BRB Nos. 07-0778 BLA
and 07-0778 BLA-A

B.H. (Widow of M.E.H.) Claimant-Respondent Cross-Petitioner v. A & E COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners Cross-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/09/2008 DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits and Denying Survivor's Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, and claimant cross-appeals, the Decision and Order Awarding Living Miner's Benefits and Denying Survivor's Benefits (05-BLA-5977 and 05-BLA-5978) of Administrative Law Judge Richard A. Morgan rendered on a miner's subsequent 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).[1] The administrative law judge credited the miner with at least ten years of coal mine employment,[2] found that the miner's claim was timely filed, and found that employer is the responsible operator. The administrative law judge found that the newly submitted evidence in the miner's claim established total respiratory disability, and thus established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d). On the merits of the miner's claim, the administrative law judge found that the x-ray and medical opinion evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b).[3] Additionally, the administrative law judge found that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R.

[1] Claimant is the widow of the miner, who died on October 9, 2004. Widow's Claim Record (W)-Director's Exhibit 7. The miner filed two previous claims on May 16, 1977, and April 26, 1983, both of which were finally denied. Miner's Claim Record (M)-Director's Exhibits 1, 2. The miner's 1983 claim was denied on October 25, 1984, because the miner did not establish any element of entitlement. M-Director's Exhibit 2. The miner filed his current claim on March 29, 2004. M-Director's Exhibit 4. Claimant filed her survivor's claim on October 27, 2004. W-Director's Exhibit 2. Due to the miner's death, his claim is being pursued by his widow.

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in Kentucky and Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[3] Regarding the existence of pneumoconiosis, the administrative law judge further found that the medical opinion evidence did not establish that the miner's chronic obstructive lung disease arose out of coal mine employment so as to constitute legal pneumoconiosis pursuant to 20 C.F.R. §§718.201, 718.202(a)(4).

§718.204(c). Therefore, the administrative law judge awarded benefits on the miner's claim. In the survivor's claim, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment, but did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits on the survivor's claim.

On appeal, employer challenges the administrative law judge's determination that the miner's subsequent claim was timely filed, and challenges several evidentiary rulings by the administrative law judge. Employer also contends that the administrative law judge did not explain his determination that employer is the responsible operator. In addition, employer asserts that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis and that the miner's total disability was due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits in the miner's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Board to reject employer's arguments that the miner's claim was untimely filed, that the administrative law judge erred in his evidentiary rulings, and erred in finding employer to be the responsible operator. Employer has filed reply briefs, restating its position. In her cross-appeal, claimant alleges that the administrative law judge erred in admitting certain evidence into the survivor's claim record, and erred in his weighing of the medical opinion evidence regarding the cause of the miner's death. Employer responds, urging affirmance of the denial of benefits in the survivor's claim.[4]

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).

Timeliness

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least ten years of coal mine employment, that claimant established that the miner was totally disabled and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, employer contends that the miner's testimony that he was told by a doctor in 1989 that he was totally disabled due to black lung disease triggered the running of the statute of limitations more than three years before this claim was filed.

Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at Section 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit stated that "[t]he three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis . . . ." *Kirk*, 244 F.3d at 608, 22 BLR at 2-298. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). It is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the miner]" more than three years prior to the filing of his or her claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296. In defining what constitutes a medical determination sufficient to start the running of the statute of limitations, the Sixth Circuit held that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-298.

Contrary to employer's contention, the administrative law judge properly found that the miner's testimony that he was told that he was totally disabled due to pneumoconiosis did not support rebuttal of the timeliness presumption. The administrative law judge noted that at a July 5, 2004 deposition, the miner had testified that he was "informed during a hospital stay in 1989 that he was totally disabled due to black lung," "that he was provided this information at Three Rivers Medical Center[,] and that Dr. Browning was involved." Decision and Order at 9, citing M-Director's Exhibit 19 at 9-10. The administrative law judge found that employer did not demonstrate "that this information amounted to a reasoned medical determination." Decision and Order at 10. As noted, the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-298. The administrative law judge found that because there was no information in the record regarding the 1989 opinion, he could not determine whether it was "reasoned." This was proper under the *Kirk* standard. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-298; *see also Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006)(*en banc*), *recon. denied en banc*, BRB No. 05-0722 BLA (Oct. 26, 2006)(Order)(unpub.)[5] Therefore, on the specific

[5] We reject employer's assertion that *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006)(*en banc*) must be reconsidered in view of the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 425-26, 23 BLR 2-321, 2-330 (4th Cir. 2006). In *Henline*, the Fourth Circuit

facts of this case, we affirm the administrative law judge's finding that the miner's testimony did not establish rebuttal of the timeliness presumption.

However, there is merit in employer's contention that the administrative law judge erred in finding that the medical reports of Drs. Odom and Cornish did not rebut the presumption that this claim was timely filed. The administrative law judge found that Dr. Odom, in a report dated October 5, 1976, and Dr. Cornish, in a report dated February 9, 1977, opined that the miner was totally disabled due to pneumoconiosis.[6] Decision and Order at 10 n. 13. The administrative law judge determined that, under *Peabody Coal Co. v. Director, OWCP* [*Dukes*], 48 Fed.Appx. 140, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002)(Batchelder, J., dissenting), neither report could trigger the statute of limitations because the reports were submitted in the miner's second claim, which was denied. *Cf. Kirk*, 264 F.3d at 608, 22 BLR at 2-298-99 (holding that the three-year limitations clock "is not stopped by the resolution of the miner's claim or claims" if those claims were "medically supported"). The administrative law judge erred by relying on *Dukes*, over the court's published opinion in *Kirk*, as *Kirk* constitutes binding precedent on the timeliness issue.[7] *Sturgill v. Bell County Coal Corp*., 23 BLR 1-159, 1-165 n.10 (2006)(*en banc*)(McGranery, J., concurring and dissenting). Consequently, we must vacate the administrative law judge's finding that the miner's claim was timely filed, and remand this case for the administrative law judge to determine whether the opinion of Dr.

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court held that the communication to the miner need not be in writing to trigger the statute of limitations. The Board's decision in *Brigance* was limited to holding that under the Sixth Circuit's standard in *Kirk*, a medical opinion must be reasoned to trigger the running of the statute of limitations; the Board specifically declined to address whether the medical opinion must be in writing. *Brigance*, 23 BLR at 1-175, n.4. Further, a review of the administrative law judge's decision in this case reflects that he did not require that the medical determination be in writing.

[6] Dr. Odom diagnosed coal workers' pneumoconiosis and chronic bronchitis and opined that the miner was totally and permanently disabled for coal mining, arduous labor, or work in a dusty environment. M-Director's Exhibit 2. Dr. Cornish stated that the miner was "suffering from silicosis and should be considered totally and permanently disabled therefrom. I believe his disability arose as a result of his occupation as an underground coal miner." M-Director's Exhibit 2.

[7] The Director's request that the Board not consider this issue until the United States Court of Appeals for the Sixth Circuit rules in *Ken Luck Coal Co. v. Lacy*, No. 06-4512 (6th Cir. Nov. 2, 2007)(unpub.), is moot, as the court has issued its opinion in *Lacy*. The court's opinion in *Lacy*, which followed *Dukes*, does not alter the analysis herein since *Lacy*, like *Dukes*, is unpublished.

Odom or Dr. Cornish constitutes a medical determination of total disability due to pneumoconiosis that was communicated to the miner, in accordance with 20 C.F.R. §725.308 and *Kirk*.

However, if on remand the administrative law judge should find that the miner's subsequent claim was timely filed, in the interest of judicial economy we will now address additional arguments raised by employer.

Responsible Operator

Employer asserts that the administrative law judge erred in designating it, A & E Coal Co., Inc., as the responsible operator. The miner was employed by both A & E Coal Co. and A & E Coal Co., Inc., and employer contends that the administrative law judge has not explained how these two companies could be the same company, noting that they had different addresses, in different states, and different employer identification numbers.

The regulations provide that the operator responsible for the payment of benefits is the potentially liable coal mine operator that most recently employed the miner for a cumulative period of not less than one year, with the designated responsible operator bearing the burden of proving that it is not the potentially liable operator that most recently employed the miner for such period. *See* 20 C.F.R. §§725.494, 725.495, 725.101(a)(32).

The record reflects that the miner worked for A & E Coal Co., Inc., "c/o Asa Wright" of Kingsport, Tennessee, in the third and fourth quarters of 1975 and the first and second quarters of 1976. At the miner's 2004 deposition, he testified that he started at A & E in July or August of 1975 and worked there until May 20, 1976. M-Director's Exhibit 19 at 3-4. Because this time period was less than one calendar year, employer moved the district director to dismiss it as the responsible operator. M-Director's Exhibit 19. The district director denied the motion, because the miner's Social Security earnings records reflected that he also worked for A & E Coal Co., of Jackhorn, Kentucky, which also listed an "Asa Wright," in 1968, 1971, 1974, and 1975.[8] M-Director's Exhibit 20. The district director noted that when he asked the miner about his earnings records, the miner stated that he had forgotten about working for A & E during the earlier period. *Id*. The district director determined that the miner had worked for the same company at two different mines for a cumulative total of at least one year. *Id*. Employer responded that the two companies were not the same, because they had different addresses and employer

[8] Specifically, the miner worked for A & E Coal Co. of Jackhorn, Kentucky in the fourth quarter of 1968, the second quarter of 1971, the fourth quarter of 1974, and the first and second quarters of 1975.

identification numbers. M-Director's Exhibit 21. Upon further investigation, the district director determined that the Kentucky Secretary of State listed the Kentucky company as "A & E Coal Co., Inc." M-Director's Exhibit 22. These same records listed Asa Wright as a director and incorporator of the Kentucky company. The district director again denied employer's motion to be dismissed as the responsible operator.

Employer renewed its objection to its designation as the responsible operator before the administrative law judge. The administrative law judge summarized the district director's investigation and findings,[9] and issued his own finding, stating:

> Based on the information provided by the District Director's investigation, I similarly find that there is only one company called A & E Coal Co., Inc. Specifically, based on the District Director's investigation, I note that alleged first company and alleged second company share the same name and that Mr. Asa Wright is associated with both. Therefore, I find that the miner worked for the single company, A & E Coal Co., Inc., for a cumulative period of greater than one year. Because this is the last such coal mine employer, A & E Coal Co., Inc. is properly designated as the responsible operator . . . .

Decision and Order at 11.

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[9] The administrative law judge stated that:

> Upon investigation, the District Director determined that the alleged first company, listed as "A & E Coal Co.," was in fact listed by the Kentucky Secretary of State as "A & E Coal Co., Inc.," the same name as the alleged second company. It also deduced that the Kings Port TN address listed as the location of the alleged second company was in fact the personal residence of Mr. Asa Wright. Mr. Wright is listed by the Kentucky Secretary of States as a director and incorporator of A & E Coal Co., Inc. As noted, it was this Kentucky entity that the District Director identified as the alleged first company. Based on the totality of this information, the District Director concluded that the alleged first company and the alleged second company were in fact the same entity, A & E Coal Co., Inc. Therefore, because the miner had over one cumulative year of employment with this entity, the District Director denied the Employer's request that it be dismissed as responsible operator.

Decision and Order at 11 (citations omitted).

Employer argues that the administrative law judge did not explain how these two companies could be the same. We disagree. The administrative law judge found that these two companies were the same entity because they had the same name, because Asa Wright was associated with both companies, and because Wright was listed as the director and incorporator of the Kentucky company, and his personal address was the address listed for the Tennessee company. Decision and Order at 11. Under these circumstances, substantial evidence supports the administrative law judge's determination to treat the miner's work with these two entities as work for the same company for purposes of the responsible operator determination.[10] *See Ridings v. C & C Coal Co*., 6 BLR 1-227 (1983). We therefore affirm the administrative law judge's finding that employer is the responsible operator.

Evidentiary Rulings

Employer contends that the administrative law judge erred in admitting a positive interpretation by Dr. Miller of a May 7, 2004 x-ray that was submitted by claimant in rebuttal to a positive interpretation of the same x-ray by Dr. Baker as part of the Department-sponsored complete pulmonary evaluation. We disagree. Rebuttal evidence admitted pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive, but instead need only refute the case presented by the opposing party. *Sprague v. Freeman United Coal Mining Co*., BRB No. 05-1020 BLA (Aug. 31, 2006)(unpub.). Moreover, as the Director notes, since claimant did not submit two x-rays in support of the miner's affirmative case, Dr. Miller's reading may be considered one of the miner's two affirmative x-ray interpretations. 20 C.F.R. §725.414(a)(2)(i). Therefore, we affirm the administrative law judge's decision to admit Dr. Miller's x-ray interpretation.

Employer argues further that the administrative law judge erred in refusing to permit it to submit rebuttal readings of x-rays that were contained in the miner's medical treatment records, on the ground that 20 C.F.R. §725.414 does not allow for the rebuttal of hospitalization or treatment records. We conclude that error, if there was any, by the administrative law judge in not allowing employer to rebut the x-rays in the miner's treatment records was harmless, since the administrative law judge did not rely on the treatment x-rays to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[10] Moreover, as the Director points out, although not noted by the administrative law judge, the fact that the miner left work with one A & E Coal Co. after the second quarter of 1975 and immediately commenced work with another A & E Coal Co. in the third quarter of 1975 further supports the administrative law judge's conclusion that the two employment listings reflect work for the same company. Director's Brief at 4 n.5.

Therefore, employer was not prejudiced by the administrative law judge's ruling in this regard.

Finally, we reject employer's assertion that it was ambushed by the administrative law judge's evidentiary rulings because they were not made until the administrative law judge's decision. Contrary to employer's characterization, there was significant discussion of the evidentiary matters at the hearing, and the administrative law judge made rulings at that time, some of which were left subject to change pending post-hearing submissions by the parties. Hearing Transcript at 5-6, 8-15, 25-41. Thereafter, the administrative law judge made final evidentiary rulings in his decision. Decision and Order at 3-5. An administrative law judge exercises broad discretion in procedural matters, 20 C.F.R. §725.455, and employer has identified no authority for its argument that the administrative law judge was barred from making final evidentiary rulings in his decision. Employer's Brief at 18. We therefore reject employer's allegation of error, and turn to the merits of the miner's claim.

Merits of the miner's claim

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, the miner must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

Pursuant to 20 C.F.R. §718.202(a)(1), employer asserts that the administrative law judge erred by relying solely on the numerical superiority of positive x-ray readings, that he ignored an interpretation of an October 9, 2004 x-ray, and that he improperly accounted for the CT scan evidence. We disagree.

In weighing the x-ray evidence, the administrative law judge credited the more recent x-ray interpretations in the current claim over those from the prior claims. In considering the newly admitted x-ray evidence and the readers' radiological credentials,[11]

[11] The newly submitted evidence contains eight readings of two x-rays dated May 7, 2004 and June 5, 2004. Dr. Baker, a B reader, and Dr. Miller, a Board-certified radiologist and B reader, read the May 7, 2004 x-ray as positive for pneumoconiosis. Dr. Wiot, a B reader and Board-certified radiologist, read the same x-ray as negative. Dr. Binns read this x-ray for its quality only. M-Director's Exhibit 12; M-Employer's Exhibit 1; M-Claimant's Exhibit 1. Drs. Miller and Alexander, both B readers and Board-certified radiologists, read the June 5, 2004 x-ray as positive for pneumoconiosis. Dr. Wiot, whose x-ray reading qualifications are the same, and Dr. Dahhan, who is a B reader, read this x-ray as negative for pneumoconiosis. M-Director's Exhibit 13; M-Claimant's Exhibits 2, 11; M-Employer's Exhibit 11.

the administrative law judge found that two of the three interpretations of the May 7, 2004 x-ray were positive for pneumoconiosis, and, based on "the numerical superiority of the positive readings," he found this x-ray to be positive for pneumoconiosis. Decision and Order at 29. The administrative law judge discussed four interpretations of the June 5, 2004 x-ray, of which two were positive and two were negative. Based on the readings by the more highly-qualified physicians, he found the June 5, 2004 x-ray to be positive. Decision and Order at 29. Additionally, the administrative law judge noted that of the x-rays submitted with the current claim, four of the seven substantive interpretations were positive for pneumoconiosis, and that of the five readings by dually-qualified physicians, three were positive and two were negative. Decision and Order at 29-30, n. 44. Therefore, the administrative law judge found that both x-rays were positive for pneumoconiosis and established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Contrary to employer's arguments, the administrative law judge's findings, taken as a whole, demonstrate that he properly considered both the quantity and the quality of the x-ray readings, and permissibly found that the preponderance of positive readings by dually-qualified readers outweighed the negative readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc on recon*.); Decision and Order at 29-30.

Employer argues further that the administrative law judge erred by "fail[ing] to account for the uncontradicted negative reading" of an October 9, 2004 x-ray that was contained in the miner's medical treatment records. Employer's Brief at 25. The treatment records contain Dr. Leonard's interpretation of a chest x-ray dated October 9, 2004, in which Dr. Leonard did not specifically address the existence of pneumoconiosis.[12] M-Claimant's Exhibit 3. An x-ray interpretation that does not mention pneumoconiosis may, in appropriate circumstances, support an inference that pneumoconiosis was not present. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). Whether to so infer is a question of fact for the administrative law judge. *Id*. In this case, the administrative law judge properly accorded greater weight to the x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. Because Dr. Leonard's radiological qualifications are not found in the record, the administrative law judge's error, if any, in his consideration of Dr. Leonard's x-ray interpretation was harmless. *See Larioni*, 6 BLR at 1-1278.

[12] As summarized by the administrative law judge, Dr. Leonard identified a three-centimeter, "mass-like area within the right mid lung zone with an appearance likely representing a pseudotumor/loculated fluid within the miner fissure . . . ." Decision and Order at 23.

Employer also asserts that the administrative law judge erred by failing to weigh the CT scans together with the x-ray readings. Since only conventional x-rays are considered pursuant to Section 718.202(a)(1), and CT scans constitute other medical evidence, we reject this assertion. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*)(Boggs, J., concurring); *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*); *see also Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Therefore, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Under the law of the Sixth Circuit, the existence of pneumoconiosis may be established under any one of the subsections of Section 718.202(a). *See Furgerson v. Jericol Mining Inc*., 22 BLR 1-216, 1-226-27 (2002)(*en banc*). Since we affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis by the x-ray evidence pursuant to Section 718.202(a)(1), we need not address employer's assertion that the administrative law judge erred in finding that the medical opinion evidence also established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(4).

Employer challenges the administrative law judge's finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c). In so finding, the administrative law judge discounted the opinions of Drs. Dahhan and Fino because they did not diagnose the miner with pneumoconiosis.[13] Decision and Order at 35. The administrative law judge noted that contrary to his finding that legal pneumoconiosis had not been established, Dr. Baker diagnosed legal pneumoconiosis.[14] The administrative law judge stated "To the degree that his

[13] Dr. Dahhan stated that the miner's pulmonary disability was due to his smoking history, not the inhalation of coal mine dust. M-Director's Exhibit 12; M-Employer's Exhibits 2, 5, 9, 14, 17. In his deposition, Dr. Dahhan stated that, assuming that the miner suffered from coal workers' pneumoconiosis, he would not change his opinion. M-Employer's Exhibit 5 at 12. Dr. Fino opined that the miner did not have coal workers' pneumoconiosis, and that the miner had no disease or impairment caused by his coal dust exposure. In his deposition, Dr. Fino stated that even if the miner had coal workers' pneumoconiosis, it would not change his other opinions. M-Employer's Exhibits 3, 4, 8, 10, 13, 16.

[14] Dr. Baker diagnosed coal workers' pneumoconiosis due to coal dust exposure, and chronic bronchitis, chronic obstructive pulmonary disease, and hypoxemia, all due to coal dust exposure and cigarette smoking. Dr. Baker opined that each of these diagnoses contributed "fully" to the miner's "severe" impairment. M-Director's Exhibit 12; M-Claimant's Exhibit 9.

conclusions as to [disability] causation rely on this diagnosis, they are somewhat discredited. However, this discrediting is far from fatal because Dr. Baker also diagnosed CWP and included that disease in his causation finding." Decision and Order at 35 n.51.

Employer asserts that the administrative law judge erred by relying on Dr Baker's opinion, "the very opinion he rejected as lacking adequate reasoning." Employer's Brief at 26. Employer also contends that the administrative law judge mischaracterized the opinions of Drs. Dahhan and Fino when he discounted them because they did not diagnose clinical pneumoconiosis.

We reject employer's assertion that the administrative law judge erred by relying on Dr. Baker's opinion at Section 718.204(c). Although the administrative law judge did not credit Dr. Baker's diagnosis of legal pneumoconiosis, *see* Decision and Order at 31-32, as the administrative law judge noted, Dr. Baker's opinion that the miner's disability was due to pneumoconiosis was based also on the clinical pneumoconiosis that Dr. Baker diagnosed. M-Director's Exhibit 12; M-Claimant's Exhibit 9.

However, we agree with employer that, on remand, the administrative law judge must reconsider the disability causation opinions of Drs. Dahhan and Fino and weigh them against Dr. Baker's opinion. An administrative law judge may discount a physician's opinion on disability causation where that opinion is based on an erroneous assumption that the miner did not have pneumoconiosis. *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated sub nom.*, *Consolidated Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). The record indicates that Drs. Dahhan and Fino also opined that, even if the miner suffered from clinical coal workers' pneumoconiosis, their opinions with respect to the cause of his total disability would not change.[15] M-Employer's Exhibit 4 at 10-11; M-Employer's Exhibit 5 at 12-13; M-Employer's Exhibit 9 at 8-12; M-Employer's Exhibit 10 at 11-12. Since the administrative law judge did not address these portions of the opinions of Drs. Fino and Dahhan, we vacate the administrative law judge's finding that claimant established that the miner's total disability was due to pneumoconiosis pursuant to Section 718.204(c), and instruct him to reconsider the medical opinion evidence on this issue. *See Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214-15 (2002)(*en banc*).

In sum, on the merits of the miner's claim we affirm the administrative law judge's finding that the evidence established the existence of clinical pneumoconiosis

[15] As noted, Drs. Dahhan and Fino opined that the miner suffered from no respiratory or pulmonary impairment related to coal mine dust, but was totally disabled due to lung disease caused by smoking.

pursuant to Section 718.202(a)(1), but we vacate his disability causation finding and instruct him to reconsider the evidence pursuant to Section 718.204(c), if he determines that the miner's claim was timely filed.

Survivor's Claim

To establish entitlement to survivor's benefits, 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. §§718.3, 718.202, 718.203, 718.205(a); *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 pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co*., 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Pursuant to Section 718.205(c), the administrative law judge found that the medical opinions of Drs. Baker and Dahhan did not support a finding that pneumoconiosis substantially contributed to the miner's death.[16] With respect to Dr.

[16] Dr. Baker reviewed the miner's records and stated that obstructive airway disease due to coal dust exposure contributed to the miner's death from heart disease:

> The question of how coal dust contributed to the patient's death would be based on two premises. One is that coal dust cause [sic] obstructive airway disease . . . . The second premise is that with obstructive airway disease inflammatory markers are present in the blood stream with increasing numbers that can lead to inflammatory changes in the arteries in the heart in causing ischemic heart disease, as more recent studies have shown some association between COPD and ischemic heart disease. None of the examiners mentioned these studies, but mentioned older studies that did not show any evidence.
>
> In summary, I feel that the patient had Coal Workers (sic) Pneumoconiosis, chronic obstructive airway disease, and a disabling degree of respiratory hypoxemia and hypercarbia and that while his death was cardiac in nature, it definitely was contributed to by his obstructive airway disease on the basis of inflammatory markers being present that contributed to the finding of ischemic heart disease.

Baker's opinion submitted by claimant, the administrative law judge found that Dr. Baker did not opine that the miner's clinical coal workers' pneumoconiosis contributed to his death, but instead focused "solely on chronic obstructive airway disease." Decision and Order at 37 and n. 54. The administrative law judge discounted Dr. Baker's opinion, that chronic obstructive airway disease related to coal dust exposure contributed to the miner's death, for two reasons. First, the administrative law judge noted that claimant had established only that the miner had clinical pneumoconiosis based on the x-ray evidence, but had not established that his chronic obstructive disease was legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Second, the administrative law judge found that, even if claimant had established the existence of legal pneumoconiosis, Dr. Baker's opinion "did not provide sufficient evidence that this particular miner's legal pneumoconiosis contributed to his death" from heart disease. Decision and Order at 37. Specifically, the administrative law judge found that Dr. Baker cited studies to support the proposition that chronic obstructive airway disease leads to "inflammatory markers" that "can lead" to ischemic heart disease, but had not offered "specific evidence that this miner's chronic obstructive airway disease in fact resulted in this process or outcome." *Id*.

In her cross-appeal, claimant asserts that the administrative law judge improperly rejected Dr. Baker's opinion regarding the cause of the miner's death.[17] We disagree.

Substantial evidence supports the administrative law judge's finding that Dr. Baker did not opine that the miner's clinical coal workers' pneumoconiosis contributed to his death. W-Claimant's Exhibits 8, 9. Further, the administrative law judge acted within his discretion to find that Dr. Baker's opinion, that legal pneumoconiosis contributed to the miner's death, was based on "generalities" rather than on information specific to the miner's condition demonstrating a link between pneumoconiosis and the "cardiac problems that led to his death." Decision and Order at 37; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). Moreover, other than stating that obstructive lung disease can be caused by coal mine dust exposure, claimant does not challenge the administrative

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W-Claimant's Exhibit 8. Dr. Dahhan reviewed the miner's medical records and concluded that coal dust exposure did not cause, contribute to, or hasten the miner's death. W-Employer's Exhibit 18.

[17] Claimant does not challenge the administrative law judge's findings that neither the miner's medical treatment notes, nor his death certificate, provided a link between pneumoconiosis and the miner's death. Those findings are therefore affirmed. *Skrack*, 7 BLR at 1-711.

law judge's credibility determination with respect to Dr. Baker. Claimant's Brief (Survivor's Claim) at 6. As Dr. Baker's medical opinion was the only one supportive of claimant's burden of proof and the administrative law judge permissibly discounted that opinion, we affirm the administrative law judge's finding that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

Claimant further asserts that the administrative law judge erred by admitting Dr. Dahhan's March 6, 2007 report into the record of the survivor's claim. Since the administrative law judge permissibly discredited the medical opinion supportive of claimant's burden of proof, any error by the administrative law judge in admitting Dr. Dahhan's opinion was harmless. *See Larioni*, 6 BLR at 1-1278. The administrative law judge's denial of benefits on the survivor's claim is therefore affirmed.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge