

BRB No. 08-0723 BLA

E. P. )  
(Widow of D.P.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
D & K COAL COMPANY )  
 ) DATE ISSUED: 06/30/2009  
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 Second Remand of Stuart A. Levin,  
Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for  
employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (03-BLA-5477) of  
Administrative Law Judge Stuart A. Levin (the administrative law judge), 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 March 2, 2001 and is before the Board for the second  
time. In the initial decision, the administrative law judge applied the doctrine of  
collateral estoppel to preclude relitigation of the issue of the existence of pneumoconiosis

arising out of coal mine employment.<sup>1</sup> 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).<sup>2</sup> Accordingly, the administrative law judge awarded benefits.

In its initial appeal to the Board, employer did not allege that any of the elements of collateral estoppel had not been satisfied. Rather, employer argued that it had not had a financial incentive to vigorously defend the miner's claim because any benefits awarded therein would have been offset by benefits awarded to the miner in a 1984 state claim. Employer argued that it was entitled to an exception to the application of the doctrine of collateral estoppel. By Decision and Order dated May 27, 2005, the Board agreed with employer that the issue was not whether offensive collateral estoppel was available, but rather, whether its application was fair under the facts of this case. [*E.P.*] v. *D & K Coal Co.*, 23 BLR 1-77 (2005). Because the administrative law judge had not adequately discussed whether the use of collateral estoppel would be fair in this case, the Board vacated the administrative law judge's Decision and Order and remanded the case to the administrative law judge for further consideration. *Id.*

On remand, the administrative law judge found that the application of collateral estoppel was not unfair to employer in this case. The administrative law judge, therefore, incorporated by reference his previous Decision and Order dated June 7, 2004, and awarded benefits.

Pursuant to employer's second appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's determination that the application of collateral estoppel was not unfair to employer in this case.<sup>3</sup> *E.P. v. D & K Coal Co.*, BRB No. 06-

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<sup>1</sup> The miner filed a claim on July 22, 1983. Director's Exhibit 1. In a Decision and Order dated September 16, 1987, Administrative Law Judge Daniel Lee Stewart awarded benefits. *Id.* Although employer filed an appeal with the Board, employer subsequently requested that its appeal be dismissed. By Order dated January 29, 1988, the Board dismissed employer's appeal with prejudice. [*D.P.*] v. *D & K Coal Co.*, BRB No. 87-2991 BLA (Jan. 29, 1988) (unpub.) (Order).

<sup>2</sup> The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

<sup>3</sup> The Board also held that employer waived its right to challenge the administrative law judge's evidentiary rulings. *E.P. v. D & K Coal Co.*, BRB No. 06-0907 BLA (Aug. 29, 2007)(unpub.).

0907 BLA (Aug. 29, 2007)(unpub.). However, the Board vacated 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 remanded the case for further consideration. *Id.*

In his Decision and Order on Second Remand, the decision now before the Board on appeal, the administrative law judge 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 argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions of error.

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'Keefe 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's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>4</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director*,

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<sup>4</sup> 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.

*OWCP*, 11 BLR 1-85 (1988). 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); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

### **Background Information**

In this case, three physicians, Drs. Breeding, Rosenberg, and Jarboe, addressed the cause of the miner's death. Dr. Breeding, the miner's treating physician, opined that the miner's death was due to pneumoconiosis.<sup>5</sup> Director's Exhibits 12, 15; Claimant's Exhibit 1. Dr. Rosenberg attributed the miner's death to smoking-related chronic obstructive pulmonary disease.<sup>6</sup> Employer's Exhibit 6. Dr. Jarboe attributed the miner's death to severe bilateral pseudomonas pneumonia, a hospital-acquired infection, and severe cardiomyopathy. Employer's Exhibit 7. Dr. Jarboe also opined that the miner's

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(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).

<sup>5</sup> Dr. Breeding completed the miner's death certificate. Dr. Breeding attributed the miner's death to emphysema due to "Pneumoconiosis (Black lung)." Director's Exhibit 12. In a report dated April 11, 2001, Dr. Breeding opined that the miner's death was "solely due to pneumoconiosis and complications from pneumoconiosis." Director's Exhibit 15. Dr. Breeding further opined that the miner's "life was shortened by [ten to twenty percent] due to his pneumoconiosis." *Id.* During a July 7, 2003 deposition, Dr. Breeding testified that the miner suffered from pneumoconiosis, emphysema, chronic bronchitis, and chronic obstructive pulmonary disease, all of which he found to be significantly contributed to, or aggravated by, coal dust exposure. Claimant's Exhibit 1 at 6-7. *Id.* Dr. Breeding opined that during the miner's final hospitalization, he suffered from pneumonia, a condition that Dr. Breeding noted was "seen more commonly in people who have coal workers' pneumoconiosis and [the miner's] condition." *Id.* at 9. During his deposition, Dr. Breeding reiterated that the miner's pneumoconiosis contributed to, or hastened, his death. *Id.*

<sup>6</sup> Dr. Rosenberg opined that the miner's chronic obstructive pulmonary disease was not caused by coal dust exposure or the presence of coal workers' pneumoconiosis. Employer's Exhibit 6.

severe bronchial asthma was also a likely contributing factor to his death.<sup>7</sup> *Id.*

In his initial decision (which the administrative law judge incorporated into his subsequent 2006 Decision and Order on Remand), the administrative law judge noted that Drs. Breeding, Rosenberg, and Jarboe agreed that the miner's death was due to his compromised and deteriorating pulmonary condition. Decision and Order at 5. The administrative law judge further found that Dr. Breeding's opinion, that the miner's death was due to pneumoconiosis, was entitled to greater weight based upon his status as the miner's treating physician. *Id.* at 5-7. The administrative law judge found that the opinions of Drs. Rosenberg and Jarboe were insufficient to outweigh Dr. Breeding's opinion that pneumoconiosis contributed to the miner's death. *Id.* The administrative law judge, therefore, found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

In its 2007 Decision and Order, the Board instructed the administrative law judge as follows:

Although the administrative law judge found that Dr. Breeding's opinion was "well supported by the evidence" and "credible in light of...its own reasoning," *see* Decision and Order at 7, the administrative law judge did not address the validity of the specific reasoning that Dr. Breeding provided for his opinions. For example, the administrative law judge did not address Dr. Breeding's basis for attributing the miner's emphysema, chronic bronchitis, and chronic obstructive pulmonary disease to his coal dust exposure. The administrative law judge also did not address Dr. Breeding's reason for attributing the miner's death to pneumoconiosis.<sup>8</sup> The administrative law judge also failed to explain how Dr. Breeding's "unique status" as the miner's treating physician provided him with an advantage over Drs. Rosenberg and Jarboe. Decision and Order at 6. Consequently, we remand the case for further consideration. Before according additional weight to Dr. Breeding's opinion based upon his status as the miner's treating physician, the administrative law judge, on remand, should initially

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<sup>7</sup> Dr. Jarboe opined that the miner's death was not due to, caused by, or hastened by coal worker's pneumoconiosis and/or the inhalation of coal mine dust. Employer's Exhibit 7.

<sup>8</sup> Dr. Breeding opined that the miner's "life was shortened by [ten to twenty percent] due to his pneumoconiosis." Director's Exhibit 15. The administrative law judge did not address Dr. Breeding's basis for rendering this opinion.

address whether the opinion is sufficiently reasoned, and then should weigh Dr. Breeding's opinion, consistent with 20 C.F.R. §718.104(d) and [*Eastover Mining Co. v. Williams*], 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)].

On remand, the administrative law judge should also consider the respective qualifications of Drs. Breeding, Rosenberg, and Jarboe.

*E.P.* (2007), slip op. at 7-8.

### **The Administrative Law Judge's 2008 Decision and Order on Second Remand**

In the decision currently before the Board, the administrative law judge accorded greater weight to Dr. Breeding's opinion, that pneumoconiosis hastened the miner's death, over the contrary opinions of Drs. Rosenberg and Jarboe based upon Dr. Breeding's status as the miner's treating physician. Decision and Order on Second Remand at 9-10. The administrative law judge also found that Dr. Breeding's opinion was better reasoned than those of Drs. Rosenberg and Jarboe. *Id.* at 17-18. The administrative law judge, therefore, found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

### **Legal Pneumoconiosis**

Employer initially contends that the administrative law judge, in addressing whether the medical opinion evidence established the existence of legal pneumoconiosis, did not follow the Board's remand instructions.<sup>9</sup> Specifically, employer argues that the

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<sup>9</sup> As the Board previously noted, Judge Stewart, in his adjudication of the miner's claim, found that the x-ray evidence established the existence of clinical pneumoconiosis. *E.P. v. D & K Coal Co.*, BRB No. 06-0907 BLA (Aug. 29, 2007)(unpub.), slip op. at 8 n.17; Director's Exhibit 1. However, Judge Stewart did not address whether the medical opinion evidence established the existence of legal pneumoconiosis. *Id.* Consequently, while the doctrine of collateral estoppel precludes the relitigation of the issue of the existence of clinical pneumoconiosis, the issue of the existence of legal pneumoconiosis, an issue not litigated in the miner's claim, was properly before the administrative law judge.

"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).

administrative law judge did not address Dr. Breeding's basis for attributing the miner's emphysema, chronic bronchitis, and chronic obstructive pulmonary disease to his coal dust exposure. We disagree. On remand, the administrative law judge found that Dr. Breeding opinion was sufficiently documented, noting that it was based upon x-ray findings, the results of pulmonary function and blood gas studies, coal mine employment and smoking histories, the doctor's findings on physical examination, and the failure of prescribed medications to alleviate all of the miner's symptoms. Decision and Order on Second Remand at 6. Dr. Breeding attributed the miner's lung diseases to his coal mine employment because, after taking into account the miner's coal mine dust exposure history, and the "chronicity" and severity of the miner's problems, he did not believe that the miner's pulmonary problems could have been caused exclusively by smoking. Claimant's Exhibit 1 at 8-9. Taking into account these factors, the administrative law judge found that "Dr. Breeding's diagnosis of pneumoconiosis and his evaluation of the severity of [the miner's] lung condition were . . . well reasoned and documented." *Id.* at 8. Consequently, the administrative law judge found that Dr. Breeding's diagnoses of legal pneumoconiosis, in the form of emphysema, chronic bronchitis, and chronic obstructive pulmonary disease due to coal mine dust exposure, were sufficiently reasoned. Because the administrative law judge provided a permissible basis for his determination, we affirm the administrative law judge's finding that Dr. Breeding's diagnoses of legal pneumoconiosis are sufficiently reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Employer also contends that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion that the miner's chronic obstructive pulmonary disease was not attributable to coal mine dust exposure. The Board, however, previously addressed this issue, stating that:

Dr. Rosenberg opined that the miner's "type of disabling [chronic obstructive pulmonary disease] would only occur in relationship to coal dust exposure if the complicated form of [coal workers' pneumoconiosis] was present." Employer's Exhibit 6. The administrative law judge found that Dr. Rosenberg's reliance upon the absence of complicated pneumoconiosis to rule out coal dust exposure as a cause of the miner's pulmonary impairment is inconsistent with the regulations. Decision and Order at 6. We agree. The regulations do not require a finding of complicated pneumoconiosis before a miner's disabling or fatal chronic obstructive pulmonary disease can be found to be attributable to coal dust exposure. *See* 65 Fed. Reg. 79,951 (2000) ("The statute contemplates an award of benefits based upon proof of pneumoconiosis as defined in the statute (which encompasses simple pneumoconiosis), and not just upon proof of complicated pneumoconiosis."). Consequently, the administrative

law judge properly accorded less weight to Dr. Rosenberg's opinion, that the miner's chronic obstructive pulmonary disease was not attributable to coal dust exposure, because the doctor's opinion was premised upon the absence of complicated pneumoconiosis.

*E.P.* (2007), slip op. at 8 (footnote omitted).

The Board's previous holding on this issue constitutes the law of the case and governs the Board's determination. See *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address employer's contentions of error in regard to administrative law judge's basis for according less weight to Dr. Rosenberg's opinion that the miner's chronic obstructive pulmonary disease was not attributable to coal dust exposure.<sup>10</sup>

### **Section 718.205(c)**

Employer next contends that the administrative law judge erred in his consideration of Dr. Breeding's opinion regarding the cause of the miner's death. Employer specifically argues that the administrative law judge erred in finding that Dr. Breeding's opinion regarding the cause of death was sufficiently reasoned. As instructed by the Board, the administrative law judge, on remand, addressed the fact that Dr. Breeding did not provide a basis for his opinion that that the miner's life was shortened by ten to twenty percent due to his pneumoconiosis:

The record does not specifically reveal the basis for Dr. Breeding's estimate that pneumoconiosis shortened the miner's life by [ten to twenty percent]. The estimate was, however, provided in Dr. Breeding's report dated April 11, 2001, and Dr. Breeding was subsequently deposed by the parties, and neither addressed the basis for his estimate at his deposition. Nevertheless, the crucial question is not whether pneumoconiosis shortened the miner's life by a quantifiable percentage, but whether it hastened his demise or was a substantially contributing cause or factor in the miner's death. 20 C.F.R. §718.205(c). Consequently, the failure of the record to disclose the basis

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<sup>10</sup> The administrative law judge accurately noted that, although Dr. Jarboe opined that the miner's emphysema was due to cigarette smoking, the doctor noted that it was possible that coal dust inhalation also contributed to the disease. Decision and Order at 12; Employer's Exhibit 7. Thus, Dr. Jarboe did not exclude the possibility that the miner's emphysema was due to his coal mine dust exposure.

for Dr. Breeding's estimate of the percentage of life shortened by pneumoconiosis is not a sufficient basis to discredit his opinion.

Decision and Order on Second Remand at 8.

The administrative law judge, therefore, concluded that Dr. Breeding's opinion, that pneumoconiosis hastened the miner's death, was reasoned, notwithstanding the physician's lack of an explanation for his precise estimate that pneumoconiosis shortened the miner's life by ten to twenty percent. Decision and Order on Second Remand at 9. Although an administrative law judge may choose to discredit an opinion that lacks a thorough explanation, he is not compelled to do so. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Although Dr. Breeding did not offer any explanation for his conclusion that the miner's pneumoconiosis shortened the miner's life by ten to twenty percent, the administrative law judge permissibly found, based on the totality of his medical report and deposition testimony, that he reached a reasoned medical opinion. *Id.*; Decision and Order on Second Remand at 9.

Employer next argues that the administrative law judge erred in according greater weight to Dr. Breeding's opinion based upon his status as the miner's treating physician. The Board instructed the administrative law judge that, before according additional weight to Dr. Breeding's opinion based upon his status as the miner's treating physician, he should weigh his opinion, consistent with 20 C.F.R. §718.104(d) and *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

In weighing the medical evidence of record relevant to whether the miner died 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 opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

The United States Court of Appeals for the Sixth Circuit has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Williams*, 338 F.3d at 513, 22 BLR at 2-647. The Sixth Circuit has held that "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Id.*

On remand, the administrative law judge, in considering whether to accord greater weight to Dr. Breeding's opinion based upon his status as the miner's treating physician, considered the factors set forth at 20 C.F.R. §718.104(d)(1)-(4), noting that:

The record shows that Dr. Breeding was the miner's treating physician for over nine years, during the period 1991 through January, 2001. He saw the miner almost monthly during that period, examined him on multiple occasions, treated his pulmonary problems, prescribed medications and, over time, with the experience in dealing with the miner's condition, changed medications and treatment modalities over the entire time he treated the miner. He served as the miner's attending physician when the miner was hospitalized. Although he is not a pulmonary specialist, he had access to, and reviewed, the clinical test data acquired by pulmonary specialists which were part of the miner's medical records. Under such circumstances, if a treating physician who is actually responsible for a patient's well being is ever able to acquire a "unique" professional appreciation of a patient's medical condition and terminal illness through frequent, long term sustained care and consideration of a patient's condition and the best treatment alternatives during his lifetime, Dr. Breeding had such a relationship with the miner. For the foregoing reasons, I find that the factors set forth in Section 718.104(d)(1)-(4) support Dr. Breeding's opinion.

Decision and Order on Second Remand at 9-10.

In his most recent decision, the administrative law judge properly considered the relevant factors set forth at Section 718.104(d) and determined that, based upon the facts of this case, Dr. Breeding's treatment relationship with the miner entitled his opinion to greater weight. We find no error in regard to the administrative law judge's finding.

The administrative law judge also complied with the Board's directive to consider Dr. Breeding's opinion in light of *Williams*. The administrative law judge noted the Sixth Circuit's admonition in *Williams* that "a treating physician without the right pulmonary certifications should have his opinions appropriately discounted." *Williams*, 338 F.3d at 513, 22 BLR at 2-647. However, in this case, the administrative law judge found that Dr. Breeding's lack of expertise as a pulmonary specialist<sup>11</sup> was not a critical factor. The

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<sup>11</sup> Dr. Breeding is Board-certified in Family Practice. Claimant's Exhibit 1 at 4. Dr. Rosenberg is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 4. Dr. Jarboe's qualifications are not found in the record.

administrative law judge explained that the “miner’s pneumoconiosis was diagnosed and established in litigation before Dr. Breeding even became his treating physician.” Decision and Order on Second Remand at 14. The administrative law judge also noted that, before Dr. Breeding treated the miner, Administrative Law Judge Daniel Lee Stewart had awarded lifetime benefits to the miner, finding that his pneumoconiosis was totally disabling. *Id.* Given the fact that the miner’s pneumoconiosis and its severity were already established, the administrative law judge found that “the fact that Dr. Breeding is not a pulmonary specialist diminishes neither his diagnosis of pneumoconiosis nor his assessment of its severity.” *Id.* Given the facts of this case, we find no error in the administrative law judge’s determination that Dr. Breeding’s qualifications did not undermine his opinions.

The administrative law judge also considered whether Dr. Breeding, as the miner’s treating physician, provided his opinions in an attempt to be of assistance to the miner’s family. The administrative law judge found no evidence that Dr. Breeding diagnosed pneumoconiosis in order to assist the miner’s family in obtaining black lung benefits. The administrative law judge noted that Dr. Breeding did not wait until after the miner’s death to diagnose coal workers’ pneumoconiosis. Rather, Dr. Breeding diagnosed coal workers’ pneumoconiosis the first time that he saw the miner on September 27, 1991. Claimant’s Exhibit 1 at 11. The administrative law judge noted that Dr. Breeding testified that he relied upon a May 23, 1990 report in the miner’s clinic records in formulating his diagnosis and treatment plans for the miner. The May 23, 1990 report includes diagnoses of coal workers’ pneumoconiosis and chronic obstructive pulmonary disease. The administrative law judge found no support for employer’s suggestion that Dr. Breeding provided a false medical opinion in order to assist the miner’s family.<sup>12</sup> Decision and Order on Second Remand at 16. We find no error in regard to the administrative law judge’s finding that there is no evidence that Dr. Breeding offered his opinion as an accommodation to the miner’s family.

The administrative law judge also addressed the Sixth Circuit’s holding that a physician’s opinion that the miner’s pneumoconiosis hastened his death must be based

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<sup>12</sup> Employer argues that the administrative law judge erred in not considering that Dr. Breeding provided his opinion in response to a note in the hospital records that claimant “needs statement saying pt. had black lung and that he died from such complications.” Employer’s Brief at 13; Director’s Exhibit 16. Employer also contends that Dr. Breeding, in a separate note, only diagnosed pneumoconiosis during the miner’s lifetime so that the miner could obtain prescription coverage for augmentin. Employer does not provide any evidence that Dr. Breeding altered his opinions in response to these notes.

upon more than just a finding that the miner suffered from the disease. *Williams*, 338 F.3d at 518, 22 BLR 2-655. The administrative law judge found that Dr. Breeding did not base his opinion, that the miner's pneumoconiosis hastened his death, solely on the fact that the miner suffered from the disease. Rather, the administrative law judge found that Dr. Breeding, as well as Drs. Rosenberg and Jarboe, agreed that the miner's pulmonary condition and subsequent deterioration contributed to his death. Decision and Order on Second Remand at 16. Dr. Breeding opined that the miner's "life was shortened by [ten to twenty percent] due to his pneumoconiosis." Director's Exhibit 15. Thus, in light of the above discussion, we hold that the administrative law judge properly considered Dr. Breeding's opinion in accordance with the considerations set forth in *Williams*.

Employer next argues that the administrative law judge erred in his consideration of the opinions of Drs. Rosenberg and Jarboe regarding the cause of the miner's death. We disagree. The administrative law judge accorded less weight to Dr. Rosenberg's opinion because he found that the doctor failed to consider whether the miner's totally disabling pneumoconiosis contributed to, or hastened, the miner's death. Decision and Order on Second Remand at 17. As discussed, *supra*, the administrative law judge also properly accorded less weight to Dr. Rosenberg's opinion because the doctor improperly relied upon the absence of complicated pneumoconiosis to rule out coal dust exposure as a cause of the miner's pulmonary impairment, a view that is inconsistent with the regulations.

Noting that Dr. Jarboe opined that the miner's asthma was a likely contributing factor to his death, the administrative law judge found that Dr. Jarboe failed to adequately explain why the miner's totally disabling coal workers' pneumoconiosis could not have also contributed to the miner's death. Decision and Order on Second Remand at 17; Employer's Exhibit 7. The administrative law judge noted that Dr. Jarboe opined that the miner's emphysema, which the doctor acknowledged could be due to coal mine dust exposure, was not a contributor to the miner's death because it was not the "primary cause" of the miner's disabling impairment. The administrative law judge found that Dr. Jarboe failed to explain why a respiratory impairment had to be the "primary" cause of the miner's disability before it could be a factor that caused or hastened the miner's death. Decision and Order on Second Remand at 13. Because the administrative law judge has discretion as the trier-of-fact to render credibility determinations, we affirm the administrative law judge's decision to accord less weight to the opinions of Drs. Rosenberg and Jarboe as to the cause of the miner's death at 20 C.F.R. §718.205(c). See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Because it is based upon substantial evidence, we affirm 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).

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge