on Remand at 12. The administrative law judge found that:

Dr. Naeye does not discuss other evidence which substantiates Dr. Racadag's findings. Records from Logan Regional Medical Center indicate that a portable chest x-ray was performed on May 17, 2003, and a CT Scan of the chest performed on May 18, 2003 by Dr. Mahesh Koppikar. (DX 22). The first test showed a homogenous density measuring 6 cm, while the second test demonstrated a left perihilar mass measuring 5.31 x 5.74 cm with a left hilar adenopathy measuring up to 2 cm. I note that Dr. Racadag's CV is not in the record and Dr. Naeye is eminently qualified; however, the evidence in the record substantiates Dr. Racadag's findings and Dr. Naeye's [sic] does not fully address the evidence in the record indicating macules present in the locations and sizes reported by Dr. Racadag. I find Dr. Racadag's opinion merits additional weight as to the finding concerning the size of macules present in the miner's lungs.

Decision and Order on Remand at 12.

⁹ In his gross examination of the miner's lungs, Dr. Racadag opined that sectioning of the lung "show[ed] a tan-brown pillowy cut surface with black macules measuring up to 0.8 cm in maximum dimension" Director's Exhibit 18 at 2. In his review of the miner's lung tissue slides, Dr. Naeye noted that there was "only a very small amount of black pigment in the lung tissues," with the largest deposit "less than 1 mm in diameter." Director's Exhibit 20 at 1.

As employer notes, the administrative law judge “failed to explain how Dr. Racadag’s description of eight millimeter macules of pneumoconiosis was substantiated by x-ray findings of opacities nearly ten times that size.” Employer’s Brief at 18. Moreover, the record reflects that the densities described on the x-ray and CT scan interpretations were not identified as pneumoconiosis.¹⁰ Consequently, the administrative law judge erred in finding that Dr. Racadag’s opinion was entitled to greater weight because his finding regarding the size of the macules in the miner’s lungs was supported by other evidence in the record.

In light of the above errors, we hold that the administrative law judge did not provide sufficient reasons for according greater weight to Dr. Racadag’s opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Dr. Naeye

Employer also argues that the administrative law judge erred in his consideration of Dr. Naeye’s opinion. Dr. Naeye opined that the miner suffered from “very mild, simple coal workers’ pneumoconiosis.” Director’s Exhibit 20 at 1. Dr. Naeye further opined that the miner’s coal workers’ pneumoconiosis was “far too mild to have had any measurable effect on lung function, so it did not cause any disability or have any role in his death.” *Id.* Dr. Naeye opined that the “squamous cell carcinoma that arose in his left lung initiated a series of events that led to his death.” *Id.*

In regard to Dr. Naeye’s opinion, the administrative law judge stated:

Dr. Naeye commits two significant errors in reaching his conclusion concerning the death of the miner: (1) that disability is an element of consideration when determining whether the death of the miner was due to pneumoconiosis; and (2) his failure to consider whether pneumoconiosis aggravated the primary cause of death thereby hastening the miner’s death in any way.

Decision and Order on Remand at 13.

¹⁰ It appears that Dr. Koppikar, who interpreted the miner’s May 17, 2003 x-ray and May 18, 2003 CT scan, was identifying lesions of lung cancer, not pneumoconiosis. Director’s Exhibit 22.

Contrary to the administrative law judge's characterization, Dr. Naeye did not assume that disability was an element of consideration in determining whether the miner's death was due to pneumoconiosis. Although Dr. Naeye opined that the results of the miner's 1989 pulmonary function study were normal and thus consistent with the small amount of pneumoconiosis later found in the miner's lungs, Employer's Exhibit 2 at 20-21, the doctor did not predicate his opinion, that the miner's death was not hastened by pneumoconiosis, upon the fact that the miner's respiratory impairment was not disabling. Moreover, Dr. Naeye specifically opined that the degree of the miner's coal workers' pneumoconiosis "wouldn't have caused any impairments or disability at all" because the "lesions were far too few and too small in diameter to cause any measurable impairments in lung function." *Id.* at 19. Dr. Naeye, therefore, opined that the miner's coal workers' pneumoconiosis did not play any role in causing, contributing to, or hastening his death. *Id.* at 24. Thus, contrary to the administrative law judge's finding, Dr. Naeye addressed whether the miner's pneumoconiosis aggravated the primary cause of death, lung cancer.

The administrative law judge also noted that Dr. Naeye's report was admitted as autopsy rebuttal evidence. Decision and Order on Remand at 12. The administrative law judge further noted that rebuttal autopsy evidence must be limited to a consideration of the pathological evidence and cannot take into consideration clinical evidence. *Id.* The administrative law judge, therefore, held that Dr. Naeye's consideration of the miner's clinical records was impermissible. *Id.* Consequently, the administrative law judge redacted those portions of Dr. Naeye's report that incorporated the clinical evidence.¹¹ *Id.* However, employer accurately notes that the administrative law judge did not address the significance of the fact that Dr. Racadag, in preparing the autopsy report (that Dr. Naeye reviewed and rebutted), also referenced clinical evidence. See Director's Exhibit 18. Consequently, the administrative law judge erred in treating the autopsy reports prepared by Drs. Racadag and Naeye inconsistently, without explanation. See *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(*en banc*).

Dr. Bush

Employer also argues that the administrative law judge erred in his consideration of Dr. Bush's opinion. On remand, the administrative law judge found that Dr. Bush's report was admissible as employer's affirmative autopsy report.¹² See *Keener v. Peerless*

¹¹ The administrative law judge, however, failed to identify which portions of Dr. Naeye's report were redacted.

¹² Dr. Bush reviewed the miner's autopsy slides, autopsy report, and other medical evidence. In his report, Dr. Bush opined that the miner's lungs showed "minimal evidence" of coal worker's pneumoconiosis. Employer's Exhibit 5. Dr. Bush further

Eagle Coal Co., 23 BLR 1-229, 1-237-38 (2006) (*en banc*) (holding that the regulations set forth in 20 C.F.R. §725.414 permit both claimant and employer to submit, as affirmative-case autopsy evidence pursuant to 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), a report by a pathologist who has reviewed the autopsy tissue slides).

The Board, in its previous consideration of this case, instructed the administrative law judge, on remand, to consider whether Dr. Bush's report also constituted a "medical report" within the meaning of 20 C.F.R. §725.414(a)(3)(i).¹³ Although the administrative law judge, on remand, found that Dr. Bush's report constituted a medical report in part, he noted that employer had already submitted two medical opinions in support of its affirmative case (the reports of Drs. Hippensteel and Rosenberg). Consequently, the administrative law judge found that Dr. Bush's "medical report" exceeded the evidentiary limitations imposed by 20 C.F.R. §725.414 and excluded it from consideration. Decision and Order on Remand at 14.

Dr. Bush's report was admitted only to the extent it constituted employer's affirmative autopsy evidence. If a physician's autopsy report contains conclusions that are based on materials beyond the scope of the autopsy evidence, the administrative law judge may exclude the report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). Exclusion of evidence, however, is not the favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id.*

In considering Dr. Bush's opinion, the administrative law judge stated that:

I am left to guess as to the extent that Dr. Bush relied on the histology slides versus the rest of the medical evidence in reaching his conclusion. To accept Dr. Bush's conclusions in his written assessment is to risk

opined that the miner's coal workers' pneumoconiosis was "too limited to have contributed in any manner to death." *Id.*

¹³ Where a physician reviews not only the autopsy report and slides, but also reviews additional medical records and then bases his or her findings and conclusions both on the pathological and clinical evidence, the report constitutes both an autopsy report and a medical report for the purposes of the evidentiary limitations. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239 (2006) (*en banc*).

relying on an opinion tainted by inadmissible evidence. Thus, I attribute little probative value to Dr. Bush's autopsy report.

Decision and Order at 14.

The administrative law judge erred in attributing little probative value to Dr. Bush's autopsy report without first attempting to redact the objectionable content or to factor in the doctor's reliance upon evidence outside the scope of the autopsy. The administrative law judge found that Dr. Bush "[did] not separate his review of the autopsy slides from the rest of the medical evidence he consider[ed] when he submitted his conclusions as to the cause of the miner's death." Decision and Order on Remand at 14. However, Dr. Bush, in the last paragraph of his report, opined that the miner's histologic slides did not "suggest the presence of coal worker's pneumoconiosis or coal mine dust disease of the lungs in any significant degree." Employer's Exhibit 5. Thus, contrary to the administrative law judge's statement, Dr. Bush separated his review of the autopsy slides in certain portions of his report. The administrative law judge also did not explain why he declined to ask Dr. Bush to submit a new report that was limited to his review of the autopsy evidence.¹⁴ Consequently, we instruct the administrative law judge, on remand, to reconsider the proper weight to be accorded to Dr. Bush's autopsy report.¹⁵

Drs. Hippensteel and Rosenberg

The administrative law judge accorded less weight to the opinions of Drs. Hippensteel and Rosenberg because he found that their "repeated assertions regarding the absence of an association between lung cancer and coal mine dust exposure fail[ed] to address . . . whether pneumoconiosis, in any form, caused, contributed to, or hastened, the miner's death in any way." Decision and Order on Remand at 16. Drs. Hippensteel and Rosenberg reviewed the evidence of record and prepared medical reports. Contrary to the administrative law judge's characterization, each of these physicians addressed whether pneumoconiosis contributed to the miner's death. Dr. Hippensteel opined that the miner "died of his metastatic lung cancer and the complications from that cancer."

¹⁴ Employer accurately notes that the administrative law judge did not address the significance of the fact that Dr. Racadag also referenced clinical evidence in preparing his autopsy report. Director's Exhibit 18. The administrative law judge should do so on remand.

¹⁵ On remand, should the administrative law judge elect to allow Dr. Bush to submit a new autopsy report, on behalf of employer, claimant is entitled to submit rebuttal autopsy evidence. 20 C.F.R. §725.414(a)(2)(ii).

Employer's Exhibit 4 at 21. Dr. Hippensteel opined that the miner's coal workers' pneumoconiosis did not play any role in causing, contributing to, or hastening the miner's death. *Id.* Dr. Rosenberg similarly opined that the "events surrounding [the miner's] death were related to smoking-related lung cancer, which bore no relationship to his past employment." Employer's Exhibit 1. Dr. Rosenberg opined that the miner's coal dust exposure did not cause or hasten his death. *Id.*

The administrative law judge also accorded less weight to the opinions of Drs. Hippensteel and Rosenberg because they did not review the miner's autopsy slides. Decision and Order on Remand at 16-17. However, Drs. Hippensteel and Rosenberg reviewed the autopsy reports of Drs. Racadag and Naeye. Employer's Exhibits 1, 3. Consequently, the administrative law judge failed to provide a valid basis for according less weight to the opinions of Drs. Hippensteel and Rosenberg.¹⁶ *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration.¹⁷

¹⁶ Although the administrative law judge may have considered the pathologists better qualified to interpret the autopsy evidence and slides, the Board is not permitted to undertake "guesswork" and "supply [an administrative law judge's] reasoning for him." *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191, 22 BLR 2-251, 2-260 (4th Cir. 2000).

¹⁷ Despite the Board's previous holding, that a finding of legal pneumoconiosis was not supported by the record, *see [A.F.W.] v. Buffalo Mining Coal*, BRB No. 06-0808 BLA (July 20, 2007)(unpub.), slip op. at 8, the administrative law judge, on remand, found that Dr. Racadag's microscopic findings constituted a finding of legal pneumoconiosis. Decision and Order on Remand at 17. In his microscopic description of the miner's lungs, Dr. Racadag stated, *inter alia*, that the lungs showed:

scattered subpleural, peribronchiolar, and perivascular aggregates of black pigmented histiocytes associated with minimal fibrosis and focal emphysematous changes . . . consistent with coal macules.

Director's Exhibit 18. Contrary to the administrative law judge's determination, these findings do not constitute a diagnosis of legal pneumoconiosis, *i.e.*, a chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The doctor diagnosed clinical coal workers' pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1). Moreover, because no physician attributed the miner's death to

On remand, when considering whether the medical evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge should address the comparative credentials of the respective physicians,¹⁸ the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.¹⁹ *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

legal pneumoconiosis, the administrative law judge correctly recognized that the "issue of legal pneumoconiosis is not dispositive." Decision and Order on Remand at 18.

¹⁸ Drs. Naeye and Bush are Board-certified pathologists and Drs. Hippensteel and Rosenberg are Board-certified pulmonary specialists. Director's Exhibit 20; Employer's Exhibits 1, 3, 5. Dr. Racadag's qualifications are not found in the record.

¹⁹ Employer requests that the case be remanded for reassignment to a different administrative law judge. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).