BRB No. 05-0379 BLA

KATHY LYNNE HOWARD (Widow of ROGER HOWARD)	)	
Claimant-Respondent	)	
v.	)	
P & C MINING COMPANY	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 01/19/2006
Employer/Carrier- Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Survivor Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor Benefits (03-BLA-5436) of Administrative Law Judge Joseph E. Kane 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). In a decision dated December 29, 2004, the administrative law judge found that employer is the responsible operator in this claim, credited the miner with ten years of coal mine employment[1] and found that claimant 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 the survivor's claim commencing November 1, 2000, the month in which the miner died.

On appeal, employer contends that the administrative law judge abused his discretion in his application of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer further asserts that the administrative law judge erred in his analysis of the medical opinion evidence in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the administrative law judge's evidentiary rulings under Section 725.414 and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's evidentiary rulings under Section 725.414. Employer has filed a reply brief reiterating its contentions.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the

[1] The record indicates that claimant's coal mine employment occurred in Kentucky. 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, 1-202 (1989)(*en banc*).

[2] Employer conceded to the existence of simple pneumoconiosis. Employer's Post-Hearing Brief at 3; Director's Exhibit 16. In addition, as neither party challenges the administrative law judge's findings that employer is the responsible operator, or that claimant established ten years of coal mine employment, they are hereby affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if 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), (4). 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); *Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer initially contends that by failing to issue his final evidentiary rulings prior to the issuance of the Decision and Order, the administrative law judge precluded employer from knowing in advance what evidence he must rebut, thus invalidating employer's defense of the claim without notice. Employer's Brief at 15; *see* 20 C.F.R. §725.414(a)(3)(ii)(providing for the responsible operator's rebuttal of the opposing party's affirmative case). Employer's argument is without merit.

At the hearing, held on September 24, 2003, it became clear that despite a pre-hearing Order instructing both parties to complete a pre-hearing form report five days prior to the hearing, neither party had done so.[3] Notice of Hearing dated August 18, 2003; Hearing Transcript at 9, 16. As a result, the administrative law judge offered the parties the choice of rescheduling the hearing, designating their evidence on the spot, or of submitting their reports post hearing. Both parties agreed to submit their designations within ten days after the hearing, and further agreed to submit rebuttal evidence within an additional sixty days. The administrative law judge stated that he would then review the evidence submitted for compliance with the revised regulations at Section 725.414. Hearing

[3] By letter dated July 9, 2003, claimant set forth the evidence she relied on. However, prior to the hearing claimant had not completed the pre-hearing form report providing for the designation of each piece of evidence as initial, rebuttal or rehabilitative evidence.

Transcript at 18. Claimant submitted her evidentiary designations on September 30, 2003, and employer submitted its designations on October 3, 2003. Neither party submitted any additional rebuttal or rehabilitative evidence, and, on December 29, 2004, the administrative law judge issued his decision. Thus, under the facts of this case, as employer had ample notice of what evidence claimant was submitting, and had an opportunity to rebut that evidence, the administrative law judge neither abused his discretion, nor deprived employer of due process of law, in waiting until the decision and order to set forth his evidentiary rulings. *See Hodges v. Bethenergy Mines Inc.*, 18 BLR 1-84 (1994); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192-3; *Clark*, 12 BLR at 1-153; *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 2-1 (4th Cir. 1991). Moreover, there is no evidence in the record that employer sought reconsideration of the administrative law judge's evidentiary rulings.

Employer next asserts that the administrative law judge erred in allowing claimant to submit medical treatment notes, notwithstanding the evidentiary limits imposed by revised 20 C.F.R. §725.414,[4] but refusing employer the same leeway to submit additional rebuttal evidence, also notwithstanding the limitations. Employer's argument is without merit.

First, in admitting claimant's proffered treatment notes over employer's objection, the administrative law judge properly applied the revised regulation at 20 C.F.R. §725.414(a)(4), which provides that "notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for . . . or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-53 (2004); Decision and Order at 6. Second, the administrative law judge properly found that Section 725.414(a)(3)(ii) does not contain any specific provision governing the rebuttal of medical treatment or hospitalization notes. 20 C.F.R. §725.414(a)(3)(ii); Decision and Order at 8. Rather, as the Director asserts, the comments to the regulations indicate that the department contemplated that "any evidence that predates a miner's claim for benefits may be addressed in the two medical reports permitted each side in the regulation. If additional evidence is generated as the result of a hospitalization or treatment that takes place after the parties have completed their evidentiary submission, the administrative law judge has the discretion to permit the development of additional evidence under the 'good cause' provision of §725.456." 64 Fed. Reg. 54996 (Oct. 8, 199);

[4] Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on February 22, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

Director's Brief at 2-3. Thus, contrary to employer's argument, there is no "irrebuttable presumption" in favor of treatment notes, as employer is not precluded from responding to or rebutting hospital or treatment notes, but must do so within the limitations of 20 C.F.R. §725.414 or must obtain permission to submit additional evidence under the "good cause" exception. Further, a review of the facts herein indicates that both Dr. Caffrey and Dr. Rosenberg, employer's physicians, reviewed the treatment notes from Mountain Comprehensive Health Care prior to offering their opinions. Finally, contrary to employer's arguments, the Board has held that the evidentiary limitations of Section 725.414 do not violate Section 413(b) of the Act, 30 U.S.C. §923(b), requiring the consideration of all relevant evidence. *Dempsey*, 23 BLR at 1-58.

Employer's final procedural argument is that the administrative law judge erred in excluding Dr. Branscomb's report from the record as in excess of the limitations. Employer's Brief at 18. We disagree.

In reviewing employer's evidence summary form, the administrative law judge correctly noted that employer designated the depositions of Drs. Caffrey and Rosenberg as its two initial medical reports, and again designated Dr. Caffrey as rebuttal to the autopsy report. Employer also designated the deposition of Dr. Branscomb, on the portion of the form provided for rebuttal of "other medical evidence" pursuant to 20 C.F.R. §718.107, as rebuttal to the autopsy report, the medical report of Dr. Alam, and the medical treatment notes from Mountain Comprehensive Health Care.[5] Decision and Order at 7. The administrative law judge correctly noted that, pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), only one autopsy rebuttal report is allowed by each party, and that employer had specifically designated Dr. Caffrey's report as such. Thus, the administrative law judge properly found Dr. Branscomb's report inadmissible pursuant to Section 725.414(a)(3)(ii). Decision and Order at 8. The administrative law judge further properly found that as claimant had submitted no "other medical evidence" at Section 718.107, Dr. Branscomb's report could not be admitted either as rebuttal, or as rehabilitative evidence pursuant to that subsection. Decision and Order at 8. In addition, the administrative law judge properly found that, while Dr. Branscomb's report also rebutted medical treatment notes, there is, as discussed above, no specific provision allowing for separate rebuttal of that evidence,

[5] The administrative law judge also found that although, at the hearing, employer proffered the report of Dr. Repsher, as Dr. Repsher was not included on employer's evidence summary form, his report was excluded from consideration. Decision and Order at 7. As this ruling is unchallenged on appeal, it is hereby affirmed. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

notwithstanding the numerical limitations, and that employer had already reached the limit for evidentiary submissions. Decision and Order at 8. Finally, the administrative law judge acted within his discretion in finding that, under the facts of this case, the report of Dr. Branscomb could not be admitted under the good cause exception under Section 725.456(b)(1), which provides, in certain circumstances, for the submission of excess evidence. *See* 64 Fed. Reg. 54996; *Clark*, 12 BLR at 1-153; Decision and Order at 8. Therefore, we hold that the administrative law judge did not abuse his discretion in excluding employer's proffered report from Dr. Branscomb, submitted as additional rebuttal evidence, because employer had already reached the limit of its permitted rebuttal provisions. *See* 20 C.F.R. §725.414(a)(3)(ii).

Turning to the merits of entitlement, in reviewing the autopsy reports and medical opinions relevant to the cause of the miner's death[6] pursuant to 20 C.F.R. §718.205(c), the administrative law judge initially noted that the miner's death certificate lists the immediate cause of death as cardio-respiratory failure, due to coronary artery disease with chronic obstructive pulmonary disease (COPD), with other significant conditions being diabetes. Director's Exhibit 14; Decision and Order at 9. The death certificate states that the autopsy results were not available at the time the certificate was completed. Director's Exhibit 14; Decision and Order at 9. The administrative law judge further noted that the autopsy, performed by Dr. Burrows, revealed evidence of simple coal workers' pneumoconiosis, but attributed death only to "natural causes," and concluded that a definitive cause of death could not be determined from the limited autopsy.[7] Director's Exhibit 16. Claimant's physicians, Drs. Alam and Breeding, opined that pneumoconiosis hastened the miner's death. Specifically, Dr. Alam opined that pneumoconiosis and impairment due to coal dust contributed to the miner's death,[8] and Dr.

[6] The miner died in his sleep on November 29, 2000, at age 50. He had been diagnosed with severe sleep apnea, and corrective surgery had been recommended but not performed. Hearing Transcript at 31-32.

[7] Macroscopically, large amounts of subpleural pigment were present in all lobes, with a few subpleural small firm nodules, consistent with coal macules. There were also multi focal small areas of anthracotic pigment deposition, and hilar lymph nodes were also anthracotic. Microscopically, multiple dust macules, dust filled microphages and areas of minimal fibrosis were present, but no progressive massive fibrosis. Some areas demonstrated focal emphysema. Director's Exhibit 16.

[8] We hold that although the administrative law judge correctly summarized Dr. Alam's opinion when initially reviewing the evidence, when he later weighed the evidence the administrative law judge incorrectly stated that Dr. Alam did not offer an

Breeding, a treating physician who is Board-certified in family medicine, stated that pneumoconiosis and obesity hastened the miner's death. Claimant's Exhibits 1, 2; Decision and Order at 9. The administrative law judge also noted that, in contrast, employer's physicians opined that the miner's pneumoconiosis was too minimal to have played any role in his death. Specifically, Dr. Caffrey, a pathologist, opined that the miner most likely had a cardiac death. Employer's Exhibits 3, 4. Dr. Rosenberg, a Board-certified internist and pulmonologist, opined that the miner's death was due to obesity, causing hypoventilation and low oxygen, compounded by his pain medication, which also had the effect of suppressing respiration, that the low oxygen levels likely caused cardiac impairment, but that the miner's pulmonary artery pressure did not indicate that the miner's coal workers' pneumoconiosis contributed to heart strain. Employer's Exhibit 1 at 24, 27; Decision and Order at 10-14. In finding the medical evidence sufficient to establish that pneumoconiosis hastened the miner's death, the administrative law judge accorded superior weight to the opinion of Dr. Breeding, as well documented and reasoned and based on the most complete picture of the miner's health. The administrative law judge then found the opinions of Drs. Caffrey and Rosenberg to be less well-reasoned and documented, and, therefore, insufficient to "rebut the presumption" that the miner died due to pneumoconiosis. Decision and Order at 16-17.

Employer initially asserts that the administrative law judge erred in crediting the opinion of Dr. Breeding, which employer contends is legally insufficient to establish entitlement pursuant to *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Employer further contends that the administrative law judge erred by automatically crediting Dr. Breeding as a treating physician without assessing the validity of the underlying support for his opinion; further failed to critically analyze the physician's explanation; and improperly found that Dr. Breeding's opinion invoked a presumption of death due

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opinion on the cause of death. Claimant's Exhibit 1; Decision and Order at 9, 16. In a report dated June 9, 2003, Dr. Alam diagnosed chronic lung disease causally related to coal mine employment, checked a box indicating pneumoconiosis hastened death, and opined that claimant had been exposed to coal dust for approximately twenty-two years, and that his chronic symptoms of cough and shortness of breath and his ultimate death were contributed to by coal dust and pulmonary impairment. In further support, Dr. Alam stated, incorrectly, that the miner had never smoked and that his cardiac/coronary artery disease status had been negative in 1996. Claimant's Exhibit 1. In fact, the miner smoked one to two packs a day for eleven years. Hearing Transcript at 34; Director's Exhibits 16, 19; Decision and Order at 3.

to pneumoconiosis, which employer was required to rebut. Employer's Brief at 18-24. Employer's arguments are not without merit.

In his deposition, Dr. Breeding testified that he had treated the miner from January 8, 1997 until November 1, 2000, that his partner had treated the miner for the ten years prior to that, and that in forming his opinion, he had reviewed three volumes of treatment records, dating back to 1978, as well as the death certificate, autopsy report, and the reports of Drs. Caffrey and Alam. Breeding Deposition at 5, 8, 10. Dr. Breeding's recent diagnoses included COPD, causally related to coal mine employment, chronic back pain, hypoxia, obesity, syncopal episodes, diabetes, mild chronic heart failure, pulmonary fibrosis, sleep apnea, tobacco abuse (chewing tobacco) and coal workers' pneumoconiosis, by autopsy. Director's Exhibit 16. In response to whether pneumoconiosis played a hastening role in the miner's death, Dr. Breeding stated: "I believe it did. His lung condition led him to be unable to work, which led to weight gain. His weight gain contributed to his death as did his lung disease. His shortness of breath. Which we treated for the period from 1995 until he died." Claimant's Exhibit 2 at 14. Dr. Breeding did not offer any additional explanation for this opinion. Dr. Breeding agreed that both the miner's obesity and his pain medication contributed to diminished lung function. Claimant's Exhibit 2 at 17-18. Dr. Breeding also stated that he disagreed with Dr. Caffrey's assertion, that the autopsy evidence did not support a diagnosis of COPD, noting that, contrary to Dr. Caffrey's statement, the autopsy did reveal evidence consistent with both COPD and focal emphysema.[9] Claimant's Exhibit 2 at 8-9, 10-11.

Initially, we hold that, contrary to employer's arguments, the administrative law judge did not mechanically credit Dr. Breeding's opinion as that of a treating physician, but, rather, noting that the physician had treated the miner numerous times, personally examined him, reviewed the autopsy report and numerous consulting medical opinions, permissibly concluded that "[h]e therefore had the most complete picture of the miner's condition and of his various ailments." 20 C.F.R. §718.104(d); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); Decision and Order at 16. However, as employer correctly asserts, the determination of whether an opinion is reasoned and documented requires the fact finder to examine the validity of a medical opinion's reasoning in light of the studies conducted and the objective indications upon which the medical conclusion is based, *Director, OWCP v. Rowe*, 710 F.2d 251,

[9] As noted above, the autopsy revealed areas of focal emphysema. It is unclear what portion of the autopsy results Dr. Breeding felt supported COPD. Director's Exhibit 16.

255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983), and the administrative law judge did not specifically analyze the underlying support, if any, for Dr. Breeding's opinion as to the cause of the miner's death.[10] More importantly, as employer contends, there is a question as to whether Dr. Breeding's opinion, quoted above, is legally sufficient to establish hastening. In *Williams*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, held that pneumoconiosis only "hastens" a death if it does so through a specifically defined process that reduces the miner's life by an estimable time.[11] In addition, we note that, as was the case in *Williams*, Dr. Breeding's opinion is couched in terms of a "reasonable medical probability," Claimant's Exhibit 2 at 14, not reasonable medical certainty, which the Sixth Circuit stated was an additional

[10] For example, we note that while Dr. Breeding stated that he based his opinion in part on the report of Dr. Alam, Dr. Alam's report is itself based on an inflated coal mine employment history of twenty-two years, rather than the ten years of employment credited by the administrative law judge. *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1986); *see Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*).

[11] In *Williams*, the court discussed the opinion of Dr. Woolum, whom the administrative law judge had accorded the greatest weight. Noting that Dr. Woolum hypothesized that, although the miner's death was directly due to a pulmonary embolus, "pneumoconiosis hastened his demise because the miner's 'lack of oxygen [and] his retained carbon dioxide all played an effect on all parts of his body,'" *Eastover Mining Co. v. Williams*, 338 F.3d 501, 506 n.6; 22 BLR 2-625, 2-634 n.6 (6th Cir. 2003), quoting Dr. Woolum, the court held that, in addition to numerous other flaws in Dr. Woolum's opinion, it was legally inadequate to establish hastening. The court stated:

> One can always claim, as Woolum did, that if pneumoconiosis makes someone weaker, it makes them less resistant to some other trauma. If, for instance, a miner with pneumoconiosis gets hit by a train and bleeds to death, Woolum (or someone adopting his position) would argue that the pneumoconiosis "hastened" his death because he bled to death somewhat more quickly than someone without pneumoconiosis. This is absurd, of course, and presumably not what Congress meant by "hasten." Under Woolum's interpretation, pneumoconiosis would virtually always "hasten" death to at least some minimal degree. Legal pneumoconiosis only "hastens" a death if it does so through a specifically defined process that reduces the miner's life by an estimable time. Woolum's letter is conclusory and inadequate because Woolum just asserts that because (in Woolum's opinion) the miner had pneumoconiosis, the disease must have hastened his death. *Williams*, 338 F.3d at 517-18; 22 BLR at 2-655.

reason to doubt a physician's conclusion. *Williams*, 338 F.3d at 517; 22 BLR at 2-654. Thus, we vacate the administrative law judge's findings with respect to the opinion of Dr. Breeding. On remand, the administrative law judge must reconsider Dr. Breeding's opinion, in light of *Williams* and *Rowe*. In addition, we find merit in employer's contention that, having found Dr. Breeding's opinion credible, the administrative law judge appeared to invoke a presumption of entitlement, which employer was required to rebut. In discussing Dr. Caffrey's opinion, the administrative law judge stated: "The Employer has not established that pneumoconiosis did not contribute to the miner's death…I find his opinion does not rebut the presumption." Decision and Order at 16-17. Similarly, in discussing Dr. Rosenberg's opinion, the administrative law judge concluded: "I find that Dr. Rosenberg's opinion does not offer sufficient evidence to rebut the opinion of Dr. Breeding that the miner died due to pneumoconiosis." Decision and Order at 17. Contrary to the administrative law judge's statements, employer does not have the burden to establish that pneumoconiosis did not hasten the miner's death. *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *see White v. Director, OWCP*, 6 BLR 1-368 (1983). Rather, on remand, the administrative law judge must determine whether claimant has met her burden of proof to establish that the miner's death was due to pneumoconiosis. There is no rebuttable presumption of entitlement pursuant to 20 C.F.R. §718.205(c).

Employer next asserts that the administrative law judge erred in discrediting the opinion of Dr. Caffrey, that the miner likely died a cardiac death and that pneumoconiosis played no role.[12] Employer specifically contends that the

[12] Dr Caffrey reviewed the medical reports, autopsy report and lung tissue slides, and opined that the miner had very mild simple pneumoconiosis, based on the paucity of lesions on the slides, which was too minimal to have caused any impairment or to have contributed to death. Employer's Exhibit 4 at 8-9. Dr. Caffrey stated that he also did not agree with the death certificate's cause of death as including COPD, because the autopsy physicians did not diagnose chronic bronchitis or emphysema, usually present with COPD, and the death certificate indicates that the autopsy results had not been available for review. Dr. Caffrey stated that while the autopsy revealed a large amount of pigment in the lungs, he personally didn't see any evidence of chronic bronchitis or emphysema on his review of the slides. Dr. Caffrey acknowledged that he did not have samples of all of the tissue necessary for diagnosing COPD, but noted that the autopsy prosector, who viewed all the tissue, also did not diagnose COPD. Dr. Caffrey opined that the miner's major pulmonary problem was sleep apnea, not related to coal dust, and explained that sleep apnea was often misdiagnosed as COPD. Dr. Caffrey also disagreed with the death certificate's listing of coronary artery disease, again because while the autopsy revealed cardiomegaly, there was no evidence of significant arteriosclerosis. Employer's Exhibit 4. Dr. Caffrey stated, however that the presence of EKG pads on the body at autopsy,

administrative law judge erred in finding Dr. Caffrey's opinion inconsistent with the autopsy results, and further erred in finding that the physician provided no basis for his conclusions. We agree. The administrative law judge found Dr. Caffrey's opinion "less than fully reasoned where he does not provide the basis for his assertions in contrast to the pathologists who actually viewed the lungs and the tissue in its entirety." Decision and Order at 16. The administrative law judge added that while Dr. Caffrey "took exception to the autopsy report's statement that the miner died due to coronary artery disease with chronic obstructive pulmonary disease because the pathologists did not diagnose emphysema or bronchitis," Dr. Caffrey did not provide the basis or rationale for this statement." Decision and Order at 16. Initially, we note that the administrative law judge impermissibly mischaracterized Dr. Caffrey's opinion; Dr. Caffrey did not disagree with the autopsy results, but with the death certificate. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Further, Dr. Caffrey clearly stated that his rationale for his disagreement with the death certificate's preliminary conclusion of coronary artery disease and COPD, was that, in his opinion, these conditions were not supported by the subsequent autopsy results.[13] *See Lattimer v. Peabody Coal Co.*, 8 BLR 1-509 (1986); Employer's Exhibits 3, 4; Decision and Order at 16. In addition, we hold that the administrative law judge also erred in finding Dr. Caffrey's diagnosis of very simple pneumoconiosis, based on the paucity of lesions seen on the slides, to be unsupported by the autopsy findings of large amounts of anthracotic pigment in the lungs. As employer notes, large amounts of anthracotic pigment does not equate to large amounts of pneumoconiosis, as an autopsy or biopsy finding of anthracotic pigmentation is not sufficient, by itself, to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111, 2-117 (6th Cir. 1995); Employer's Brief at 24-25. In addition, while Dr. Caffrey conceded that he only examined a small percentage of lung tissue, as the autopsy prosector did not diagnose extensive pneumoconiosis, or offer any opinion as to whether pneumoconiosis hastened death, Dr. Caffrey's opinion does not appear to be inconsistent with the autopsy results in any way and it is hard to understand the administrative law judge's conclusion that Dr. Caffrey's opinion is "less than fully reasoned where he does not provide the basis for his assertions in contrast to the pathologists who actually viewed the lungs and

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combined with the fact that the miner's heart was forty to fifty percent larger than normal, indicated that the miner most likely had a terminal cardiac event with unsuccessful resuscitation. Employer's Exhibit 4.

[13] While the autopsy report confirmed some areas of focal emphysema in the lungs, the autopsy prosector did not specifically diagnose either COPD or emphysema. Director's Exhibit 16.

the tissue in its entirety." Decision and Order at 16. Moreover, contrary to the administrative law judge's conclusions, Dr. Caffrey did not conclude that "sleep apnea was the major cause of the miner's death," Decision and Order at 16, and Dr. Caffrey did "provide the rationale for his conclusions that the miner's breathing difficulties did not stem from his other pulmonary ailments except for his sleep apnea." *Tackett*, 7 BLR at 1-703; Employer's Exhibits 3, 4 at 9-11; Decision and Order at 17. To the extent that the administrative law judge criticized Dr. Caffrey's opinion as being based only a small amount of lung tissue, we note that the administrative law judge may not substitute his own medical judgment for that of a physician. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Dr. Caffrey explicitly stated that he had sufficient slide tissue to make his diagnosis of pneumoconiosis, and explained that based on his review of the slides, autopsy report and medical records, claimant's pneumoconiosis was too minimal to have caused any impairment or to have contributed to death. Employer's Exhibits 3, 4 at 8-9, 14. Finally, while the administrative law judge is correct that, other than to note that the miner's heart was forty to fifty percent larger than normal, Dr. Caffrey did not provide the basis for his reasoning that the presence of EKG pads at autopsy indicated that the miner's death was due to cardiac conditions, the burden to establish the cause of death rests with claimant, not employer.[14] *Oggero*, 7 BLR at 1-860; *see White*, 6 BLR at 1-368; Decision and Order at 16.

Employer also asserts that the administrative law judge erred in discrediting Dr. Rosenberg's opinion, that the miner's death was due to obesity coupled with pain medication, which combined to lower his oxygen levels.[15] Employer's Brief at 25-26. The administrative law judge initially found Dr. Rosenberg's assertion, that the miner did not have any impairment due to pneumoconiosis, to be undocumented because it was based on objective testing conducted approximately sixteen years prior to the miner's death. Decision and Order at 17. We note, however, that contrary to the administrative law judge's conclusions, while Dr. Rosenberg acknowledged on cross-examination that the miner's past pulmonary function studies were normal, Employer's Exhibit 1 at 29-31, he did not point to

[14] The treatment notes, which Dr. Caffrey reviewed, do indicate that the miner was being treated for chronic heart failure. Director's Exhibit 16.

[15] Dr. Rosenberg explained that the lowered oxygen levels probably triggered cardiac arrhythmia, which was, probably, the cause of his documented black out spells, or syncope. Employer's Exhibit 1 at 22, 25. Dr. Rosenberg further noted that the miner had been diagnosed with, and was being treated for, heart failure. Employer's Exhibit 1 at 25.

these test results as the basis for his opinion, but rather stated that, based on accepted medical studies in the literature, the minimal degree of coal workers' pneumoconiosis seen on the miner's autopsy does not translate into any type of pulmonary impairment. Employer's Exhibit 1 at 23. Furthermore, we hold that the administrative law judge's additional reason for discrediting Dr. Rosenberg's opinion, that "he does not provide the basis for his conclusion that pneumoconiosis did not contribute as well to the miner's death" is also in error. While it is within the purview of the administrative law judge to determine whether an opinion is adequately explained, *Clark*, 12 BLR at 1-149, contrary to the administrative law judge's finding, Dr. Rosenberg did provide the basis for his conclusions, stating that claimant's pneumoconiosis was too minimal pathologically to cause any impairment in lung function, and that his pulmonary artery pressure at the time of death indicated that pneumoconiosis also had not contributed to any heart impairment. *Tackett*, 7 BLR at 1-703; Employer's Exhibit 1 at 23-25. In addition, as noted above, employer is not required to rule out any contribution by pneumoconiosis.[16] *Oggero*, 7 BLR at 1-860; *see White*, 6 BLR at 1-368.

In light of the above-referenced errors, we vacate the administrative law judge's findings at 20 C.F.R. §718.205(c) and remand this case for the administrative law judge to reconsider all of the medical opinion evidence, including the report of Dr. Alam, which the administrative law judge did not weigh together with the other medical opinions of record at Section 718.205(c), and to consider specifically the sufficiency of Dr. Breeding's report to establish that the miner's death was due to pneumoconiosis pursuant to the standards set forth by the United States Court of Appeals for the Sixth Circuit in *Williams* and *Rowe*.

[16] In an analogous situation, the court in *Williams* stated that the administrative law judge had erred in criticizing a physician for failing to adequately explain why the miner's lengthy coal mine employment had not also contributed to his lung condition. *See Williams*, 338 F.3d at 515; 22 BLR at 2-651.

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

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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JUDITH S. BOGGS
Administrative Appeals Judge