BRB No. 02-0200 BLA

ISABELL TAYLOR (Widow of JOHN LLOYD TAYLOR)	)	
Claimant- Respondent	)	
v.	)	
RAG AMERICAN COAL COMPANY	)	
Employer-Petitioner	)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant

.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Mary Forrest-Doyle (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-1299) of Administrative Law Judge Rudolf L. Jansen awarding benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] The instant case involves a survivor's claim filed on June 2, 1998.[2] After crediting the miner with forty years of coal mine employment, the

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

[2]The miner filed a claim on January 5, 1981. Director's Exhibit 24. In a Decision and Order dated August 19, 1987, Administrative Law Judge Charles W. Campbell determined that he did not have jurisdiction to consider the miner's 1981 claim because the miner had failed to timely appeal the district director's denial of benefits. *Id.* Judge Campbell, therefore, declined to consider the miner's 1981 claim. *Id.* Judge Campbell also affirmed the district director's denial of the miner's request for modification. *Id.* By Decision and Order dated May 31, 1989, the Board affirmed Judge Campbell's finding that the miner had abandoned his 1981 claim. *Taylor v. Amax Coal Co.*, BRB No. 87-2599 BLA (May 31, 1989) (unpublished). The Board, however, held that the miner's subsequently submitted evidence constituted a petition for modification. *Id.* The Board, therefore, remanded the case to Judge Campbell for consideration of whether the miner's evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000). *Id.* The Board subsequently denied employer's motion for reconsideration. *Taylor v. Amax Coal Co.*, BRB No. 87-2599 BLA (Aug. 16, 1990) (Order) (unpublished).

On remand, Judge Campbell considered all of the evidence of record. Director's Exhibit 24. Judge Campbell found, *inter alia*, that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* The administrative law judge also found that the miner was not entitled to the presumption set out at 20 C.F.R. §718.304 (2000). *Id.* Accordingly, Judge Campbell denied benefits. *Id.* By Decision and Order dated January 26, 1994, the Board affirmed Judge Campbell's finding that the miner was not entitled to the presumption set out at 20 C.F.R. §718.304 (2000). *Taylor v. Amax Coal Co.*, BRB No. 91-1056 BLA (Jan. 26, 1994) (unpublished). The Board further affirmed Judge Campbell's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* The Board, therefore, affirmed Judge Campbell's denial of benefits. *Id.*

The miner subsequently requested modification of his denied claim. Director's Exhibit 24. The district director denied the miner's request for modification on October 5,

administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4). The administrative law judge also found that claimant was entitled to a presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the definition of pneumoconiosis set out at revised 20 C.F.R. §718.201(c) is impermissibly retroactive. Employer also argues that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis. Employer also contends that the administrative law judge erred in finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis. Employer finally contends that it should be dismissed from the case because the administrative law judge's reliance upon Dr. Jones's autopsy report constitutes a violation of its due process rights. Claimant[3] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that employer waived its due process argument. The Director also contends that the definition of pneumoconiosis set out at revised 20 C.F.R. §718.201(c) is not impermissibly retroactive. In its reply to claimant's response brief, employer reiterates its previous contentions. In its separate reply to the Director's response brief, employer argues that it did not waive its due process argument. Employer also reiterates its contention that revised 20 C.F.R. §718.201(c) is impermissibly retroactive.[4]

1995. *Id.* There is no indication that the miner took any further action in regard to his 1981 claim.

[3]Claimant is the surviving spouse of the deceased miner who died on June 14, 1997. Director's Exhibit 7.

[4]Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2) and (a)(4) and 718.203(b), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Employer initially contends that revised Section 718.201(c) is impermissibly retroactive. Revised Section 718.201(c) recognizes pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction the instant case arises, has specifically recognized the progressive nature of pneumoconiosis. *See Amax Coal Co. v. Franklin*, 957 F.2d 355, 359, 16 BLR 2-50, 2-57 (7th Cir. 1992) (Black lung disease, at least when broadly defined, is a progressive disease...."); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1139 (7th Cir. 1988) ("Pneumoconiosis is a progressive disease...."). The U.S. Supreme Court has also recognized the progressive nature of pneumoconiosis. *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988) (recognizing that pneumoconiosis is a "serious and progressive pulmonary condition"). Moreover, the United States Court of Appeals for the District of Columbia recently held that revised Section 718.201(c) is not impermissibly retroactive. *Nat'l Mining Ass'n v. United States Dep't of Labor*, F.3d , 2002 WL 130007 (D.C. Cir. June 14, 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). Consequently, we reject employer's contention that revised Section 718.201(c) is impermissibly retroactive.

We now turn our attention to employer's contentions regarding the merits of the claim. Employer argues that the administrative law judge erred in finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In his consideration of the x-ray evidence, the administrative law judge acted within his discretion by according greater weight to the interpretations of claimant's most recent x-rays. *See Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); Decision and Order at 10. The administrative law judge also properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 10. Specifically, the administrative law judge found that Drs. Aycoth and Lee, each dually qualified as a B reader and Board-certified radiologist, rendered positive interpretations of the miner's March 25, 1994 x-ray, the only x-ray taken after November 19, 1986 that was interpreted by physicians qualified as B readers and/or Board-certified radiologists. Decision and Order at 10; Director's Exhibit 24. The administrative law judge further found that there were no negative interpretations of this x-ray. Decision and Order at 10. The administrative

law judge, therefore, found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis. *Id.*

Employer argues that the administrative law judge erred in finding that Dr. Linge's interpretations of the miner's x-rays were "not diagnostic of pneumoconiosis." Dr. Linge interpreted the miner's x-rays taken on January 12, 1994, March 7, 1994, March 10, 1994, March 14, 1994, March 25, 1994, September 23, 1994, March 11, 1997, June 4, 1997, June 7, 1997 and June 10, 1997. Director's Exhibits 9, 17. Because Dr. Linge, in rendering his x-ray interpretations, did not mention pneumoconiosis, employer contends that the doctor's x-ray interpretations should have been considered negative for pneumoconiosis.

An x-ray interpretation that does not mention pneumoconiosis will, in appropriate circumstances, support an inference that a miner does not suffer from pneumoconiosis. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). It is a question of fact for the administrative law judge to resolve. *Id.* However, the administrative law judge, in the instant case, properly accorded greater weight to the x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. Because Dr. Linge's radiological qualifications are not found in the record, the administrative law judge's error, if any, in finding that his x-ray interpretations were "not diagnostic of pneumoconiosis" is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986); Decision and Order at 10. Inasmuch as it is based on substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer next contends that the administrative law judge committed numerous errors in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis. Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[5] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v.*

[5]Section 718.205(c) provides that:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the

Director, OWCP, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).

In the instant case, Drs. Abraham, Jones, Green and Cohen opined that the miner's death was due to pneumoconiosis. Drs. Caffrey, Fino, Hutchins, Kleinerman, Naeye, Repsher and Tuteur opined that the miner's death was not due to pneumoconiosis. After according less weight to the opinions of Drs. Caffrey, Fino, Hutchins, Naeye, Repsher, Tuteur, Abraham and Green, the administrative law judge found that:

> Weighing these reports together, I give the most weight to the opinions of Drs. Cohen and Jones. Both physicians are highly qualified, gave well documented and reasoned opinions, and sufficiently explained their diagnoses in light of their findings. Considering all the relevant factors for crediting and discrediting a physician's medical opinion, I find that the weight of the evidence of record supports a finding that [the miner] died as a result of multiple and recurrent pulmonary diseases, but that his death was hastened by his underlying pneumoconiosis. Accordingly, I find that the weight of the medical evidence demonstrates by a preponderance of the evidence that [the miner's] death was due to pneumoconiosis, as defined in §718.205. By reason of the foregoing, it is concluded that [claimant] is entitled to benefits.

---

evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

Decision and Order at 17.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Naeye and Caffrey. In evaluating the relevant medical opinion evidence at Section 718.205(c), the administrative law judge noted that Drs. Naeye and Caffrey opined that pneumoconiosis does not progress after a miner ceases coal mine employment.[6] Because the administrative law judge found that Drs. Naeye and Caffrey foreclosed "all possibility of a progression of pneumoconiosis," he found that their opinions were contrary to the Act and entitled to little weight. Decision and Order at 15.

In addressing the "hostility-to-the-Act" rule, the Seventh Circuit has held that the rule "allows an administrative law judge to disregard medical testimony when a physician's testimony is affected by his subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions." *Pancake v. Amax Coal Co.*, 858 F.2d 1250, 1256 (7th Cir. 1988); *see also Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). However, a physician's expression of a view that is at odds with the Act is not enough by itself to exclude that opinion from consideration. Rather, the administrative law judge must determine whether, and to what extent, the hostile opinion affected the physician's medical diagnoses. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). Inasmuch as the administrative law judge did not undertake such an analysis in the instant case, he erred in his consideration of the opinions of Drs. Naeye and Caffrey.

[6]Dr. Naeye opined that simple coal workers' pneumoconiosis "does not advance after a miner has quit the industry." Director's Exhibit 18. Dr. Caffrey noted that "[i]t is a well known fact, which is accepted by all experts in the fields, that simple coal workers' pneumoconiosis does not progress after a miner leaves the industry." Director's Exhibit 20.

Employer next argues that the administrative law judge failed to provide a basis for discrediting Dr. Kleinerman's opinion.[7] The administrative law judge noted that Dr. Kleinerman concluded that "pneumoconiosis did not contribute to [the miner's] cardiac failure and death." Decision and Order at 17. The administrative law judge further found that Dr. Kleinerman's report was "well reasoned and documented." *Id.* Although the administrative law judge subsequently accorded the "most weight" to the opinions of Drs. Cohen and Jones, he did not provide a basis for preferring their opinions over that of Dr. Kleinerman. *Id.* Consequently, the administrative law judge's consideration of Dr. Kleinerman's opinion does not comply with the requirements of the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

---

[7]Dr. Kleinerman reviewed the miner's autopsy slides and medical evidence. In a report dated June 13, 1999, Dr. Kleinerman opined that the extent of the miner's coal workers' pneumoconiosis was insufficient to cause pulmonary or respiratory dysfunction. Director's Exhibit 19. Dr. Kleinerman further opined that:

> In my opinion and with reasonable medical certainty [the miner] did not die as a result of the small amount of simple CWP present in his lungs. [The miner] appears to have died of cardiac failure with marked cardiac hypertrophy of the biventricular type. Cardiac failure caused severe pulmonary edema. However, the simple CWP present did not cause, did not contribute to, and did not hasten [the miner's] death.

Director's Exhibit 19.

Employer also contends that the administrative law judge engaged in a selective analysis of the evidence. Employer argues that:

> The ALJ's determination to credit Drs. Jones and Cohen and discredit Drs. Tuteur, Hutchins, Repsher and Fino must be vacated. In analyzing this evidence, the [administrative law judge] subjected the opinions finding no connection between [the miner's] death and his pneumoconiosis to a higher standard of documentation and explanation than the reports by Drs. Cohen and Jones.

Employer's Brief at 20.

Although the administrative law judge carefully considered the reasoning underlying the opinions rendered by Drs. Tuteur, Hutchins, Repsher and Fino, he failed to apply the same degree of scrutiny to the opinions rendered by Drs. Cohen and Jones. *See* Decision and Order at 13-17. The administrative law judge accepted the opinions of Drs. Jones and Caffrey with little consideration of their underlying reasoning.[8] *Id.* at 16-17.

---

[8]In regard to Dr. Jones's opinion, the administrative law judge stated:

> Dr. Jones opined that the respiratory failure causing [the miner's] death was due, in part, to his cardiac failure. He attributed the cor pulmonale to pneumoconiosis, thus concluding that pneumoconiosis hastened [the miner's] death. His opinion is well documented and reasoned, and he performed the autopsy, entitling his opinion to increased weight.

Decision and Order at 16 (case citation omitted).

The administrative law judge provided even less scrutiny to the reasoning underlying Dr. Cohen's opinion, stating that:

> Dr. Cohen specifically addresses the combined effect of [the miner's] recurrent pulmonary emboli, and his underlying lung diseases. He opines that, according to the 1994 spirometry, the [m]iner suffered from a combination of restrictive and obstructive defect. Dr. Cohen, as well as consultant [Dr. Kennedy] finds the June 23, 1994 study to be interpretable. Dr. Cohen is as qualified to opine that this study is interpretable as any other physician opining to its invalidity. He further opines that [the miner's] coal dust induced diseases so compromised lung function that he was unable to withstand the

> combined insults of pneumonia and recurrent pulmonary emboli. I find his opinion well documented and reasoned.

Decision and Order at 17 (case citation omitted).

Employer contends that Dr. Cohen "offered no explanation for his opinion." Employer's Brief at 23. In addition to diagnosing clinical pneumoconiosis, Dr. Cohen also arguably diagnosed legal pneumoconiosis, having attributed the miner's COPD and emphysema to his coal mine employment. Claimant's Exhibit 1. Dr. Cohen opined that the miner died of respiratory failure due to "severe COPD, pneumonia, and recurrent pulmonary emboli." Claimant's Exhibit 1. Dr. Cohen attributed the miner's "underlying lung disease" to his coal dust exposure and cigarette smoking. *Id.*

In his summary of the medical opinion evidence, the administrative law judge stated that:

> Dr. Cohen diagnosed pneumoconiosis and emphysema, and opined that [the miner] was suffering from a severe obstructive defect. He further opined that [the miner's] pneumoconiosis prevented him from withstanding the combined insults of pneumonia and emboli. Without the underlying pneumoconiosis, he opined that the miner would have lived longer.

Decision and Order at 9.

In his consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge stated that:

> Dr. Cohen opines that [the miner's] coal dust induced diseases so compromised lung function that he was unable to withstand the combined insults of pneumonia and recurrent pulmonary emboli.

Decision and Order at 17.

Contrary to the administrative law judge's characterization, Dr. Cohen did not specifically opine that the miner would have lived longer if he had not suffered from "pneumoconiosis." Dr. Cohen actually opined that the miner would have lived longer if he had not suffered from his "severe underlying chronic lung disease." *See* Claimant's Exhibit 1. The administrative law judge erred in failing to address whether Dr. Cohen attributed the miner's death to "legal pneumoconiosis," *see* 20 C.F.R. §718.201(a)(1), rather than "clinical pneumoconiosis." See 20 C.F.R. §718.201(a)(2). Although the administrative law judge found that the evidence was sufficient to establish clinical pneumoconiosis, he did not address whether the evidence of record was sufficient to establish that the miner's other lung diseases arose "out of coal mine employment." *Id.* On remand, the administrative law judge should address whether the evidence is sufficient to establish that the miner's other underlying lung diseases constitute "legal pneumoconiosis" as defined at 20 C.F.R.

§718.201.

The administrative law judge also failed to adequately address whether Dr. Cohen relied upon the results of an invalid pulmonary function study in rendering his opinions. In his discussion of Dr. Abraham's opinion, the administrative law judge noted that "[a]ll of the pulmonary function tests since 1981 have been invalidated by various physicians." Decision and Order at 16. However, after noting that Dr. Cohen relied upon the results of the miner's June 23, 1994 pulmonary function study to diagnose "a combination of restrictive and obstructive defect," the administrative law judge noted that Drs. Cohen and Kennedy found that the miner's June 23, 1994 pulmonary function study was "interpretable." *Id.* at 17. The administrative law judge further noted that Dr. Cohen was "as qualified to opine that this study is interpretable as any other physician opining to its invalidity." *Id.*

In his report, Dr. Cohen acknowledged that Drs. Renn and Tuteur had invalidated the miner's June 23, 1994 pulmonary function study. Claimant's Exhibit 1. Dr. Cohen further noted that the reduction in diffusion could "be due in part to poor inspiratory effort." *Id.* Although Dr. Cohen interpreted the study as revealing a moderate restrictive defect and a mild obstructive defect, he cautioned that the "restriction would have to be confirmed by lung volume measurements." *Id.* The administrative law judge failed to consider all of the conflicting evidence regarding the validity of the pulmonary function study evidence. On remand, the administrative law judge is instructed to make specific findings regarding the validity of the pulmonary function study evidence of record and reconsider Dr. Cohen's opinion in light of his conclusions.

Employer also argues that the administrative law judge failed to adequately address deficiencies in Dr. Jones's report. Dr. Jones performed the miner's autopsy on June 15, 1997. In an undated autopsy report, Dr. Jones opined that:

> 1. [The miner] suffered from severe coal workers' pneumoconiosis.
>
> 2. [The miner] died of respiratory failure and chronic obstructive pulmonary disease.
>
> 3. [The miner] suffered from cardiac complications of chronic obstructive pulmonary disease (cor pulmonale).
>
> 4. [The miner's] respiratory failure was due in large part to his heart failure.
>
> 5. The presence of extensive coal workers' pneumoconiosis caused the cor pulmonale which in turn precipitated [the miner's] death.

> 6. [The miner] **did not** suffer from significant coronary artery disease.
> 7. [The miner's] long-standing coal workers' pneumoconiosis was significantly related to his death and the presence of long-standing coal workers' pneumoconiosis hastened his death and finally the presence of pneumoconiosis significantly impeded his lung's [sic] ability to provide adequately oxygenated blood to the rest of his body which resulted in his untimely death.

Director's Exhibit 8 (footnote omitted).[9]

Employer contends, *inter alia*, that the administrative law judge erred in failing to address the significance of the fact that Dr. Jones's opinion was based on the erroneous belief that the miner had x-ray evidence of complicated pneumoconiosis. We disagree. In his autopsy report, Dr. Jones noted that several of the miner's chest x-rays were interpreted as revealing complicated pneumoconiosis. Director's Exhibit 8. Dr. Jones, however, did not specifically diagnose complicated pneumoconiosis and there is no indication that Dr. Jones's opinions were based upon a finding of complicated pneumoconiosis.

Employer also argues that the administrative law judge erred in failing to adequately address evidence calling into question Dr. Jones's diagnosis of cor pulmonale. The administrative law judge accorded Dr. Jones's opinion as to the condition of the miner's heart "increased weight" based upon Dr. Jones's status as the autopsy prosector. Decision and Order at 16. The Seventh Circuit has held that if there is a medical reason to believe that a visual scrutiny of gross attributes is more reliable than microscopic examination of tissue samples as a way to diagnose a condition, then relying on the conclusions of the prosector is sensible. *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001).

[9]Dr. Jones also completed the miner's death certificate on June 15, 1997. Director's Exhibit 7. Dr. Jones attributed the miner's death to respiratory failure due to pulmonary edema, a left lower lobe pulmonary infarction and a pulmonary embolis. *Id.* Dr. Jones listed coal workers' pneumoconiosis as an other significant condition contributing to death. *Id.*

After noting that Drs. Caffrey, Fino and Naeye disputed Dr. Jones's finding of cor pulmonale, the administrative law judge noted that Dr. Fino admitted that the prosector was in a better position to evaluate the existence of cor pulmonale. Decision and Order at 16. During a January 5, 2001 deposition, Dr. Fino acknowledged that a prosector would be in the best position to determine the size of a miner's right and left ventricles "**if the prosector is doing it properly.**" Employer's Exhibit 15 at 32 (emphasis added). In the instant case, Dr. Fino opined that the miner did not suffer from cor pulmonale. *Id.* at 18. Dr. Fino explained that he found Dr. Jones's measurements of claimant's left ventricle questionable in light of the miner's multiple hospitalizations for congestive heart failure. *Id.* at 32-33. Drs. Caffrey and Naeye also questioned Dr. Jones's finding of cor pulmonale.[10] Director's Exhibits 18,

[10]Dr. Caffrey noted that Dr. Jones failed to indicate where his measurements of the miner's heart were taken. Director's Exhibit 20. Dr. Caffrey explained that to be reliable, the measurements must be taken from the base of the trabeculae. *Id.* Dr. Caffrey stated that he did not know why Dr. Jones did not take sections of the miner's heart and coronary arteries for the reviewing pathologists. *Id.* Dr. Caffrey further stated that:

20. On remand, the administrative law judge is instructed to specifically address the validity of the criticisms of Dr. Jones's diagnosis of cor pulmonale put forward by Drs. Fino, Caffrey and Naeye.

> In his independent opinion Dr. Jones stated that [the miner] suffered from cardiac complications of chronic obstructive pulmonary disease and then he puts in brackets after that, "cor pulmonale." This is not the appropriate way to make a diagnosis of cor pulmonale, and I do not believe that Dr. Jones has objectively established the fact that [the miner] had cor pulmonale.

Director's Exhibit 20.

> Dr. Naeye explained that:
>
> At autopsy [the miner's] cardiac right ventricle was reported to be 5 mm thick. If this was a full thickness measurement as I suspect it cannot be interpreted. To be reliably interpreted such measurements must be made from the base of the trabeculae. Therefore, it is not possible to know whether chronic cor pulmonale was present or absent in [the miner].

Director's Exhibit 18.

Employer also contends that the autopsy prosector's failure to preserve heart or coronary tissue samples for review by other medical experts prejudiced its ability to refute Dr. Jones's opinion that the miner suffered from cor pulmonale. Because it was prevented from disputing Dr. Jones's diagnosis of cor pulmonale, employer argues that it should be dismissed from the case. We agree with the Director's contention that employer waived its right to raise this issue for the first time on appeal. At the time of the hearing, employer was aware that Dr. Jones had not provided heart tissue samples for review. Employer did not argue that the lack of lung tissue samples undermined its ability to defend the claim. Employer also failed to object to the admission of Dr. Jones's autopsy report into the record. Employer did not seek to cross-examine Dr. Jones regarding his gross examination of the miner's heart by scheduling a deposition. Because it failed to raise the argument before the administrative law judge, employer waived the right to argue, for the first time on appeal, that Dr. Jones's failure to provide cardiac samples prejudiced its ability to provide an adequate response to Dr. Jones's diagnosis of cor pulmonale.[11] *See Cabral v. Eastern Associated Coal Co.*, 18 BLR 1-25 (1993).

Employer also contends that the administrative law judge erred in taking judicial notice of Dr. Jones's qualifications. An administrative law judge may take judicial notice of the qualifications of physicians provided he does so in accord with the general principles concerning judicial notice. *See Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge took judicial notice of the fact that Dr. Jones is Board-certified in Pathology and Forensic Pathology. Decision and Order at 6. Employer does not assert that the administrative law judge's characterization of Dr. Jones's qualifications is inaccurate. Rather, employer contends that if it had been provided notice that Dr. Jones's qualifications would be entered into the record, it would have submitted "contrary probative evidence." *See* Employer's Brief at 26 n.5. If employer possessed evidence that it believed relevant to Dr. Jones's credibility, it was free to submit it for the administrative law judge's consideration. Employer opted not to do so. Consequently, under the circumstances of this case, we hold that there was no error in the administrative law judge's taking of judicial notice of Dr. Jones's qualifications.

The administrative law judge, however, failed to adequately address whether Dr.

[11]We note that Dr. Jones's diagnosis of cor pulmonale was not based upon his microscopic examination of the miner's heart tissue. Dr. Jones's diagnosis of cor pulmonale was based upon his measurements of the miner's left and right ventricles. Employer did not attempt to cross-examine Dr. Jones regarding his measurement of the thickness of the miner's ventricles. Employer also did not make any attempt to ask Dr. Jones to explain from what part of the heart his measurements were taken.

Jones's opinion was reasoned. Consequently, the administrative law judge, on remand, is instructed to reconsider whether Dr. Jones's opinion is sufficiently reasoned.

Finally, the administrative law judge, in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis, failed to reconcile the differing bases for the opinions of Drs. Jones and Cohen. The administrative law judge noted that Dr. Jones opined that the respiratory failure that caused the miner's death was due, in part, to cardiac failure. Decision and Order at 16. The administrative law judge noted that Dr. Jones attributed the miner's cor pulmonale to pneumoconiosis, "thus concluding that pneumoconiosis hastened [the miner's] death." *Id.*

By contrast, Dr. Cohen made no mention of cor pulmonale in finding that the miner's death was due to pneumoconiosis. The administrative law judge noted that Dr. Cohen opined that the miner's "coal dust induced diseases so compromised lung function that he was unable to withstand the combined insults of pneumonia and recurrent pulmonary emboli." Decision and Order at 17. The administrative law judge failed to reconcile the conflicting explanations of Drs. Jones and Cohen for why the miner's death was due to pneumoconiosis.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration. On remand, the administrative law judge is instructed to reevaluate the credibility of the conflicting opinions based on his view of the reliability of the physicians' medical analyses and the depth of support for their conclusions. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge