U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0240 BLA
and 14-0308 BLA

MARY GUAZDAUSKY (Widow of and o/b/o JOE GUAZDAUSKY)	)	
Claimant-Petitioner Respondent	)	
v.	)	
SUGARLOAF MINING COMPANY	)	
	)	DATE ISSUED: 03/26/2015
Employer-Respondent Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Richard C. Lerblance (Lerblance & Beare), Hartshorne, Oklahoma, for claimant.

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

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] and employer appeal the Decision and Order (2007-BLA-05444, 2010-BLA-05505) of Administrative Law Judge Daniel F. Solomon denying benefits on a miner's subsequent claim,[2] and awarding benefits on a survivor's claim, filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The Board has consolidated the appeals for purposes of decision only.

Considering amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[3] the administrative law judge credited the miner with twenty-five years of underground coal mine employment.[4] The administrative law judge further found, however, that the evidence did not establish that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption, and, in the

[1] Claimant is the widow of the miner, who died on March 11, 2009. Claimant's Exhibit 5. Claimant pursues the miner's lifetime claim, which he filed on June 26, 2006. Director's Exhibit 6. Claimant filed her claim for survivor's benefits on August 24, 2009. Claimant's Exhibit 1.

[2] The present claim is the miner's fifth application for benefits. The miner's most recent prior claim for benefits, filed on October 23, 2002, was denied as abandoned by the district director on February 27, 2003. Director's Exhibit 4. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[3] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act (the Act), which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis, or that a miner's death was due to pneumoconiosis, in cases where the miner worked at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4). The Department of Labor (DOL) revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[4] The record reflects that the miner's last coal mine employment was in Oklahoma. Director's Exhibit 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

alternative, could not affirmatively establish entitlement to benefits under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits in the miner's claim.

Addressing the survivor's claim, the administrative law judge initially found that the evidence did not establish the existence of complicated pneumoconiosis.[5] Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Considering amended Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge found that the relevant medical evidence failed to establish that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[6] The administrative law judge, therefore, determined that claimant did not invoke the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at Section 411(c)(4) of the Act. The administrative law judge next considered whether claimant could affirmatively establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, and found that the evidence was sufficient to establish the existence of clinical[7] pneumoconiosis pursuant to

[5] The administrative law judge correctly noted that the evidence submitted in the survivor's claim contained a diagnosis of "complicated pneumoconiosis" by Dr. Distefano, the autopsy prosector. Claimant's Exhibit 3. The administrative law judge further noted, however, that during his deposition Dr. Distefano clarified that he was not using the term to describe progressive massive fibrosis, but rather to describe a degree of pneumoconiosis "in the middle somewhere" between the simple form of pneumoconiosis and progressive massive fibrosis. Claimant's Exhibit 10 at 11-12. Dr. Distefano further clarified that the miner did not have the large scarred areas of progressive massive fibrosis, but rather had many small scars. Claimant's Exhibit 10 at 20, 32, 59. Based on Dr. Distefano's testimony, the administrative law judge rationally concluded that Dr. Distefano's opinion did not establish that the miner suffered from complicated pneumoconiosis, as defined by the regulations. 20 C.F.R. §718.304(b); *see Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 19.

[6] Because the evidentiary record in the survivor's claim differed from that in the miner's claim, the administrative law judge made an independent total disability determination in the survivor's claim. Decision and Order at 19.

[7] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the

20 C.F.R. §718.202(a)(2) and legal[8] pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2), 718.202(a)(4). The administrative law judge also found that the evidence was sufficient to establish that the miner's death was due to clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, claimant challenges the administrative law judge's denial of benefits in the miner's claim, arguing that the administrative law judge erred in his evaluation of the medical opinion evidence in finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and in finding that claimant did not establish invocation of the Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. Claimant replies, reiterating her contentions on appeal. The Director, Office of Worker's Compensation Programs (the Director), did not file a brief in the miner's claim. With respect to the denial of the survivor's claim, employer asserts that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Claimant responds, urging affirmance of the award of benefits in the survivor's claim. The Director filed a limited response, urging affirmance of the award of benefits in the survivor's claim.[9] Employer filed a combined reply brief, reiterating its contentions on appeal.

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lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[9] Claimant does not challenge the administrative law judge's findings, in the miner's claim, that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged on appeal, the administrative law judge's finding, in the survivor's claim, that the biopsy evidence established the existence of simple clinical pneumoconiosis, arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2), 718.203(b).

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 Miner's Claim

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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).

Claimant contends that the administrative law judge erred in his analysis of the medical opinions in determining that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Miller, Odger, Repsher and Tuteur.[10] Dr. Miller, claimant's treating physician, testified that while he "[couldn't] say" that the miner was totally disabled, Hearing Tr. at 23, the miner "was certainly restricted in many ways with his breathing difficulty." Hearing Tr. at 24. Dr. Miller stated that the miner was "probably" restricted to lifting, pushing, and pulling no more than ten pounds of weight, and added that the miner would not have been able to walk the better part of a day in a work environment. Hearing Tr. at 54. Dr. Odger diagnosed artherosclerotic heart disease and resting hypoxia, and stated that the miner had a longstanding history of dyspnea on exertion and was severely limited by knee pain. Dr. Ogder clarified that much of the miner's shortness of breath was due to his cardiac status and deconditioning. Director's Exhibit 12. Dr. Repsher opined that the miner's pulmonary function study and blood gas study results were "within normal limits," reflecting no restrictive impairment and possibly very mild, clinically insignificant chronic obstructive pulmonary disease (COPD). Employer's Exhibit 3 at 4; 10 at 13, 14, 18. However, Dr. Repsher clarified that the miner had "no pulmonary impairment" and "from a respiratory point of view, he [was] fully fit to perform his usual coal mine work." Employer's Exhibit 3 at 3. Dr. Repsher added that the miner did have a significant impairment due to his very serious heart disease. Employer's Exhibits 3, 10. Dr. Tuteur opined that the miner had no measureable impairment of pulmonary function, noting that his valid pulmonary function and blood gas study results showed little to no obstruction,

[10] The administrative law judge also considered the opinion of Dr. Whiteneck, and noted correctly that the physician did not offer an opinion on the issue of disability. Decision and Order at 11; Claimant's Exhibit 1.

no restriction, and no impairment of gas exchange at rest or exercise. Employer's Exhibit 4 at 8. Dr. Tuteur concluded that, while the miner's cardiac status caused him to experience breathlessness, the miner did not have a level of pulmonary impairment that would have prevented him from performing his usual coal mine work. Employer's Exhibit 9 at 15, 18-19, 21, 26, 41.

In considering whether the medical opinions supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge observed that while Dr. Miller testified that the miner's breathing difficulty restricted his activities, he admitted that he "[couldn't] say" that the miner was totally disabled. Decision and Order at 12. Moreover, the administrative law judge noted that Dr. Miller did not identify any objective medical evidence relevant to the miner's respiratory condition to support his opinion. *Id.* In contrast, the administrative law judge found the opinions of Drs. Repsher and Tuteur to be well-documented and well-reasoned, and consistent with Dr. Odger's opinion that the miner's shortness of breath was due to his cardiac status. Decision and Order at 12. The administrative law judge, therefore, found that the preponderance of the medical opinion evidence did not establish total respiratory disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Claimant argues that the administrative law judge erred in finding that Dr. Miller's opinion is insufficient to establish that the miner suffered from a totally disabling pulmonary impairment. Claimant's Brief at 4-7. Claimant asserts that the physical limitations outlined by Dr. Miller establish that the miner was totally disabled, when compared with the exertional requirements of the miner's usual coal mine work. Claimant's Brief at 5-7. Claimant's contention lacks merit. The administrative law judge fully considered Dr. Miller's opinion, that the miner's shortness of breath would have severely restricted his activity, but permissibly discounted Dr. Miller's opinion because the doctor failed to identify any objective medical evidence to support his conclusion.[11] *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48,

[11] Claimant argues that the administrative law judge failed to properly consider Dr. Miller's status as the miner's treating physician. Claimant's Brief at 8-9. The regulations provide that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5). Here, the administrative law judge properly considered Dr. Miller's status as the miner's treating physician but permissibly found that the doctor's opinion was not well-documented. *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39. Consequently, the administrative law judge properly found that Dr. Miller's opinion was not entitled to special deference as the miner's treating physician pursuant to 20 C.F.R. §718.104(d).

2-59 (10th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Nor is there merit to claimant's contention that the administrative law judge erred in crediting the opinions of Drs. Repsher and Tuteur. Claimant's Brief at 10-11. The administrative law judge found that Drs. Repsher and Tuteur based their determinations on a review of multiple medical records, including pulmonary function studies and blood gas studies, and persuasively explained why the miner's objective test results, together with the extensive documentation of miner's heart disease, supported their opinions that the miner did not suffer from a disabling pulmonary or respiratory impairment from any cause. Decision and Order at 12; Employer's Exhibits 3 at 5; 9 at 41. Thus, the administrative law judge permissibly concluded that the opinions of Drs. Repsher and Tuteur were better supported by the objective evidence of record and entitled to greater weight than the opinion of Dr. Miller. *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-59; *Clark*, 12 BLR at 1-155; Decision and Order at 12. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 13.

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.[12] *See Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

The Survivor's Claim

Turning to the survivor's claim, where, as in this case, the administrative law judge has determined that the Section 411(c)(3) and 411(c)(4) statutory presumptions do not apply, claimant must affirmatively establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718. Specifically, 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. §§718.202(a), 718.203, 718.205(b);[13] *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85,

[12] Because claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

[13] The DOL revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The language previously found at 20 C.F.R. §718.205(c) is now set forth in 20 C.F.R. §718.205(b).

1-87-88 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (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(b)(6); *see Pickup*, 100 F.3d at 873-74, 20 BLR at 2-339-40.

Having determined that the autopsy evidence established the existence of clinical pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), the administrative law judge next considered whether claimant also established that the miner suffered from legal pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Distefano, Oesterling, and Tuteur.[14] Dr. Distefano, the autopsy prosector, diagnosed the miner with emphysema due to both coal mine dust exposure and smoking. Claimant's Exhibit 10 at 19-21, 55-57. Drs. Oesterling and Tuteur attributed the miner's COPD/emphysema solely to smoking. Employer's Exhibits 1, 1A, 11, 12.

The administrative law judge determined that the opinion of Dr. Distefano was entitled to the greatest weight because it was well-reasoned, well-documented, and "consistent with the Department of Labor's findings regarding the effects of smoking and coal dust exposure" as expressed in the preamble to the 2001 regulatory revisions. Decision and Order at 28.

In contrast, the administrative law judge found Dr. Tuteur's opinion, that the miner's COPD/emphysema was due solely to smoking, to be entitled to "little weight," because Dr. Tuteur based his opinion on statistical averaging rather than on the specifics of the miner's condition. Decision and Order at 28. Further, the administrative law judge found that Dr. Oesterling failed to explain why coal mine dust exposure did not aggravate the miner's COPD/emphysema, noting that the preamble discussed medical literature stating that smoking-related emphysema and dust-related emphysema occur through similar mechanisms. Decision and Order at 29. Based on the foregoing findings, the

[14] The administrative law judge also considered Dr. Miller's opinion that the miner had "chronic obstructive pulmonary disease (COPD)/coal-workers' pneumoconiosis." Claimant's Exhibit 2. To the extent Dr. Miller attributed the miner's COPD to coal mine dust exposure, the administrative law judge permissibly discounted his opinion as insufficiently documented and based primarily on the miner's work history. *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-59; *Clark*, 12 BLR at 1-155; Decision and Order at 23-24, 27; Claimant's Exhibit 2; Hearing Tr. at 19-22, 36-37, 44-45.

administrative law judge found that claimant established the existence of legal pneumoconiosis. *Id.*

Employer argues that the administrative law judge erred in not providing notice to the parties that he would refer to the preamble when assessing the medical opinions, and further erred by relying on the preamble's discussion of medical science accepted by the Department of Labor (DOL) when he weighed the conflicting evidence. Employer's Brief at 15-23. We disagree. Contrary to employer's contention, the administrative law judge permissibly consulted the preamble to the revised 2001 regulations as a statement of medical studies found valid, and relied upon, by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1025, 24 BLR 2-297, 2-315 (10th Cir. 2010) (holding that, "with regard to disputes concerning the existence and causes of pneumoconiosis, an [administrative law judge] has the benefit of a substantial inquiry by the Department of Labor"); *see also Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127, 25 BLR 2-581, 2-595 (9th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Moreover, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Adams*, 694 F.3d at 802, 25 BLR at 2-212; *Looney*, 678 F.3d at 316, 25 BLR at 2-132.

Employer next contends that the administrative law judge misapplied the preamble and the regulations in crediting Dr. Distefano's opinion that the miner suffered from legal pneumoconiosis, in the form of emphysema due to both coal mine dust exposure and smoking, than to the contrary opinions of Drs. Tuteur and Oesterling. Employer's Brief at 20-23. This contention lacks merit. The administrative law judge reasonably credited Dr. Distefano's diagnosis of legal pneumoconiosis as well-documented because it is based on the results of the autopsy he performed, and on his review of the medical records. *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-59; *Clark*, 12 BLR at 1-155; Decision and Order at 28. Further, the administrative law judge permissibly found Dr. Distefano's opinion to be well-reasoned, because his explanation was consistent with medical studies found reliable by the DOL, that coal mine dust and smoking are additive in causing significant obstructive lung disease. *See Gunderson*, 601 F.3d at 1025, 24 BLR at 2-315; *see also Opp*, 746 F.3d at 1127, 25 BLR at 2-595; *Adams*, 694 F.3d at 802, 25 BLR at 2-211; Decision and Order at 28, *citing* 65 Fed. Reg. 79, 920, 79,940 (Dec. 20, 2000).

Employer argues further that the administrative law judge erred in discounting Dr. Tuteur's opinion that the miner's COPD/emphysema was due solely to smoking. Employer's Brief at 21. Contrary to employer's argument, the administrative law judge permissibly discounted Dr. Tuteur's opinion because he found it to be based on statistical averaging, rather than on the miner's specific condition.[15] *See Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-46, 25 BLR 2-549, 2-568 (10th Cir. 2014); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103-04; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 28, *citing* 65 Fed. Reg. at 79,940. The administrative law judge permissibly found that, in light of the findings of the DOL, as set forth in the preamble, that statistical averaging can hide the effect of coal mine dust exposure in individual miners, Dr. Tuteur did not adequately explain why this particular miner's impairment did not arise, in part, out of his twenty-five years of coal mine dust exposure. *See Goodin*, 743 F.3d at 1345-46, 25 BLR at 2-568; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103-04; Decision and Order at 28, *referencing* 65 Fed. Reg. at 79,941.

Nor is there merit to employer's contention that the administrative law judge did not provide a rational basis for discounting Dr. Oesterling's opinion, that the miner's COPD/emphysema was due solely to smoking. Employer's Brief at 23. The administrative law judge rationally gave less weight to Dr. Oesterling's opinion, because Dr. Oesterling did not adequately explain why coal mine dust exposure did not aggravate the miner's COPD/emphysema, given studies found valid by the DOL that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms.[16] *See*

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[15] As noted by the administrative law judge, Dr. Tuteur testified that the reason he attributed the miner's COPD/emphysema solely to smoking, and not to both smoking and coal mine dust exposure, was the greater statistical probability that smoking would cause obstruction:

> So when one compares the risks of cigarette smoking at a 20 percent rate of development of airflow obstruction and coal dust at a one percent rate, in this case, with reasonable medical certainty, the emphysema found on autopsy and on radiographic studies is a result of the inhalation of cigarette smoke for more than three decades at rates described as up to a pack and a half a day, not due to the inhalation of coal mine dust.

Employer's Exhibit 1 at 28.

[16] As the administrative law judge noted, in attributing the miner's COPD/emphysema to cigarette smoke, and not to coal mine dust exposure, Dr. Oesterling testified that "we're talking about emphysema that classically is associated with the inhalation of tobacco smoke. And clearly, this gentleman had a – what was referred to as a remote history, but he has a history of exposure to tobacco smoke. And I would

Gunderson, 601 F.3d at 1025, 24 BLR at 2-316-17; Decision and Order at 29, *citing* 65 Fed. Reg. 79,943.

Further, contrary to employer's contention, in crediting the opinion of Dr. Distefano, and discounting the opinions of Drs. Tuteur and Oesterling, in light of the medical science cited in the preamble, the administrative law judge did not improperly treat the preamble as evidence, a legal rule, or a presumption that all obstructive lung disease is pneumoconiosis. Employer's Brief at 23-24. Rather, the administrative law judge permissibly consulted the preamble as a statement of medical science accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32. We therefore reject employer's allegations of error in the administrative law judge's weighing of the medical opinions, and affirm the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer also argues that the administrative law judge erred in finding that the miner's death was due to clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Relevant to the cause of the miner's death, the administrative law judge again considered the opinions of Drs. Distefano, Tuteur, and Oesterling. The physicians all agreed that the miner had at least clinical pneumoconiosis, and also agreed that pneumoconiosis was not the immediate cause of the miner's death.[17] As noted above,

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therefore assume that the bulk of what we were seeing in his lungs in the form of emphysema, I would relate to that personal habit; not to occupational exposure." Decision and Order at 25, *quoting* Employer's Exhibit 2 at 10-11.

[17] Dr. Distefano opined that, following abdominal surgery, the miner's history of pancreatitis contributed to his development of multiple post-operative complications including severe bile duct obstruction and the formation of large bile abscesses. These in turn caused the miner to become septic, go into organ failure, and develop bronchopneumonia, which was the immediate cause of his death. Claimant's Exhibits 3 at 11-12; 10 at 48-49, 51. Dr. Oesterling opined that he agreed with Dr. Distefano's primary diagnosis, stating that the miner "died from diffuse sepsis with multiorgan system failure following bile duct obstruction resulting in . . . pancreatitis" and was also "experiencing bronchopneumonia as a complication of his more systemic disease." Employer's Exhibit 1 at 6-7. Dr. Tuteur similarly opined that the miner died due to "polymicrobial sepsis associated with hyepatobiliary obstruction and secondary hepatic abscesses complicated by bronchopneumonia superimposed on advanced panlobular emphysema, advanced coronary disease, and insulin dependent mellitus." Employer's Exhibit 16.

however, the physicians disagreed as to whether the miner also had legal pneumoconiosis, and further disagreed as to whether pneumoconiosis, in any form, hastened the miner's death. Dr. Distefano opined that clinical pneumoconiosis and legal pneumoconiosis, in the form of emphysema due in part to coal mine dust exposure, hastened the miner's death. In contrast, Drs. Tuteur and Oesterling opined that the miner's death was not caused or hastened by pneumoconiosis. The administrative law judge credited the opinion of Dr. Distefano, and discredited the opinions of Drs. Tuteur and Oesterling, to conclude that the miner's death was due to pneumoconiosis.

Employer contends that the administrative law judge erred in finding Dr. Distefano's opinion sufficient to meet claimant's burden to establish that pneumoconiosis hastened the miner's death. Employer contends that, after the United States Court of Appeal for the Tenth Circuit recognized that pneumoconiosis will be considered a substantially contributing cause of a miner's death if it hastens his death, the United States Court of Appeals for the Sixth Circuit clarified 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. Employer's Brief at 24, *citing Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303, 24 BLR 2-257, 2-266 (6th Cir. 2010) and *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). Employer asserts that because Dr. Distefano did not explain the specifically defined process that reduced the miner's life by an estimable time, the administrative law judge erred in finding his opinion sufficient to meet claimant's burden of proof. Employer's Brief at 25.

Employer's contention lacks merit. As the administrative law judge properly found, the Tenth Circuit has held that a survivor is entitled to benefits if pneumoconiosis hastened the miner's death "to any degree," Decision and Order at 33, *citing Pickup*, 100 F.3d at 874, 20 BLR at 2-340, and employer has cited no authority establishing that the Tenth Circuit has adopted a different standard. Thus, the administrative law judge properly found that Dr. Distefano's opinion, that the miner's clinical and legal pneumoconiosis hastened his death "to a certain degree," supports a finding that the miner's death was due to pneumoconiosis.[18] 20 C.F.R. §718.205(b)(6); *see Pickup*, 100 F.3d at 874, 20 BLR at 2-340; Decision and Order at 33. Nor is there merit to employer's contention that the administrative law judge improperly "decided that [Dr. Distefano] was

[18] Dr. Distefano explained that the miner's bronchopneumonia caused his lungs to fill with water in the spaces where there should be air. Claimant's Exhibit 10 at 48. Dr. Distefano opined that the scarring and lung damage from the miner's pneumoconiosis and emphysema also resulted in diminished surface area for gas exchange and contributed to, and hastened, the miner's death. *Id.* at 15-16, 20-21, 24, 39, 40, 42-43, 51, 56, 60-61. Dr. Distefano opined that the miner's pneumoconiosis was not a major contributor to his death, *Id.* at 16, but was a significant contributor. *Id.* at 39.

well-qualified because he performed the autopsy in this case." Employer's Brief at 27. Contrary to employer's contentions, the administrative law judge permissibly found Dr. Distefano to be well-qualified because, in addition to having performed the autopsy in this case, "he is [B]oard-certified in anatomic pathology, laboratory medicine, and forensic pathology; did forensic pathology full time from 1990 to 2008; and has performed 'somewhere around 5000 autopsies.'" *See Pickup*, 100 F.3d at 874, 20 BLR at 2-341; Decision and Order at 34; Claimant's Exhibit 10 at 5-7. Moreover, the administrative law judge acted within his discretion in finding Dr. Distefano's opinion to be "persuasive" because he fully accounted for all of the miner's serious health problems, and acknowledged that these "multiple other problems . . . were of greater significance than his lung problems," but explained how the scarring caused by his clinical and legal pneumoconiosis nonetheless contributed to the miner's death. *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-59; *Clark*, 12 BLR at 1-155; *Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-23 (1992); Decision and Order at 33-34. As substantial evidence supports these credibility determinations, they are affirmed. *See Goodin*, 743 F.3d at 1341, 25 BLR at 2-562; *Hansen*, 984 F.2d at 368, 17 BLR at 2-54.

Furthermore, substantial evidence supports the administrative law judge's permissible finding that Dr. Distefano's opinion, relating the miner's death to clinical and legal pneumoconiosis, is more persuasive and entitled to greater weight than the "inconsistent" opinions of Drs. Tuteur[19] and Oesterling[20] on the role of the miner's

[19] As the administrative law judge noted, in his December 2009 medical report, Dr. Tuteur attributed the miner's death, in part, to emphysema, stating that his death was due to "sepsis . . . complicated by bronchopneumonia superimposed on advanced panlobular emphysema." Employer's Exhibit 16. Dr. Tuteur subsequently testified, however, that even if the miner's emphysema was due to coal mine dust exposure, it did not cause or hasten his death. Employer's Exhibit 1 at 21-22. The administrative law judge found that Dr. Tuteur did not adequately explain how he could reconcile the two statements. *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-59; *Clark*, 12 BLR at 1-155; Decision and Order at 34-35.

[20] Dr. Oesterling initially stated that pneumoconiosis and COPD/emphysema were not aggravating or hastening factors in the miner's death, and that the "significant processes within [the miner's] terminal stage" included destruction of the pancreas and liver, progressive ischemic heart disease, and bronchopneumonia in the lungs, all of which resulted from his sepsis-related multi-organ failure. Employer's Exhibit 2 at 10, 14-15, 18. As noted by the administrative law judge, however, Dr. Oesterling later stated that the miner's COPD/emphysema "may have accelerated the pneumonia." *Id.* Thus, the administrative law judge concluded that Dr. Osetering offered inconsistent testimony as to the role of emphysema in the miner's death. Decision and Order at 34. Moreover,

COPD/emphysema on his death. *See Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Goodin*, 743 F.3d at 1341, 25 BLR at 2-562; *Hansen*, 984 F.2d at 368, 370, 17 BLR at 2-54, 2-59; *Clark*, 12 BLR at 1-155; Decision and Order at 34-35.

Because substantial evidence supports the administrative law judge's findings that claimant established that the miner had clinical and legal pneumoconiosis and that his death was due to pneumoconiosis, those findings are affirmed. 20 C.F.R. §§718.202(a)(4), 718.205. As claimant established each element necessary to demonstrate entitlement to benefits in a survivor's claim under 20 C.F.R. Part 718, we affirm the administrative law judge's award of benefits. *See Trumbo*, 17 BLR at 1-87-88.

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the administrative law judge rationally concluded that as claimant established that the miner's emphysema arose in part out of his coal mine dust exposure, Dr. Oesterling's opinion that emphysema may have accelerated the miner's bronchial pneumonia, may actually support a conclusion that legal pneumoconiosis hastened the miner's death. 20 C.F.R. §718.201(a)(2), (b); *see Pickup*, 100 F.3d at 873, 20 BLR at 2-338-39; *Hansen*, 984 F.2d at 370, 17 BLR at 2-59; *Clark*, 12 BLR at 1-155; Decision and Order at 34.

Accordingly, the administrative law judge's the Decision and Order denying benefits in the miner's claim, and awarding benefits in the survivor's claim, is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge