U.S. Department of Labor

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

BRB No. 16-0206 BLA

H. DARLENE TAYLOR (Widow of KEITH TAYLOR) Claimant-Respondent v. KING KNOB COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/16/2017 DECISION and ORDER

Appeal of the Decision and Order on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Program Director, Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

GILLIGAN, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order on Remand (11-BLA-5998) of Administrative Law Judge Drew A. Swank awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on September 2, 2010, and is before the Board for the second time.[1]

Initially, the administrative law judge credited the miner with 19.08 years of coal mine employment,[2] and found that the autopsy evidence established the existence of clinical pneumoconiosis[3] that arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).[4] Accordingly, the administrative law judge awarded benefits.

[1] Claimant is the widow of the miner, who died on June 23, 2007. Director's Exhibit 14. Section 422(*l*) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012). Claimant cannot benefit from this provision, as the miner's three claims for benefits were denied. Director's Exhibits 1-3.

[2] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 7, 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] The administrative law judge found that the evidence did not establish the fifteen years of qualifying coal mine employment necessary for claimant to invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

Upon review of employer's appeal, the Board vacated several of the administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414.[5] *Taylor v. King Knob Coal Co.*, BRB No. 14-0305 BLA (Mar. 11, 2015)(unpub.)(Boggs, J., concurring). Specifically, the Board noted that, at the hearing, the administrative law judge overruled claimant's objection to the admission of Dr. Wonsettler's autopsy report[6] and, based on that ruling, also admitted Dr. Wonsettler's deposition testimony[7] submitted by employer, as well as Dr. Swedarsky's report, which employer designated as autopsy rebuttal to Dr. Wonsettler's report.[8] Later, however, in his Decision and Order awarding benefits, the

[5] Section 725.414 sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §725.414. Notwithstanding those limitations, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the evidentiary limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). The Board previously set forth in detail the parties' respective evidentiary designations under 20 C.F.R. §725.414 in this case. *Taylor v. King Knob Coal Co.*, BRB No. 14-0305 BLA, slip op. at 4-5 & n. 7 (Mar. 11, 2015)(unpub.)(Boggs, J., concurring).

[6] As the Board noted in its prior decision, Dr. Wonsettler performed the miner's autopsy at Monongalia General Hospital, and her report was submitted into the record as Director's Exhibit 16. In that report, Dr. Wonsettler diagnosed anthrasilicosis of the lymph nodes. The record does not disclose who submitted Dr. Wonsettler's report to the district director, and neither claimant, nor employer, designated it as evidence. At the hearing, claimant requested that Dr. Wonsettler's report be excluded because neither claimant nor employer designated it as evidence in the case. The administrative law judge overruled claimant's objection and admitted Dr. Wonsettler's report, without specifying the basis for its admission. *Taylor*, BRB No. 14-0305 BLA, slip op. at 4-5, 8 & nn.5, 12.

[7] Although Dr. Wonsettler diagnosed anthrasilicosis of the lymph nodes in her autopsy report, she subsequently testified that she found insufficient evidence to diagnose coal workers' pneumoconiosis. *Taylor*, BRB No. 14-0305 BLA, slip op. at 8 n.12; Employer's Exhibit 9 (excluded exhibit).

[8] Dr. Swedarsky reviewed the miner's autopsy report and slides and concluded that the miner did not have pneumoconiosis. Employer's Exhibit 2 (excluded exhibit). In a supplemental report, Dr. Swedarsky noted that he read Dr. Perper's report submitted by claimant, but stated that after again reviewing the autopsy report and slides, he concluded

administrative law judge ruled that Dr. Wonsettler's report was admissible only as a treatment record pursuant to 20 C.F.R. §725.414(a)(4) and, therefore, was not subject to rebuttal. The administrative law judge therefore excluded Dr. Swedarsky's autopsy rebuttal report submitted by employer. Further, the administrative law judge excluded Dr. Wonsettler's deposition testimony because he found that it exceeded the evidentiary limitations applicable to employer.

The Board agreed with employer that, by failing to render evidentiary rulings before issuing his decision, the administrative law judge precluded employer from either redesignating its evidence to conform to the evidentiary limitations, or presenting a good cause argument for exceeding those limitations. *Taylor*, BRB No. 14-0305 BLA, slip op. at 6, *citing L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc). Thus, the Board vacated the administrative law judge's rulings and remanded the case for him to rule on the admissibility of the evidence submitted, advise the parties of his rulings, and provide the parties with an opportunity to respond appropriately, all before issuing his decision on the merits of entitlement. *Id*. The Board further instructed the administrative law judge to explain his determination that Dr. Wonsettler's report was admissible as a medical treatment record, noting that "neither claimant nor employer designated Dr. Wonsettler's report as a medical treatment record." *Taylor*, BRB No. 14-0305 BLA, slip op. at 7.

Because the Board vacated the administrative law judge's evidentiary rulings, it also vacated his findings that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). The Board instructed the administrative law judge that if he again found that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), he was to then weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a) to determine whether it established the existence of pneumoconiosis. *Taylor*, BRB No. 14-0305 BLA, slip op. at 7. Pursuant to 20 C.F.R. §718.205(b), the Board instructed the administrative law judge that he should resolve the conflicting evidence regarding the severity of the miner's clinical pneumoconiosis, and explain how his determination affected the credibility of the physicians' opinions addressing whether clinical pneumoconiosis hastened the miner's death. *Id*. at 8. The Board further instructed the administrative law judge that if, on remand, the evidence did not establish that the miner's death was due to clinical pneumoconiosis, he should determine whether the

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that "a tissue diagnosis of [coal workers' pneumoconiosis] cannot be rendered." Employer's Exhibit 12 (excluded exhibit).

evidence established legal pneumoconiosis[9] pursuant to 20 C.F.R. §718.202(a)(4) and, if so, whether the miner's death was due to legal pneumoconiosis. 20 C.F.R. §718.205(b).[10] *Id*.

On remand, after receiving briefs from the parties regarding the evidentiary issues, the administrative law judge issued an Order on September 28, 2015 in which he admitted Dr. Wonsettler's report as a treatment record, and excluded both Dr. Wonsettler's deposition testimony and Dr. Swedarsky's report.[11] Thereafter, in a Decision and Order on Remand issued on January 5, 2016, the administrative law judge found that the autopsy and medical opinion evidence under 20 C.F.R. §718.202(a)(2),(4) supported a finding of simple clinical pneumoconiosis, and outweighed the negative x-ray and CT scan evidence under 20 C.F.R. §§718.202(a)(1) and 718.107. The administrative law judge therefore found that the evidence established the existence of clinical pneumoconiosis, which he determined was mild. Decision and Order on Remand at 14, 15. The administrative law judge further found that the evidence established that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Decision and Order on Remand at 21 & n.13. Accordingly, the administrative law judge awarded benefits.

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[9] "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).

[10] The Board addressed the legal pneumoconiosis issue because employer challenged the administrative law judge's decision to discount the death causation opinions of Drs. Oesterling and Castle on the basis that their opinions that the miner's emphysema was caused by smoking alone conflicted with scientific evidence cited by the Department of Labor in the preamble to the 2001 regulatory revisions. *Taylor*, BRB No. 14-0305 BLA, slip op. at 8. In addressing employer's argument, the Board noted that the administrative law judge did not address whether claimant carried her burden to establish that the miner's emphysema was legal pneumoconiosis. *Id.* In a concurring opinion, Administrative Appeals Judge Judith S. Boggs stated that the scientific evidence cited in the preamble did not supply a basis for discounting the opinions of Drs. Oesterling and Castle on the grounds that coal dust exposure causes panlobular and bullous emphysema. *Id*. at 9 (Boggs, J., concurring).

[11] The administrative law judge referred to the September 28, 2015 document both as a "Decision and Order on Remand Regarding Admissibility of Evidence," and as an "Order." Order at 2, 11. For ease of reference in this decision, we will refer to the document containing the administrative law judge's evidentiary rulings as an Order, to distinguish it from his Decision and Order on Remand awarding benefits.

On appeal, employer argues that the administrative law judge erred in his evidentiary rulings pursuant to 20 C.F.R. §725.414, and alleges that those errors prejudiced employer because the excluded evidence could have altered the administrative law judge's determination that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer also argues that the administrative law judge erred in finding that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Claimant responds in support of the administrative law judge's evidentiary rulings, with the exception of the admission of Dr. Wonsettler's report, and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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 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).

Evidentiary Issues

On remand, both parties argued to the administrative law judge that Dr. Wonsettler's autopsy report was not a treatment record. Order at 5-6. Employer argued, however, that Dr. Wonsettler's report should be admitted under the "good cause" exception of 20 C.F.R. §725.456(b), because it provided the basis upon which all the other pathology reports of record relied. *Id.* The administrative law judge found that employer failed to demonstrate good cause for admitting Dr. Wonsettler's report. Order at 7-8. The administrative law judge, however, admitted Dr. Wonsettler's report as a "hospitalization record and treatment note" because he found that it was "one of the miner's last medical records, and there [was] no indication . . . it was prepared for litigation purposes." Order at 8.

The administrative law judge excluded Dr. Wonsettler's deposition testimony submitted by employer. Because employer had already submitted two affirmative medical reports, the administrative law judge ruled that employer lacked an evidentiary position in which to submit Dr. Wonsettler's deposition testimony. Order at 9. Further, the administrative law judge rejected employer's argument that admission of Dr. Wonsettler's testimony was necessary for a full disclosure of the facts and to protect employer's due process rights. *Id.*

Turning to Dr. Swedarsky's autopsy rebuttal report, the administrative law judge ruled that, because he admitted Dr. Wonsettler's report as a treatment record pursuant to

20 C.F.R. §725.414(a)(4), it was not subject to rebuttal. Employer argued in the alternative that Dr. Swedarsky's report should be admitted as employer's autopsy rebuttal in response to claimant's affirmative autopsy from Dr. Abraham, because both physicians reviewed the same lung tissue slides to determine whether the miner had pneumoconiosis.[12] Order at 7. The administrative law judge rejected employer's argument and excluded Dr. Swedarsky's report, because Dr. Swedarsky did not address Dr. Abraham's report. Order at 10.

Employer contends that the administrative law judge erred in admitting Dr. Wonsettler's report as a hospitalization or treatment record. Employer asserts that the administrative law judge should have instead admitted it as an additional autopsy report, for good cause shown. Employer's Brief at 34-40.

We agree with employer that the administrative law judge abused his discretion in admitting Dr. Wonsettler's report as a hospitalization or treatment record pursuant to 20 C.F.R. §725.414(a)(4). The administrative law judge admitted Dr. Wonsettler's autopsy report as a treatment record, reasoning that it was the last record in the miner's medical file and was generated for medical, rather than litigation, purposes. Order at 8. However, in this case, no party designated the report as a hospital or treatment record, and the miner was not hospitalized for treatment of a respiratory or pulmonary disease at the time of his death.[13] Additionally, as claimant states in her response brief, "although there were voluminous treatment records of both Monongalia General Hospital and treating pulmonologist Dr. Andrezj Jaworski, [Dr. Wonsettler's report] was not contained in any of these records." Claimant's Brief at 7 (unpaginated). Moreover, substantial evidence does not support the administrative law judge's finding that Dr. Wonsettler's report was prepared for medical, rather than litigation, purposes. The record reflects that Dr. Wonsettler reported that an autopsy limited to the chest "was requested for coal-workers pneumoconiosis evaluation." Director's Exhibit 16 at 2. Because substantial evidence does not support the administrative law judge's determination that Dr. Wonsettler's

[12] Dr. Abraham diagnosed the miner with mild coal workers' pneumoconiosis. Claimant's Exhibit 5. Dr. Swedarsky opined that the autopsy slide evidence did not support a diagnosis of coal workers' pneumoconiosis. Employer's Exhibits 2, 12 (excluded exhibits).

[13] The record reflects that the miner died at home, after having been discharged from the hospital. Director's Exhibit 20. In Dr. Wonsettler's report from the Monongalia General Hospital Department of Pathology and Laboratory Medicine, a block labeled "Visit Type" was completed as "xxNon-Patient." Director's Exhibit 16 at 1.

autopsy report was admissible as a treatment record under 20 C.F.R. §725.414(a)(4), we reverse the administrative law judge's ruling.

We disagree with employer, however, that the administrative law judge erred in finding that good cause did not exist for the admission of Dr. Wonsettler's report as an additional autopsy report. It was employer's burden to demonstrate that good cause existed. *Dempsey v. Sewell Coal Co*., 23 BLR 1-47, 1-62 (2004) (en banc). The administrative law judge acted within his discretion in finding that employer did not show that the evidence already submitted in compliance with the evidentiary limitations was insufficient for the administrative law judge to determine whether claimant was entitled to benefits. *See* 20 C.F.R. §725.456(b)(1); *Clark*, 12 BLR at 1-153; Order at 7-8. The administrative law judge specifically noted that employer submitted an affirmative autopsy report from Dr. Oesterling, claimant submitted an affirmative autopsy report from Dr. Abraham, and that both parties submitted the two medical reports allowed under 20 C.F.R. §725.414. Detecting no abuse of discretion, we affirm the administrative law judge's determination that employer did not establish good cause to admit Dr. Wonsettler's report into the record.[14] *See Clark*, 12 BLR at 1-153.

Employer next contends that the administrative law judge erred in excluding Dr. Wonsettler's deposition testimony. Employer argues that Dr. Wonsettler's deposition testimony must be admitted into the record to ensure its due process rights to confront and cross-examine witnesses.[15] Employer's Brief at 46. We need not resolve this issue. As just discussed, Dr. Wonsettler's report was not properly admitted as a treatment

[14] Contrary to employer's contention, the fact that Dr. Wonsettler's report is the only pathologist's report containing both gross and microscopic descriptions of the miner's lungs does not necessitate its admission. A report by a pathologist who has reviewed the miner's autopsy tissue slides can constitute a report of an autopsy under 20 C.F.R. §725.414(a). *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-238 (2007)(en banc). Employer's argument that the report should have been admitted because "the Director cannot be the proponent of [it], and neither of the other parties can be forced to designate it as evidence," is essentially an argument that the report is relevant and should be considered even though not designated by any party. Employer's Brief at 38. An appeal to relevancy is insufficient to establish good cause. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 n.18, 23 BLR 2-430, 2-460 n.18 (4th Cir. 2007); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-61-62 (2004)(en banc).

[15] Employer notes that Dr. Wonsettler explained in her deposition that she found no pneumoconiosis, and asserts that consideration of her testimony could have altered the outcome of the claim. Employer's Brief at 46 n.8.

record and it was not otherwise admissible because its inclusion would have exceeded the evidentiary limits, given the administrative law judge's permissible finding as to good cause. The scope of Dr. Wonsettler's deposition testimony is limited to admissible evidence. *See* 20 C.F.R. §§725.457(d), 725.458. A review of the deposition transcript that employer sought to admit reflects that Dr. Wonsettler discussed only her autopsy findings. Employer's Exhibit 9 (excluded exhibit). Therefore, under the regulations, none of her deposition testimony could be considered by the administrative law judge. *See* 20 C.F.R. §§725.457(d), 725.458. More importantly, however, the administrative law judge did not rely on Dr. Wonsettler's report in his decision. Thus, employer does not explain how it was prejudiced by its alleged inability to confront and cross-examine Dr. Wonsettler. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253-54, 25 BLR 2-779, 2-788 (4th Cir. 2016).

Employer further contends that the administrative law judge erred in excluding Dr. Swedarsky's report as an autopsy rebuttal report to Dr. Abraham's affirmative autopsy submitted by claimant, on the ground that Dr. Swedarsky did not address Dr. Abraham's report. Employer's Brief at 46-49. We agree.

Where the opposing party has submitted affirmative autopsy evidence, a party is entitled to submit a rebuttal autopsy report. *See* 20 C.F.R. §725.414(a)(2)(i), (a)(3)(ii). Rebuttal evidence need not contradict the specific item of evidence to which it is responsive but, rather, need only refute "the case" presented by the opposing party. *J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-83 (2008). The "regulations contemplate that an opinion offered in rebuttal of the case presented by the opposing party will analyze or interpret the evidence to which it is responsive." *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240 (2007)(en banc).

In this case, claimant designated Dr. Abraham's report as her affirmative autopsy report. Dr. Abraham indicated that he reviewed the miner's "autopsy slides," which he described as "H&E stained slides corresponding to the autopsy report A-07-9 . . . ." Claimant's Exhibit 5 at 1. The rebuttal report of Dr. Swedarsky indicates that he reviewed "twenty H & E stained slides labeled A-07-09 and numbered 1 through 20 . . . ." Employer's Exhibit 2 at 1 (excluded exhibit). Thus, Dr. Swedarsky's report interprets the evidence to which it is responsive, namely the same tissue samples that form the basis of Dr. Abraham's autopsy report. *See Keener*, 23 BLR at 1-240. Moreover, while Dr. Swedarsky's report does not discuss or criticize the findings of Dr. Abraham, it nonetheless rebuts Dr. Abraham's report in that after consideration of the same lung tissue evidence, Dr. Swedarsky arrived at a conclusion contrary to the one reached by Dr. Abraham with regard to whether the miner had pneumoconiosis. We therefore vacate the administrative law judge's ruling, and remand this case for him to admit Dr. Swedarsky's

report as employer's autopsy rebuttal, to the extent that Dr. Swedarsky relies upon the same evidence as was relied upon by Dr. Abraham.[16] *See Keener*, 23 BLR at 1-238-40.

Merits of Entitlement

Because we have vacated the administrative law judge's decision to exclude Dr. Swedarsky's autopsy rebuttal report, we vacate the administrative law judge's findings that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that the miner's death was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.205(b), and instruct the administrative law judge to reconsider those issues.

In the interest of judicial economy, however, we will also address employer's challenges to the administrative law judge's finding that the miner's death was due to clinical pneumoconiosis. Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis set forth at 20 C.F.R. §718.304, is applicable, or the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(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(b)(6).

After finding that the miner's clinical pneumoconiosis was mild, the administrative law judge considered the opinions of Drs. Houser, Perper, Castle, and Oesterling regarding the cause of the miner's death. Drs. Houser and Perper opined that

[16] We decline claimant's request to hold that the administrative law judge's exclusion of Dr. Swedarsky's autopsy rebuttal report was harmless error because its consideration "would not shift the weight of the evidence," given that Drs. Abraham, Perper, and Oesterling diagnosed clinical pneumoconiosis. Claimant's Response at 9 (unpaginated). The excluded evidence is relevant to whether the miner suffered from clinical pneumoconiosis, *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253-54, 25 BLR 2-779, 2-788 (4th Cir. 2016), and the Board is not authorized to weigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

the miner had both clinical pneumoconiosis and legal pneumoconiosis,[17] which contributed to his death due to respiratory failure. Claimant's Exhibits 2, 3; Employer's Exhibit 13. Drs. Castle and Oesterling opined that the miner died due to heart disease and pulmonary complications caused by panlobular and bullous emphysema due solely to smoking, and opined that the miner's mild clinical pneumoconiosis did not contribute to his death.[18] Employer's Exhibit 1, 5, 10, 11.

The administrative law judge discounted Dr. Houser's opinion because he found that Dr. Houser did not adequately explain how he determined that pneumoconiosis contributed to the miner's death. The administrative law judge also discounted the opinions of Drs. Castle and Oesterling, because he found that their opinions that the miner's emphysema was due solely to smoking were contrary to medical science in the preamble to the 2001 regulatory revisions. He further discounted Dr. Castle's opinion because Dr. Castle "fail[ed] to accurately diagnose the presence of [clinical] coal workers' pneumoconiosis . . . ." Decision and Order on Remand at 19. The administrative law judge credited Dr. Perper's opinion, finding that Dr. Perper "explained why he concluded that the miner's coal workers' pneumoconiosis and COPD/emphysema contributed to his death," and supported his opinion with references to the evidence of record, and with citations to medical studies.[19] *Id*. at 20.

[17] Drs. Houser and Perper opined that the miner's chronic obstructive pulmonary disease and emphysema were due to both smoking and coal mine dust exposure. Claimant's Exhibits 2 at 40; 3 at 5; Employer's Exhibit 13 at 32.

[18] Dr. Castle initially opined that it was unlikely the miner had clinical pneumoconiosis, but that if it was present, it was of such a "minimal degree" that it played no role in his death. Employer's Exhibit 5 at 24-25. Later, after reviewing additional evidence, including the pathologists' reports, Dr. Castle opined that the miner "might have had a very mild degree of pathologic coal workers' pneumoconiosis," but concluded that it did not contribute to, or hasten, his death. Employer's Exhibit 11 at 8-9.

[19] The administrative law judge found that Dr. Perper's opinion was consistent with the preamble, in that Dr. Perper attributed the miner's respiratory condition to both smoking and coal mine dust exposure, and cited medical studies to support his opinion that smoking and coal dust are additive in causing emphysema. He further found that Dr. Perper's opinion that the miner's clinical pneumoconiosis was "mild to moderate" was consistent with his finding that the miner had mild clinical pneumoconiosis. Decision and Order on Remand at 20 & n.11.

Employer contends that the administrative law judge did not address specifically whether clinical pneumoconiosis contributed to the miner's death pursuant to 20 C.F.R. §718.205(b). Employer's Brief at 10-19. Employer notes that the administrative law judge did not find that the evidence established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), yet weighed the conflicting opinions on whether clinical pneumoconiosis contributed to the miner's death by referring to principles generally relating to determining the existence of legal pneumoconiosis. *Id*. Employer alleges further that the administrative law judge erred in discounting the opinions of Drs. Castle and Oesterling that clinical pneumoconiosis did not contribute to the miner's death, and did not adequately explain his decision to credit Dr. Perper's opinion. Employer's Brief at 20-33. We agree with employer, in part.

On remand, if the administrative law judge again finds that the miner had mild clinical pneumoconiosis, he must address specifically whether the evidence establishes that the miner's *clinical* pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b). In this regard, the administrative law judge should explain specifically what aspect(s) of Dr. Perper's opinion he credits, and why, to find that mild clinical pneumoconiosis hastened the miner's death.[20] In weighing the death causation opinions of Drs. Castle and Oesterling, the administrative law judge should take into account Dr. Castle's opinion that the miner may have had mild clinical pneumoconiosis. Further, the administrative law judge should assess the credibility of the physicians' opinions that the miner's clinical pneumoconiosis did not contribute to his death, apart from assessing the credibility of their opinions that the miner's emphysema was not legal pneumoconiosis. The administrative law judge should address the qualifications of the physicians, the documentation underlying their medical judgments, and the explanations for their conclusions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark*, 12 BLR at 1-155.

On remand, should the administrative law judge find that the evidence does not establish that the miner's death was due to clinical pneumoconiosis, he must address whether the evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, if so, whether it also establishes that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(b). In reweighing the medical opinion evidence on those issues on remand, the administrative law judge has the

[20] Contrary to employer's additional contention, we see no error in the administrative law judge's determination that Dr. Perper's opinion that the miner had "mild to moderate" clinical pneumoconiosis was consistent with the administrative law judge's finding of mild clinical pneumoconiosis.

discretion to consider the extent to which each opinion is consistent with the premises underlying the 2001 revised regulations. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). However, the administrative law judge must be mindful that in analyzing the conflicting medical evidence he should address the miner's specific condition in this case, rather than rely on general references to the preamble.[21] *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge should also bear in mind that coal mine dust exposure is not automatically implicated as a cause of the miner's lung condition by the scientific literature that was discussed in the preamble; the burden is on claimant to establish that the miner's COPD and emphysema in fact arose out of coal mine employment and thus constituted legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79920, 79923, 79938 (Dec. 20, 2000). Additionally, the administrative law judge should evaluate the credibility of the medical opinions on the issue of legal pneumoconiosis in light of whether the physicians relied on an accurate understanding of the length of the miner's coal mine employment. *See Looney*, 678 F.3d at 311 n. 2, 25 BLR at 2-124 n.2; *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993). Finally, the administrative law judge should assess Dr. Perper's death causation opinion under the "hasten death" standard, as elucidated by the United States Court of Appeals for the Fourth Circuit. *See U. S. Steel Mining Co., v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

[21] Although the preamble states that "observations support the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms," 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000), the preamble does not state that the mechanisms are identical.

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

SO ORDERED.

RYAN GILLIGAN
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

To the extent that the preamble discusses specific types of emphysema that may be caused by coal dust exposure, I note that the preamble identifies centrilobular emphysema, centriacinar emphysema, and focal emphysema, but not panlobular and bullous emphysema. *See* 65 Fed. Reg. 79,920, 79,941-42 (Dec. 20, 2000). Consequently, contrary to the administrative law judge's finding, the scientific evidence cited in the preamble does not supply a basis for discounting the opinions of Drs. Oesterling and Castle on the grounds that coal dust exposure causes panlobular and bullous emphysema. I concur in all other respects with the majority's decision.

JUDITH S. BOGGS
Administrative Appeals Judge