BRB No. 02-0445 BLA

OLA MAE PRICE (Widow of WILLIAM C. PRICE)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order On Remand - Granting Benefits of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order On Remand - Granting Benefits (97-BLA-1676) of Administrative Law Judge John C. Holmes (the administrative law judge) awarding benefits to claimant, the miner's widow, on a survivor's claim[1] filed pursuant to the provisions of Title IV of

[1] The miner's death certificate indicates that he died on January 8, 1997 due to acute respiratory distress due to "copd acute exacerbation" due to "copd" due to "black lung." Director's Exhibit 4. The death certificate lists "ASHD - chronic congestive failure" as a significant condition contributing to death but not resulting in the underlying causes provided. *Id*. Claimant filed the instant claim for survivor's benefits on January 31, 1997. Director's Exhibit 1.

the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] This case is before the Board for the third time. Most recently, the Board, in *Price v. Consolidation Coal Co.*, BRB No. 00-0453 BLA (Jan. 24, 2001), remanded the case. The Board initially explained that in the 1999 consideration of the appeal in *Price v. Consolidation Coal Co.*, BRB No. 98-1162 BLA (May 28, 1999)(unpublished), it had, in fact, held that the administrative law judge erred in declining to apply the doctrine of collateral estoppel in regard to the issue of the existence of pneumoconiosis arising out of coal mine employment. *Price*, slip op. at 6. The Board further held that, subsequent to the issuance of the administrative law judge's Order On Remand, however, the United States Court of Appeals for the Fourth Circuit issued *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) which constituted a change in law on the issue of establishing the existence of pneumoconiosis. The Board held that the prerequisites for application of the doctrine of collateral estoppel were thus not present and the doctrine was not applicable in the instant case regarding the issue of the existence of pneumoconiosis.[3] The Board thus vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis by x-ray evidence alone under 20 C.F.R. §718.202(a)(1) in light of *Compton*, and remanded the case for the administrative law judge to consider all the relevant evidence thereunder. Because the administrative law judge's finding at 20 C.F.R. §718.202 was determinative of his finding that death was due to pneumoconiosis at 20 C.F.R. §718.205(c), the Board further vacated the administrative law judge's finding at 20 C.F.R. §718.205(c). The Board instructed the administrative law judge to reconsider the cause of the miner's death at 20 C.F.R. §718.205(c), if he again found the existence of pneumoconiosis established under 20 C.F.R. §718.202.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The Board affirmed the administrative law judge's finding that claimant established the requisite etiology at 20 C.F.R. §718.203(b), as the finding was not challenged on appeal. *Price v. Consolidation Coal Co.*, BRB No. 00-0453 BLA (Jan. 24, 2001).

In order to avoid any possible repetition of error on remand, the Board addressed employer's arguments challenging the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1) and 718.205(c). *Price*, slip op. at 8-11. The Board vacated the administrative law judge's finding at 20 C.F.R. §718.202(a)(1). The Board held that the administrative law judge erred by adopting Administrative Law Judge Giles J. McCarthy's finding, in the miner's claim, that the x-ray evidence was sufficient to establish the existence of pneumoconiosis, and by considering whether the x-ray evidence submitted in connection with the instant survivor's claim warranted a contradictory finding.[4] The Board instructed the administrative law judge on remand to reconsider all the relevant evidence of record and determine whether claimant met her burden at 20 C.F.R. §718.202(a), pursuant to *Compton*. The Board also held that the administrative law judge did not consider all the relevant x-ray evidence of record and instructed him to do so on remand. The Board further vacated the administrative law judge's discrediting of Dr. Wiot's x-ray readings and instructed the administrative law judge to reconsider and/or reconcile certain x-ray readings rendered by Dr. Wiot. With regard to the administrative law judge's finding that claimant established death due to pneumoconiosis under 20 C.F.R. §718.205(c), the Board held that the administrative law judge erred in failing to consider the opinion expressed by Drs. Zaldivar and Morgan that even if the miner had pneumoconiosis, their opinions as to the cause of his impairment and/or death would not change. The Board cited further errors in the administrative law judge's weighing of the relevant medical opinions and noted his failure to consider the opinion of Dr. Hynes, one of the miner's treating physicians. The Board thus also vacated the administrative law judge's finding at 20 C.F.R. §718.205(c).

The administrative law judge, in his Order on Remand - Granting Benefits dated February 20, 2002, found that the x-ray evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), as does the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Considering all the evidence of record, the administrative law judge determined that claimant established the existence of pneumoconiosis in the instant case. Relevant to the issue of death due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge found that smoking was the primary cause of the miner's death, while coal dust exposure was a contributing cause of death. Specifically, the administrative law judge found that the primary cause of death was the miner's thirty-five to forty-five year smoking history, but that coal dust exposure was a substantially

[4] The evidence from the miner's claim is part of the record in the instant survivor's claim. The only claim *sub judice* is the survivor's claim. The record shows that Administrative Law Judge Giles J. McCarthy awarded benefits in the miner's claim by Decision and Order dated June 13, 1989, which award the Board affirmed in *Price v. Consolidation Coal Co.*, BRB No. 89-2389 BLA (Sept. 24, 1991)(unpub.).

contributing cause of death in that it exacerbated the damage to the miner's lungs caused by smoking. Decision and Order on Remand at 16-19. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge failed to follow the Board's instructions to resolve conflicts in the x-ray evidence and to reconsider fully the medical opinions regarding the issues of the existence of pneumoconiosis at 20 C.F.R. §712.202 and death due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer also contends that the administrative law judge's credibility determinations on both these issues are unexplained and thus his decision does not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a). Employer urges the Board to reverse the award of benefits as the evidence fails to establish the existence of pneumoconiosis or death due to pneumoconiosis. Alternatively, employer requests that the Board vacate the decision below and remand the case. Claimant responds, and urges affirmance of the decision below. Claimant maintains that the doctrine of collateral estoppel applies to preclude employer from relitigating the issue of the existence of pneumoconiosis. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Administrative Law Judge's Consideration of the X-Ray Evidence

Employer contends that the administrative law judge did not resolve the conflict between the three x-rays he determined to be positive for pneumoconiosis and the remaining x-rays of record, which were read as both positive and negative. The Board in *Price* instructed the administrative law judge to consider together all the relevant x-ray evidence of record from both the miner's and the survivor's claim, under 20 C.F.R. §718.202(a)(1), including x-ray readings he had not previously considered. *Price*, slip op. at 8. On remand, the administrative law judge indicated that the x-ray evidence consists of eighty-three x-ray readings, "the vast majority of which are negative." Decision and Order on Remand at 13. The administrative law judge next discussed the qualifications of the readers. He also noted that only the x-rays dated January 20, 1987, September 9, 1987 and July 25, 1995 had been read as both positive and negative, while the rest of the x-rays had been consistently interpreted as negative or unreadable. The administrative law judge resolved the conflict in these three x-rays, determining that they show the existence of pneumoconiosis. Specifically, the administrative law judge determined that the weight of the January 20, 1987 x-ray was positive, and then, citing *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), found that the weight of the September 9, 1987 and July 25, 1995 x-rays was also positive, consistent with, and supported by, the earlier positive findings. Decision and Order on Remand at 14-15. The administrative law judge then added, "This finding is also supported by the medical opinion evidence, which will assist to reconcile the negative and positive readings as to the existence of pneumoconiosis." Decision and Order on Remand at 15. Without indicating what weight he

accorded to the remaining x-ray evidence, the administrative law judge next found that the medical opinion evidence supported a finding of the existence of pneumoconiosis. He determined that, considering all the relevant evidence on this issue, the existence of pneumoconiosis had been demonstrated. Decision and Order on Remand at 16. Employer asserts that the administrative law judge inadequately analyzed the evidence and did not make any dispositive finding at 20 C.F.R. §718.202(a)(1), in contravention of the Board's remand instructions and the APA's requirement that the administrative law judge review all of the evidence and provide adequate rationale for his findings. Employer further argues that, while the administrative law judge referred to some of the qualifications of the physicians who interpreted the x-ray evidence, he made no credibility findings based thereon. Employer also asserts that the administrative law judge did not explain adequately the weight he accorded to Dr. Wiot's x-ray readings and treated this evidence arbitrarily.

We agree that the administrative law judge erred in determining that the x-ray evidence establishes the existence of pneumoconiosis. Employer correctly asserts that the administrative law judge did not analyze and weigh all the relevant x-ray evidence of record. Rather, the record shows that the administrative law judge resolved the conflicting readings of three x-rays, namely those dated January 20, 1987, September 9, 1987 and July 25, 1995, as positive. The administrative law judge did not indicate what weight, if any, he accorded to the remaining x-ray readings of record as he is required to do under the APA. APA; *see also* 20 C.F.R. §725.477(b). Employer also correctly asserts that the administrative law judge did not explicitly state what import, if any, the relative qualifications of the x-ray readers had on his analysis of the weight of the x-ray evidence, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), and he did not make an explicit finding at 20 C.F.R. §718.202(a)(1). We disagree, however, with employer's contention that the administrative law judge did not fully explain the weight he accorded to Dr. Wiot's x-ray readings and that he weighed this evidence in an arbitrary manner. The administrative law judge properly acknowledged the Board's holding that in his prior Decision and Order, he had mistakenly found that Dr. Wiot had read the same x-rays with different results on separate occasions, specifically noting the Board's clarification that these readings were actually readings of separate "PA" and "lateral" x-rays. Decision and Order on Remand at 13-14 n.5. Contrary to employer's assertion, the administrative law judge did not act arbitrarily when he accorded Dr. Wiot's x-ray readings the same weight as other equally qualified doctors." *Id.*; *Clark, supra*.

Based on the foregoing, we vacate the administrative law judge's determination that the x-ray evidence establishes the existence of pneumoconiosis and remand the case for reconsideration of all of the relevant x-ray evidence of record under 20 C.F.R. §718.202(a)(1).

Administrative Law Judge's Consideration of the Medical Opinion Evidence

Employer next asserts, with regard to the administrative law judge's weighing of the medical opinion evidence, that the administrative law judge did not provide adequate rationale for crediting Dr. Cardona's opinion, that the miner had coal workers' pneumoconiosis and died due to the disease, *see* Director's Exhibits 4-5, Claimant's Exhibits 1-2, over the contrary opinions rendered by Drs. Morgan, Zaldivar, Castle, Abernathy, Kress, Fino, Endres-Bercher and Crisalli. On remand, the administrative law judge initially stated that his finding that the x-ray evidence establishes the

existence of pneumoconiosis is also supported by the medical opinion evidence "which will assist to reconcile the negative and positive readings as to the existence of pneumoconiosis." Decision and Order on Remand at 15. The administrative law judge accorded significant weight to Dr. Cardona's opinion that the miner had pneumoconiosis because: (1) Dr. Cardona was the miner's treating physician for approximately twelve years which was much longer than any of the other physicians of record; (2) Dr. Cardona's finding of pneumoconiosis was based on his examinations of the miner, the miner's forty-year history of coal mine employment, positive x-ray findings and "poor pulmonary function tests," and (3) his assessment that the miner had pneumoconiosis was corroborated by the opinions of eleven other physicians. Decision and Order on Remand at 15. The administrative law judge indicated:

> Dr. Cardona acknowledged the Miner's thirty-five pack year smoking history and improving pulmonary function after bronchodilator, but Dr. Cardona maintained that the Miner had pneumoconiosis. I credit Dr. Cardona's opinion with significant weight given his treating history. Dr. Cardona's opinion is not given full weight due to his failure to substantially address the Miner's smoking. His opinion is supported by the positive x-ray findings of pneumoconiosis.

Id. Considering the contrary opinions regarding the existence of pneumoconiosis, the administrative law judge found that Dr. Morgan admittedly ignored relevant evidence because he believed the positive readings were rendered by biased physicians. The administrative law judge found that Drs. Zaldivar and Castle based their opinions on the negative x-ray evidence while discrediting the positive readings, and determined that these opinions were not well-reasoned. The administrative law judge thus indicated that he attributed less than full weight to the opinions of Drs. Zaldivar and Castle. The administrative law judge next stated that Drs. Abernathy, Kress, Fino, Endres-Bercher and Crisalli "appear to diagnose the Miner's condition under the clinical definition of pneumoconiosis. In particular, these doctors found an obstructive lung disease rather than pneumoconiosis, which may be an accurate clinical finding, but is also sufficient for a finding of legal pneumoconiosis." Decision and Order on Remand at 15-16. Employer argues that although the administrative law judge properly cited *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994) for the proposition that an administrative law judge may accord greater weight to the opinion of a treating physician, he failed to analyze how *Grigg* applies in the instant case where, employer asserts, Dr. Cardona's opinion is not reasoned or documented on either the issue of the existence of pneumoconiosis or the issue of death due to pneumoconiosis. Specifically, employer argues that the administrative law judge should not have credited Dr. Cardona's opinion as it is contrary to the weight of the x-ray evidence and because the administrative law judge found that Dr. Cardona failed to address substantially the effects of the miner's smoking history. Employer also asserts that the administrative law judge's crediting of Dr. Cardona's opinion is inconsistent with his treatment of employers' experts' opinions "who addressed both the effects of smoking and the effects of coal dust exposure on [the miner's] pulmonary impairment." Employer's Brief at 14. Employer thus contends that the administrative law judge selectively analyzed the medical opinion evidence by summarily discrediting the reports of physicians who found that the miner did not have pneumoconiosis. Employer submits that the administrative law judge's assessment is "simply incorrect" as each of these physicians offered a well-reasoned and documented opinion and

considered whether the miner had legal pneumoconiosis as well as clinical pneumoconiosis.

It is the province of the administrative law judge to evaluate the medical opinion evidence and, as trier of fact, the administrative law judge is not bound to accept the medical opinion or theory of any medical expert. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995). The administrative law judge properly accorded significant weight to the opinion of Dr. Cardona, the miner's treating physician for approximately twelve years, regarding the existence of pneumoconiosis, because of his treating history and based on the administrative law judge's determination that his opinion was documented and reasoned and supported by the corroborating opinions of eleven other physicians. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grigg, supra*; *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Moreover, the administrative law judge acted within his discretion when he accorded Dr. Cardona's opinion less than full weight on the issues of the existence of pneumoconiosis and the cause of the miner's death, given the physician's failure to address substantially the miner's smoking history. *See generally Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1983); Decision and Order at 15-16. The administrative law judge's weighing of the contrary medical opinion evidence, however, is not without error.

We agree that the administrative law judge erred in discrediting several medical opinions upon which employer relies to support its position that the medical opinion evidence of record fails to establish the existence of pneumoconiosis and death due to pneumoconiosis.[5] With regard to the existence of pneumoconiosis, the administrative law judge found, "Drs. Zaldivar and Castle base their opinions on the negative x-ray evidence and discredit the positive readings. These are not well-reasoned opinions and I attribute less than full weight to them." Decision and Order on Remand at 15. The record shows, however, that the opinions of Drs. Zaldivar and Castle were based on objective test results, review of the miner's medical records, and consideration of the miner's employment and smoking histories. Employer's Exhibits 1, 3, 11. The administrative law judge acknowledged the bases for the opinions rendered by Drs. Zaldivar and Castle when he summarized the evidence, *see* Decision and Order on Remand at 12, 13, but ignored the content of these opinions when he dismissed them because he found that Drs. Zaldivar and Castle "base their opinions on the negative x-ray evidence and discredit the positive readings." Decision and Order on Remand at 15.

The administrative law judge also erred when he determined that Drs. Abernathy, Kress, Fino, Endres-Bercher and Crisalli appear to diagnose the miner's condition under the clinical

[5] Notwithstanding the administrative law judge's errors in weighing the opinions of several of employer's experts, we hold that the administrative law judge permissibly accorded less weight to Dr. Morgan's opinion regarding the existence of pneumoconiosis. Specifically, the administrative law judge properly determined that Dr. Morgan admittedly ignored relevant evidence based on his stated belief that certain positive x-ray readings of record were rendered by biased physicians. *See generally Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

definition of pneumoconiosis. Specifically, the administrative law judge noted that these physicians diagnosed an obstructive lung disease rather than pneumoconiosis, which diagnosis "is sufficient for a finding of legal pneumoconiosis." Decision and Order on Remand at 15-16. A review of the record shows the following:

Dr. Abernathy, in opinions predating the miner's death, diagnosed, *inter alia*, chronic obstructive pulmonary disease, chronic bronchitis and emphysema. He found no evidence of coal workers' pneumoconiosis, and opined that the miner's impairment was due to cigarette smoking. Director's Exhibit 20.

Dr. Kress, in an opinion predating the miner's death, opined that there was insufficient evidence of coal workers' pneumoconiosis and diagnosed, *inter alia*, chronic obstructive pulmonary disease, chronic bronchitis and pulmonary emphysema. Dr. Kress attributed these conditions to cigarette smoking. He opined that even if the existence of pneumoconiosis were established by biopsy or autopsy, inasmuch as it has not been established by x-ray, it could not be the cause of the miner's obstructive impairment and hypoxemia. Dr. Kress concluded that the information available does not support the conclusion that the miner's years of coal mine employment were a "measurable contributing factor" to his chronic obstructive pulmonary disease and resulting impairment. Director's Exhibit 21.

Dr. Crisalli, in an opinion predating the miner's death, opined that the miner was totally disabled due to chronic bronchitis and emphysema, which were both due to tobacco smoke exposure. Dr. Crisalli added that the miner's exposure to coal dust did not contribute to his totally disabling pulmonary impairment in any way. Employer's Exhibit 1.

Dr. Fino found that the miner did not have coal workers' pneumoconiosis and attributed the miner's chronic obstructive pulmonary disease to tobacco abuse. Dr. Fino opined that the miner's impairment and death were directly related to tobacco consumption. He stated that the miner's death was not caused, contributed to or hastened by the inhalation of coal mine dust, and that his opinion would not change even if the miner were found to have radiological evidence of simple coal workers' pneumoconiosis. Employer's Exhibit 3.

Dr. Endres-Bercher opined that the miner's disabling respiratory impairment was due to his chronic obstructive pulmonary disease, which he attributed to the miner's tobacco smoke exposure. Dr. Endres-Bercher indicated that he did not find sufficient evidence to make a diagnosis of coal workers' pneumoconiosis and did not find that the miner's coal dust exposure contributed to any part of his disability or death. Dr. Endres-Bercher added, "Since all of his pulmonary function testing is repeatedly consistent with the presence of chronic obstructive pulmonary disease, I would not consider coal workers' pneumoconiosis a continuing factor to Mr. Price's disability or death even if confirmed by x-ray findings." Employer's Exhibit 3.

The record thus shows that Drs. Abernathy, Kress, Fino, Endres-Bercher and Crisalli do not attribute any condition or impairment to the miner's coal mine employment but, rather, expressly attribute the miner's conditions and/or pulmonary impairment and/or death to causes other than his

coal mine employment. These medical opinions thus do not support a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). The administrative law judge's findings (1) that Drs. Abernathy, Kress, Fino, Endres-Bercher and Crisalli "appear to diagnose the miner's condition under the clinical definition of pneumoconiosis" and (2) that the physicians' medical diagnoses are sufficient for a diagnosis of legal pneumoconiosis, are thus contrary to the record.

Administrative Law Judge's Consideration of the Evidence Regarding Cause of Death

Employer also alleges error in the administrative law judge's finding that credible evidence establishes that while smoking was the primary cause of death, the miner's coal dust exposure was a substantially contributing cause of death. In its prior Decision and Order in this case, the Board held that the administrative law judge failed to resolve properly the conflicts in the relevant evidence of record under 20 C.F.R. §718.205(c). The Board specifically instructed the administrative law judge on remand to consider the fact that while Drs. Zaldivar and Morgan opined that the miner did not have pneumoconiosis, they each added that even if the miner had pneumoconiosis, their opinions as to the cause of the miner's impairment and/or death would not change. The Board also held:

> The administrative law judge's assignment of greater weight to the opinions of Drs. Rasmussen and Buono [sic] and Ducatman in light of their qualifications and because he found them reasoned and supported by the evidence is inconsistent with his assignment of less weight to the opinions of Drs. Zaldivar, Fino, Castle and Endres-Bercher, as the administrative law judge also found that their opinions were reasoned and/or supported by the evidence and that they had similar, greater and/or the same qualifications, [citations omitted]. In addition, although the administrative law judge noted the qualifications of Drs. Buono [sic] and Ducatman as board-certified physicians, a review of the record does not indicate their qualifications. [citation omitted].

Price, slip op. at 10-11. The Board further noted that the administrative law judge failed to consider the opinion of Dr. Hynes, one of the miner's treating physicians, who opined that the cause of the miner's death was due, in part, to "black lung." *Id.*; *see* Director's Exhibit 5. The Board thus remanded the case for reconsideration of all the relevant evidence under 20 C.F.R. §718.205(c).

On remand, the administrative law judge found that credible medical evidence indicates that respiratory failure caused the miner's death, but that there is disagreement over what caused that respiratory failure. The administrative law judge stated:

> Based on the various medical opinions and the Miner's history of coal dust exposure and smoking, I concluded that smoking was the primary cause of death, but that coal dust exposure was a contributing cause. Credible and well reasoned medical evidence supports the finding that coal dust exposure exacerbated the damage to his lungs caused by smoking and hastened his death.
>
> I relied heavily on the reports of the opinions of Drs. Ducatman, Buono, and

> Rasmussen because they acknowledged that both smoking and coal dust exposure led to his respiratory failure. The opinions of Drs. Ducatman, Buono, and Rasmussen analyzed the available evidence and arrived at a conclusion most in line with the medical records. Simply put, these opinions are supported by the totality of the evidence and are better reasoned than those that attribute the Miner's death to a single cause.

Decision and Order on Remand at 16. The administrative law judge next accorded less than full weight to Drs. Hynes's opinion regarding the cause of the miner's death because the physician did not address the miner's smoking history. The administrative law judge next noted that he had given Dr. Cardona's opinion less than full weight because the physician excluded smoking as a contributory cause of the miner's death. The administrative law judge stated, "The Board found this reliance inconsistent with attributing less weight to the doctors who did not consider coal dust exposure as a substantially contributing cause because I had found those doctors' opinions to be well reasoned." Decision and Order on Remand at 16. Following the Board's instruction to reconsider the statements of Drs. Morgan and Zaldivar that, even if the miner had pneumoconiosis their opinions on the cause of his impairment and/or death would not change, the administrative law judge found that although these alternative opinions may hold probative value, they should not be accorded the same weight of a definitive opinion. The administrative law judge stated that "[m]ore importantly" he placed greater emphasis on how Drs. Morgan and Zaldivar arrived at their opinions. The administrative law judge explained that Dr. Morgan admittedly ignored relevant evidence because he believed that certain physicians who interpreted x-rays as positive were biased. The administrative law judge also rejected as unreasoned Dr. Morgan's opinion that the miner's loss of pulmonary capacity was due to smoking. The administrative law judge found that Dr. Morgan assumed too many factors, provided no source for his assumed numbers, and did not factor into his projections the fact that the miner had at least a moderate impairment when he left the mines. Decision and Order on Remand at 17. The administrative law judge concluded, "[Dr. Morgan's] opinion is not a well-reasoned opinion and deserves less credit than if he had acknowledged the positive readings or at least sought to disprove the positive readings on more legitimate grounds." *Id*. The administrative law judge next indicated that he did not place great weight upon Dr. Zaldivar's opinion that there was no radiographic evidence of pneumoconiosis because the physician thereby ignored contradictory findings. The administrative law judge further found that Dr. Zaldivar's statement that even if early pneumoconiosis was found it would not be the cause of the miner's pulmonary impairment, which was the last sentence in his report, was included "only to provide cover for his conclusion and I find it conclusory and not well reasoned." *Id*.

Employer raises several arguments challenging the administrative law judge's determination that claimant met her burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c). Employer initially contends that the administrative law judge irrationally accorded less weight to the opinions of Drs. Morgan and Zaldivar that even if the miner had pneumoconiosis it would not change their opinions as to the cause of the miner's impairment and/or death. *See* Employer's Exhibits 2, 11. Employer argues that it was not sufficient for the administrative law judge to state that these opinions are not entitled to definitive weight.

Employer's contentions have merit. The record shows that Drs. Morgan and Zaldivar were definitive in stating that, even if the existence of pneumoconiosis were established, it would not change their opinions. Dr. Morgan, in his opinion dated November 16, 1997, stated:

> Had Mr. Price had a postmortem, and I do not know whether he did or did not, it is possible that his lungs would have shown some minor evidence of [coal workers' pneumoconiosis] or silicosis. This however, would not in any way affect his lung function, since the [coal workers' pneumoconiosis] would be relatively minor and insufficient to show up on the chest x-ray...
>
> In my opinion, there is insufficient evidence to justify a diagnosis of [coal workers' pneumoconiosis] in the absence of a histological and pathological examination of his lungs. It is possible there may be minimum [coal workers' pneumoconiosis], the extent of which would not affect his lung function. Mr. Price had severe pulmonary impairment. This was much less severe at the time he stopped work, but increased while he continued to smoke and after he had stopped mining. This was the precipitating cause of his death, along with other factors. His respiratory impairment was related to emphysema and small airways disease induced by cigarette smoking.... As I earlier indicated I do not believe that he had [coal workers' pneumoconiosis] nor do I believe that his exposure to coal dust played any role in his death. My opinion would not change if it were found that he had some minor degree of [coal workers' pneumoconiosis] at postmortem.

Employer's Exhibit 3. Given that Dr. Morgan acknowledged the possibility that the miner had coal workers' pneumoconiosis, the administrative law judge erred in finding that Dr. Morgan's opinion is not well reasoned and "deserves less credit than if he had acknowledged the positive readings or at least sought to disprove the positive readings on more legitimate grounds." Decision and Order on Remand at 17.

Further, Dr. Zaldivar, in his report dated January 7, 1998, opined that the miner did not have coal workers' pneumoconiosis and that coal dust exposure did not play a role in the miner's disability or death, which was caused by smoking-related emphysema. Employer's Exhibit 11. Dr. Zaldivar added that, even if the miner were found to have early, simple pneumoconiosis by tissue analysis of his lungs, "my opinion regarding the cause of the severe pulmonary impairment which he had is that he had emphysema caused by smoking." *Id*. Given the totality of Dr. Zaldivar's opinion, we hold that the administrative law judge erroneously speculated that Dr. Zaldivar included this latter statement "only to provide cover for his conclusion." Decision and Order on Remand at 17, APA. Based on the foregoing, we hold that the administrative law judge erred in weighing the opinions of Drs. Morgan and Zaldivar regarding the cause of the miner's death at 20 C.F.R. §718.205(c).

Employer next contends that in finding that smoking was the primary cause of death while coal dust exposure was a substantially contributing cause of death, the administrative law judge erred in determining that Drs. Ducatman, Buono and Rasmussen analyzed the available medical evidence and arrived at conclusions which are most in line with the medical records. *See* Decision

and Order on Remand at 16. Employer argues that Drs. Ducatman and Buono could not have arrived at "conclusions most in line with the medical records" because they did not review the full medical records. Employer also argues that Dr. Rasmussen's September 22, 1997 opinion, that the miner's occupational pneumoconiosis was a material contributing factor to the miner's death, is inconsistent with Dr. Rasmussen's February 4, 1993 opinion that there was no way in which to separate the effects of the miner's coal dust exposure from the effects of the miner's smoking. Employer thus argues that the administrative law judge thereby ultimately failed to resolve the conflict between the opinions of Drs. Ducatman, Buono and Rasmussen and the contrary opinions of Drs. Zaldivar, Endres-Bercher, Fino, Morgan and Castle.

Employer's contentions lack merit. The administrative law judge permissibly credited the medical opinions of Drs. Ducatman, Buono and Rasmussen. The administrative law judge properly determined that credible evidence indicates that respiratory failure was the cause of the miner's death, and properly relied on the opinions of Drs. Ducatman, Buono and Rasmussen that smoking and coal dust exposure led to the miner's fatal respiratory failure. *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *see also Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Employer also contends that the administrative law judge irrationally discredited the opinions rendered by Drs. Fino, Castle and Endres-Bercher which, employer asserts, are credible. The administrative law judge noted that Dr. Fino agreed with Dr. Rasmussen that the miner died due to significant chronic obstructive pulmonary disease but determined that smoking was the factor which caused the chronic obstructive pulmonary disease. The administrative law judge acknowledged that he had previously found that Dr. Fino's opinion was well reasoned and documented by specific objective evidence. He indicated, however:

> But on re-examination, I find that Dr. Fino's report is not well reasoned because he failed to consider all of the clinical findings, observations, and facts (i.e. he failed to consider all of the positive readings). I accept his conclusion that smoking did play a role in the death of the Miner. However, Dr. Fino also stated that coal dust exposure did not hasten the death of the Miner. This conclusion is misguided because he failed to explain the effects of forty-two years of coal dust exposure.

Decision and Order on Remand at 18. The administrative law judge also accorded less weight to Dr. Castle's opinion finding that the miner did not have coal workers' pneumoconiosis and attributing the miner's death solely to smoking, *see* Employer's Exhibits 2, 6, because he found that it was based on the numerical superiority of the negative x-ray evidence. Similarly, the administrative law judge accorded less weight to Dr. Endres-Bercher's opinion attributing the miner's death solely to smoking, *see* Employer's Exhibit 2, Director's Exhibit 21, because he failed to consider pneumoconiosis as a factor in the miner's death, despite forty-two years of coal mine employment and numerous contradictory positive x-ray readings. The administrative law judge thus found that Dr. Endres-Bercher's opinion was unreasoned. Employer argues that the administrative law judge erroneously accorded less weight to the opinions of Drs. Fino, Castle and Endres-Bercher because they did not explain why the miner's forty-two years of coal mine employment played no role in his death. Employer argues that the administrative law judge, in so doing, erroneously required that employer rule out pneumoconiosis as a cause of the miner's death. Employer further asserts that the

administrative law judge's finding is contrary to the record, which shows that Drs. Fino, Castle and Endres-Bercher each explained his opinion that the miner's death was due to smoking. Employer also argues that the administrative law judge provided no rationale for "failing to credit" Drs. Endres-Bercher's opinion and arbitrarily dismissed Dr. Castle's opinion because it was based on his finding of no clinical pneumoconiosis. Employer further contends that the administrative law judge treated Dr. Fino's opinion in an inconsistent manner by finding it to be not well reasoned, where he previously found that the opinion was well reasoned in his January 4, 2000 Decision and Order. Employer argues that the APA requires the administrative law judge to provide an explanation for his differing treatment of Dr. Fino's opinion.

We find no merit in employer's contention that the administrative law judge required employer to rule out pneumoconiosis and/or coal mine dust exposure as a cause of the miner's death, given his forty-two years of coal mine employment. *See Compton*, *supra*. Further, the administrative law judge acted within his discretion in finding more persuasive the medical opinions which attribute the miner's death to both pneumoconiosis and smoking. *See generally Underwood*, *supra*. Nonetheless, because the administrative law judge's credibility determinations as to the opinions of employer's experts on the cause of the miner's death are dependent on his determination on the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202, a finding which we herein vacate, we also vacate the administrative law judge's finding at 20 C.F.R. §718.205(c). On remand, the administrative law judge must reconsider the weight of the relevant evidence and its credibility, and determine whether claimant has met her burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c).

Employer, citing to the Board's instruction in its 1999 Decision and Order in *Price v. Consolidation Coal Co.*, BRB No. 98-1162 BLA (May 28, 1999)(unpublished) to "fully consider the respective qualifications of all the physicians of record," *Price*, slip op. at 5, next contends that the administrative law judge failed to explain, in the Decision on Remand, what weight he accorded to the respective qualifications of the physicians who read x-rays. Employer submits that all the physicians who are Board-certified in pulmonary medicine unanimously agree that the miner did not have any coal mine dust-induced lung disease. Employer's Brief at 17. Citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), employer also argues that the administrative law judge erroneously credited the opinions of Drs. Rasmussen, Buono and Ducatman over opinions of better qualified physicians to find death due to pneumoconiosis established at 20 C.F.R. §718.205(c), without explaining what weight, if any, he accorded to their qualifications.

Employer's contentions lack merit. Employer relies on the Board's 1999 Decision and Order. In its 2001 Decision and Order, the Board did not instruct the administrative law judge to reconsider the relative qualifications of the physicians of record. Consequently, we do not find any failure by the administrative law judge to follow an instruction of the Board.

Based on the foregoing, we hold that the administrative law judge erred in finding that the weight of the x-ray evidence and medical opinion evidence establishes the existence of pneumoconiosis and we vacate those determinations. We also vacate the administrative law judge's finding that claimant established death due to pneumoconiosis under 20 C.F.R. §718.205(c) because it was affected by his finding that claimant established the existence of pneumoconiosis in this case.

On remand, the administrative law judge must weigh all the relevant evidence of record in a manner consistent with *Compton* and determine whether it is sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a). If the administrative law judge finds the existence of pneumoconiosis established at 20 C.F.R. §718.202(a), he must then determine whether the relevant evidence establishes death due to pneumoconiosis under 20 C.F.R. §718.205(c). *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Under 20 C.F.R. §718.205(c)(2), death will be considered to be due to pneumoconiosis if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. Pursuant to the revised regulation at 20 C.F.R. §718.205(c)(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)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Accordingly, we vacate in part the administrative law judge's Order on Remand - Granting Benefits and remand the case for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge