

BRB No. 03-0571 BLA

EVESTA HAMMONDS)	
(Widow of WARREN HAMMONDS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
BRIGHT COAL COMPANY)	DATE ISSUED: 05/27/2004
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Timothy S. Williams (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 the Decision and Order (01-BLA-0587) and Decision and Order on Reconsideration (01-BLA-0587) of Administrative Law Judge Thomas F. Phalen, Jr. 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).¹ This case involves a survivor's claim filed on February 9, 1998.² In the initial Decision and Order, Administrative Law Judge Daniel J. Roketenetz found that the evidence was sufficient to establish the existence of pneumoconiosis. However, Judge Roketenetz found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Roketenetz denied benefits.

Claimant³ subsequently filed a request for modification. After holding a hearing on September 20, 2000, Administrative Law Judge Rudolf L. Jansen issued an Order dated September 28, 2000 wherein he remanded the case to the district director for the development of additional medical evidence. After the case was forwarded to the Office of Administrative Law Judges for a hearing, claimant informed the Department of Labor (DOL) that she did not want a hearing and requested a decision based upon the evidence in the record. On August 9, 2001, Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) granted claimant's request and cancelled the scheduled hearing. The administrative law judge also provided the parties with sixty days in which to submit additional evidence.

On August 20, 2001, employer submitted a Motion to Dismiss, requesting that the administrative law judge dismiss claimant's request for modification. By Order dated September 14, 2001, the administrative law judge denied employer's motion.

¹ The Department of Labor (DOL) 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.

² The miner filed a claim for benefits on June 13, 1984. Director's Exhibit 34. The district director denied the claim on October 24, 1984 and April 7, 1987. After the miner died on November 5, 1988, the district director again denied the miner's claim on November 17, 1989. *Id.* There is no indication that claimant took any further action in regard to the miner's 1984 claim.

³ Claimant is the surviving spouse of the deceased miner who died on November 5, 1988. Director's Exhibit 12.

In a Decision and Order dated March 27, 2003, the administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, found that claimant had demonstrated a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and awarded benefits.⁴ On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer also argues that it should be dismissed because the administrative law judge's reliance upon Dr. Collins' opinion constitutes a due process violation. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that employer was not deprived of due process. In a reply brief, employer argues that any liability in this case should be transferred to the Black Lung Disability Trust Fund (Trust Fund) because employer was deprived of the opportunity to mount a meaningful defense.

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

The sole ground available for modification of a survivor's claim is a mistake in a determination of fact. *See Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in a determination of fact. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Judge Roketenetz found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the issue properly before the administrative law judge was whether Judge Roketenetz made a

⁴ The Director, Office of Workers' Compensation Programs (the Director), subsequently filed a request for reconsideration, requesting that the administrative law judge amend his determination regarding the date of claimant's entitlement to benefits. In a Decision and Order on Reconsideration dated May 6, 2003, the administrative law judge granted the Director's motion for reconsideration and found that claimant was entitled to benefits as of November of 1988, the month of the miner's death.

mistake in a determination of fact in finding the evidence insufficient to establish that the miner's death was due to pneumoconiosis.

Because the instant 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).⁵ See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish 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); see *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

While Drs. Collins and Perper found that the miner's death was due to pneumoconiosis, Director's Exhibits 12, 14, 47, Drs. Fino, Oesterling and Branscomb opined that the miner's pneumoconiosis did not cause, contribute to, or hasten his death. Director's Exhibits 28-30, 36-38; Employer's Exhibits 1, 2. The administrative law judge found that the opinions of Drs. Collins and Perper, that the miner's death was due to pneumoconiosis, were entitled to greater weight than the contrary opinions of Drs. Fino, Oesterling and Branscomb. Decision and Order at 9-12. The administrative law judge, therefore, found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

⁵ 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 traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

Employer contends that the administrative law judge committed numerous errors in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis. Employer initially argues that the administrative law judge erred in crediting Dr. Collins' opinion based upon his status as the miner's treating physician. The Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims. *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.*

Employer contends that the administrative law judge failed to adequately address whether Dr. Collins' opinion was sufficiently reasoned. Dr. Collins completed the miner's death certificate. Dr. Collins listed the miner's cause of death as respiratory arrest due to chronic obstructive pulmonary disease⁶ and pneumoconiosis. Director's Exhibit 12.

In a letter dated November 4, 2000, Dr. Collins stated:

This is in regard to [the miner], a gentleman I had the pleasure of treating several years ago. I treated [the miner] for respiratory disease and hypertension approximately three years prior to his death. His respiratory disease was particularly severe requiring treatment with bronchodilators, oral steroids, and antibiotics for his frequent bronchial infections.

I have long since disposed of his records (I don't keep records over seven years). However, I distinctly remember his death from bronchospasm and reactive airway disease at the Whitesburg Hospital because I was the one who suggested to the family they might want an autopsy due to the fact he had severe black lung disease. In my opinion, this black lung disease led directly to his death.

⁶ During his August 10, 2001 deposition, Dr. Collins explained that his diagnosis of COPD incorporates three things: "emphysema and/or bronchitis and/or asthma." Employer's Exhibit 3 at 11. However, because Dr. Collins did not relate the miner's COPD to his coal dust exposure, his diagnosis of COPD does not constitute a finding of "legal" pneumoconiosis. See 20 C.F.R. §718.201(a)(2).

Director's Exhibit 47.⁷

In his consideration of Dr. Collins' opinion, the administrative law judge conclusively found that Dr. Collins' reasoning was "supported by adequate data" and that his opinion was "well-reasoned." *See* Decision and Order at 9. The administrative law judge, however, failed to identify the reasoning underlying Dr. Collins' opinion that the miner's death was due to pneumoconiosis. Consequently, on remand, the administrative law judge is instructed to reconsider whether Dr. Collins' opinion is sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

We also agree with employer that the administrative law judge erred in failing to address inconsistencies in the opinions of Dr. Collins. For example, in his letter dated November 4, 2000, Dr. Collins stated that he had suggested to the miner's family that they "might want an autopsy due to the fact [the miner] had severe black lung disease." Director's Exhibit 47. However, during his August 10, 2001 deposition, Dr. Collins indicated that the only basis for his diagnosis of pneumoconiosis was the miner's autopsy report.⁸ Employer's Exhibit 3. Despite the fact that Dr. Collins testified that his diagnosis of pneumoconiosis was based solely on the miner's autopsy report, Dr. Collins listed pneumoconiosis as a cause of the miner's death on the death certificate before the miner's autopsy findings were made available to him. *See* Director's Exhibit 12. On remand, the administrative law judge is instructed to address the effect of these apparent inconsistencies on the credibility of Dr. Collins' opinion. *See generally Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Employer also argues that the administrative law judge erred in his consideration of Dr. Perper's opinion.⁹ Dr. Perper reviewed the medical evidence and the miner's

⁷ In a subsequent deposition on August 10, 2001, Dr. Collins did not address the cause of the miner's death. Employer's Exhibit 3.

⁸ Dr. Collins testified that, in treating the miner, he had not made a diagnosis of black lung. Although Dr. Collins destroyed his office records, the record contains hospital records documenting Dr. Collins' treatment of the miner. In a Discharge Summary dated March 8, 1988, Dr. Collins diagnosed black lung and bronchospasm. Director's Exhibit 47. In a Discharge Summary dated November 27, 1988, Dr. Collins diagnosed black lung and COPD. *Id.* Thus, contrary to Dr. Collins' deposition testimony, he diagnosed black lung during the time that he treated the miner.

⁹ Employer contends that the administrative law judge erred in failing to cite a permissible rationale for reversing Administrative Law Judge Daniel J. Roketenetz's

autopsy slides. In a report dated May 11, 1998, Dr. Perper opined that the miner suffered from an occupational disease caused by his coal mine employment. Dr. Perper explained that he based his finding in part upon:

The presence at autopsy of moderately severe simple coal workers' pneumoconiosis, with associated moderate to marked centri-lobular emphysema and interstitial fibrosis. In the recent two decades, the scientific literature, some sponsored by the World Health Organization and highly reputable text books on pulmonary disease, has demonstrated a clear causal correlation between exposure to coal mine dust containing silica and centri-lobular emphysema (see discussion in Appendix I), beyond any effect caused by concomitant smoking. [The miner] was unquestionable [sic] a heavy smoker, but this did not exclude a significant participatory role for exposure to coal mine dust in addition to the effect of smoking.

Today "chronic bronchitis and emphysema are now recognized complications of occupational exposure to coal dust[.]"

Director's Exhibit 14.

In an Appendix attached to his report, Dr. Perper stated that:

Chronic centri-lobular (centri-acinar) emphysema is known to be associated both with smoking and exposure to coal mine dust. Furthermore, numerous studies published in highly reputable medical journals have indicated that exposure to coal mine dust is causally

previous finding that Dr. Perper's opinion was insufficient to support a finding that the miner's death was due to pneumoconiosis. Contrary to employer's contention, the administrative law judge was not required to provide a basis for reversing Judge Roketenetz's prior weighing of the medical evidence. As previously noted, in reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Employer also notes that the record does not reveal why claimant's request for modification was not assigned to Judge Roketenetz, the administrative law judge who initially denied claimant's survivor's claim. Employer, however, failed to raise any objection to the administrative law judge's consideration of claimant's request for modification when it had an opportunity to do so. *See Taylor v. 3D Coal Co.*, 3 BLR 1-350 (1981).

associated with centrilobular emphysema, above any effect caused by smoking.

Director's Exhibit 14.

Dr. Perper also opined that the miner's coal workers' pneumoconiosis "was both directly and indirectly a substantial contributing and/or contributing cause of his death." Director's Exhibit 14. Dr. Perper based his opinion on the following:

The fact that [the miner] had irrefutable evidence of significant simple coal mine pneumoconiosis, both clinical and at the autopsy (see discussion above) and severely disturbed respiratory functions.

The fact that he had a corresponding total and permanent respiratory disability.

Although the patient had suffered of hypertension and coronary arteriosclerotic disease was [sic] substantiated at autopsy, during the patient's life in spite of severe respiratory symptomatology and markedly abnormal respiratory tests, the patient did not exhibit any evidence of congestive heart failure, cardiac arrhythmias or any electrocardiographic abnormalities.

The mechanism of death of [the miner] was either due to pure respiratory failure and/or due to a substantial contributory cause of death by the coal workers' pneumoconiosis and [sic] associated pulmonary abnormalities that triggered or aggravated a cardiac arrhythmia on the basis of the patient's arteriosclerotic cardiovascular disease, substantiated at the autopsy.

Director's Exhibit 14.

In his consideration of Dr. Perper's opinion, the administrative law judge stated that:

Dr. Perper, a pathologist, reviewed Miner's autopsy report and the autopsy slides. He opined that the mechanism of Miner's death was either due to pure respiratory failure and/or to a substantial contributory cause of death by the CWP and associated pulmonary abnormalities that triggered or aggravated a cardiac arrhythmia [sic] on the basis of Miner's arteriosclerotic cardiovascular disease as substantiated by autopsy. Dr. Perper also reviewed Miner's medical records and stated Miner exhibited symptoms of a totally disabling, progressively worsening pulmonary impairment related to CWP. He was aware of Miner's smoking history and noted the presence of emphysema. However, in reliance on medical literature, Dr. Perper stated that Miner's coal dust exposure cannot be excluded as a significant

participatory role in the causation of Miner's emphysema beyond any effect caused by concomitant smoking. He cited to medical literature that recognized chronic bronchitis and emphysema as complications of occupational exposure to coal mine dust. Dr. Perper set forth pathological observations and findings, and his reasoning is supported by adequate data. His opinion is well-reasoned and well-documented. I find that Dr. Perper's opinion is entitled to probative weight. I assign greater weight to Dr. Perper's opinion because he reviewed the autopsy slides.

Decision and Order at 10-11.

It is unclear whether the administrative law judge's finding that Dr. Perper's opinion supported a finding of death due to pneumoconiosis was based upon Dr. Perper's opinion that the miner's death was due to coal workers' pneumoconiosis or upon Dr. Perper's opinion that the miner's death was due to the effects of emphysema attributable to the miner's coal dust exposure. If it was based upon the latter, the administrative law judge failed to address whether Dr. Perper's diagnosis of emphysema constitutes a diagnosis of "legal pneumoconiosis." *See* 20 C.F.R. §718.201(a)(2).

The administrative law judge also failed to address whether Dr. Perper's opinion was based upon an improper assumption that when a miner suffers from centri-lobular emphysema, it is always caused in part by coal dust exposure. The administrative law judge did not address whether Dr. Perper adequately explained his basis for attributing the miner's emphysema, in this particular case, to his coal mine employment.

We further note that Dr. Perper did not explicitly opine that the miner's death was attributable to his emphysema. Dr. Perper opined that the miner's coal workers' pneumoconiosis "was both directly and indirectly a substantial contributing and/or hastening cause of his death." Director's Exhibit 14. Dr. Perper opined that the miner's death was "either due to pure respiratory failure and/or due to a substantial contributory cause of death by the coal workers' pneumoconiosis and [sic] associated pulmonary abnormalities that triggered or aggravated a cardiac arrhythmia on the basis of the patient's arteriosclerotic cardiovascular disease, substantiated at the autopsy." *Id.* Dr. Perper did not explain what he meant by "pulmonary abnormalities."

As with Dr. Collins' opinion, the administrative law judge summarily concluded that Dr. Perper's reasoning was "supported by adequate data" and that his opinion was "well-reasoned." Decision and Order at 10-11. The administrative law judge, however, failed to address Dr. Perper's basis for attributing the miner's death to pneumoconiosis. Consequently, the administrative law judge erred in his consideration of Dr. Perper's opinion pursuant to 20 C.F.R. §718.205(c).

Employer also argues that the administrative law judge erred in his consideration of Dr. Oesterling's opinion.¹⁰ The administrative law judge found that Dr. Oesterling's reasoning was supported by "adequate data." Decision and Order at 10. The administrative law judge also found that his opinion was well reasoned and entitled to probative weight." *Id.* The administrative law judge accorded "greater weight" to Dr. Oesterling's opinions because he reviewed the miner's autopsy slides. *Id.* The administrative law judge, however, credited Dr. Perper's opinion over that of Dr. Oesterling because "Dr. Oesterling did not refute the opinion of Dr. Perper that coal dust exposure can lead to chronic asthma or emphysema." *Id.* at 11. The administrative law judge, however, failed to explain how Dr. Perper's finding that coal dust exposure *can* lead to chronic asthma or emphysema undermines Dr. Oesterling's opinion that the miner's moderate coal worker's pneumoconiosis was insufficient to have hastened or contributed to his death. Moreover, Dr. Oesterling attributed the miner's centrilobular emphysema to bronchial asthma and cigarette abuse. As employer accurately notes, there is nothing in the record that supports a finding that the miner's asthma was attributable to his coal dust exposure. Consequently, we hold that the administrative law judge failed to provide a valid basis for discrediting Dr. Oesterling's opinion.

¹⁰ Dr. Oesterling reviewed the medical evidence and the miner's autopsy slides. In a report dated July, 28, 1998, Dr. Oesterling opined that the miner's "terminal respiratory distress was largely caused by the combination of his asthma and centrilobular emphysema. Director's Exhibit 29. Dr. Oesterling opined that the combination of the miner's cigarette usage and his asthma ultimately resulted in his pulmonary death. *Id.* Dr. Oesterling opined that the limited change in lung tissue secondary to coal mine dust was insufficient to have altered respiratory function. *Id.* Dr. Oesterling, therefore, opined that the miner's coal dust exposure in no way contributed to his death. *Id.*

After reviewing additional medical evidence, Dr. Oesterling prepared a November 16, 1998 report wherein he stated:

[I]t is evident that [the miner] suffered significant respiratory disease due to his asthmatic bronchitis and resultant centrilobular pulmonary emphysema as well as significant hypertensive arteriosclerotic cardiovascular disease. It is this combination that resulted in his death as previously stated.

Director's Exhibit 37.

After reviewing additional medical evidence, Dr. Oesterling prepared an August 13, 2001 report wherein he had indicated that he found no medical reason to change any of his initial opinions stated in his November 15, 1998 and July 28, 1998 reports. Employer's Exhibit 2.

Employer also contends that the administrative law judge erred in discrediting Dr. Branscomb's opinion. The administrative law judge found that Dr. Branscomb's opinion was well-reasoned and entitled to "probative weight enhanced by his credentials as a board-certified pulmonary specialist." Decision and Order at 10. The administrative law judge, however, questioned Dr. Branscomb's opinion, stating that:

Dr. Branscomb determined that Miner did not suffer from CWP. Even though he qualified his opinion with the statement that his opinion would hold true even if CWP is present, his opinion on the existence of CWP is contradicted by the weight of the record. The opinions of those physicians who diagnosed the presence of CWP are more probative when determining whether CWP was a factor in Miner's death.

Decision and Order at 11.

Employer contends that the administrative law judge should not have discredited Dr. Branscomb's causation opinion because the doctor did not diagnose pneumoconiosis. We disagree. The Sixth Circuit has held that where a physician finds no pneumoconiosis, in direct contradiction to the administrative law judge's finding that a claimant does suffer from pneumoconiosis, his opinion should be treated as less significant on the issue of causation. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-103-4 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *see also Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63 (6th Cir. 1989). The Board has similarly held that an administrative law judge may find that such opinions are entitled to little weight. *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Consequently, under the facts of this case, the administrative law judge acted within his discretion in according less weight to Dr. Branscomb's opinion because he failed to diagnose the existence of pneumoconiosis. *See Skukan, supra*.

Employer next contends that the administrative law judge erred in discrediting Dr. Fino's opinion. The administrative law judge found that Dr. Fino's opinion was well-reasoned and entitled to "probative weight enhanced by his credentials as a board-certified pulmonary specialist." Decision and Order at 11. The administrative law judge, however, discredited Dr. Fino's opinion, stating that:

Dr. Fino opined that all of the additional medical evidence that he reviewed did not cause him to change his original opinion that rendering an opinion as to the cause of Miner's death would be too speculative due to a lack of medical evidence from the time period surrounding Miner's death.

However, the same medical evidence was sufficient for Dr. Fino to rule out CWP as a factor in Miner's death. The other physicians of record were able to render opinions as to the cause of Miner's death after reviewing the additional medical evidence.

Decision and Order at 11-12.

The administrative law judge erred in discrediting Dr. Fino's opinion because the doctor indicated that he could not determine the cause of the miner's death based upon the information made available to him. Employer accurately notes that it is not its burden to establish the cause of the miner's death. *See* 20 C.F.R. §718.205(d); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) (Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element). Because Dr. Fino opined that the miner's pneumoconiosis did not cause, contribute to, or hasten the miner's death, his opinion is relevant to the issue of whether the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). The administrative law judge erred in ignoring this aspect of Dr. Fino's opinion because the doctor was unable to definitively determine the cause of the miner's death.

Based upon all of the above-referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration.

Relying upon *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), and *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998), employer argues that liability should be transferred to the Trust Fund. Employer contends that delays in claimant's adjudication of this case resulted in a deprivation of its right to due process. Employer specifically argues that because Dr. Collins destroyed his office records, employer was deprived of an opportunity to mount a meaningful defense. The Director contends that the facts of the instant case are distinguishable from those of *Miller*, *Holdman*, *Lockhart*, *Borda* and *Venicassa*. We agree with the Director.

In *Miller*, the United States Court of Appeals for the Third Circuit held that due process requires an opportunity for rebuttal where it is necessary to the full presentation of a case. In *Miller*, the claimant had exchanged a report with the employer exactly twenty days prior to the hearing, thereby foreclosing the employer from responding to

claimant's evidence prior to the expiration of the twenty-day deadline imposed by 20 C.F.R. §725.456. Under such circumstances, the Third Circuit held that due process required that the employer be provided with an opportunity to respond to this evidence. In this case, employer was provided with a reasonable opportunity to develop rebuttal evidence. Employer, in fact, took advantage of this opportunity to do so. In addition to deposing Dr. Collins, employer also submitted the opinions of physicians who reviewed Dr. Collins' findings.

In *Holdman*, the Sixth Circuit held that liability should be transferred to the Trust Fund because the DOL had failed to safeguard the record, resulting in employer not having access to certain evidence. In this case, there is no indication that the DOL failed to safeguard the record. As the Director notes, the DOL has no responsibility for securing the records of a physician in private practice. Moreover, there is no indication that claimant had access to any evidence not made available to employer.

In *Lockhart*, the United States Court of Appeals for the Fourth Circuit held that the DOL's inexcusable delay in notifying the employer of its potential liability deprived it of the opportunity to mount a meaningful defense. The Fourth Circuit, therefore, held that benefits were to be paid from the Trust Fund. In this case, the DOL provided timely notification to employer of its potential liability.

In *Borda*, the Fourth Circuit noted that *Lockhart* established a straight forward test for determining whether an employer has been denied due process by the government's delay in notification of potential liability: did the government deprive the employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property." *Borda*, 171 F.3d at 183, 21 BLR at 2-559-560 (citation omitted). The Fourth Circuit emphasized that it "is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Borda*, 171 F.3d at 183, 21 BLR at 2-560. In this case, there was no government delay in notifying employer of its potential liability.

In *Venicassa*, the Third Circuit held that the Director's failure to make a timely designation of the proper responsible operator should not have jeopardized an award of benefits which had been made to the claimant. The Third Circuit, therefore, affirmed an earlier administrative law judge's designation of the Trust Fund as liable for the claimant's award of benefits. Again, in this case, the Director timely designated employer as the proper responsible operator.

In this case, employer was notified of claimant's February 9, 1998 claim on February 13, 1998. Director's Exhibit 20. Employer also received timely notice of the miner's request for modification. Director's Exhibit 42. Moreover, although employer contends that it was unlawfully deprived of a meaningful opportunity to cross-examine

Dr. Collins, employer deposed Dr. Collins and had other physicians review his findings and conclusions. Consequently, under the facts of this case, we hold that the DOL did not deprive employer of a fair opportunity to mount a meaningful defense. Consequently, we decline to transfer liability to the Trust Fund.

Accordingly, the administrative law judge's Decision and Order denying benefits and Decision and Order on Reconsideration are vacated and the case is remanded 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