BRB Nos. 07-0585 BLA
and 07-0780 BLA

M.F.A. (Widow of and o/b/o S.A.) Claimant-Respondent v. PEERLESS EAGLE COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/30/2008 DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Renae Reed Patrick (Washington and Lee University Legal Clinic), Lexington, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2006-BLA-05465 and 2006-BLA-05466) of Administrative Law Judge Linda S. Chapman awarding benefits with respect to a miner's claim and 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 administrative law judge credited the miner with nineteen years of

[1] Because the administrative law judge considered both the miner's claim and the survivor's claim in her Decision and Order, we have consolidated for decision

coal mine employment, based upon employer's stipulation, and determined that the miner's claim was a subsequent claim under 20 C.F.R. §725.309(d).[2] The administrative law judge found that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.203 and, therefore, a change in an applicable condition of entitlement. With respect to the merits of entitlement, the administrative law judge found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits in the miner's claim.

Regarding the survivor's claim, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203. The administrative law judge further determined that claimant established that pneumoconiosis was a contributing cause of the miner's death under 20 C.F.R. §718.205(c). In addition, the administrative law judge found that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304. Thus, the administrative law judge awarded benefits in the survivor's claim.

Employer argues on appeal in the miner's claim that the administrative law judge did not properly weigh the newly submitted evidence relevant to Section 718.202(a)(1) and (a)(4). With respect to the survivor's claim, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a)(4) and death due to pneumoconiosis established under Section 718.205(c). Regarding both claims, employer asserts that the administrative law judge did not properly consider the evidence relevant to Section 718.304. Claimant responds and urges affirmance of the award of benefits in the miner's claim and the survivor's

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employer's appeals of the awards of benefits in the miner's claim and the survivor's claim.

[2] The miner filed an application for benefits on February 19, 1973, which was denied by the district director on May 22, 1979, as the miner did not establish any of the elements of entitlement. Living Miner's (LM) Director's Exhibit 1. The miner took no further action until filing a second claim on October 1, 2002. LM Director's Exhibit 3.

claim.[3] The Director, Office of Workers' Compensation, has not filed a brief in this appeal.[4]

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.[5] 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, 363 (1965).

The Miner's Claim

If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because he failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

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[3] Claimant is the surviving spouse of the miner. She is pursuing the miner's claim on behalf of his estate and a claim for survivor's benefits on her own behalf.

[4] We affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) in either the miner's claim or the survivor's claim, as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We also affirm the administrative law judge's determination that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) in the survivor's claim, as the parties have not challenged this finding on appeal. *Id*.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant was employed in the coal mine industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); LM Director's Exhibit 3.

Employer argues that the administrative law judge did not properly weigh the evidence pursuant to Section 718.202(a)(1) and (a)(4). Under Section 718.202(a)(1), the administrative law judge considered seven readings of three x-rays.[6] Dr. Alexander, a dually qualified Board-certified radiologist and B reader, interpreted the film dated August 1, 1997, as positive for pneumoconiosis and indicated that he detected Category B large opacities. Living Miner's (LM) Claimant's Exhibit 1. Dr. Wheeler, who is also dually qualified, read this x-ray as negative for pneumoconiosis. LM Employer's Exhibit 4. With respect to the film dated September 15, 1998, Dr. Alexander read it as positive for pneumoconiosis and indicated the presence of Category B large opacities. LM Claimant's Exhibit 1. Dr. Scott, a dually qualified reader, interpreted this x-ray as negative for pneumoconiosis. LM Employer's Exhibit 8. Dr. Alexander interpreted the film obtained on December 30, 2002, as positive for pneumoconiosis and indicated that he observed Category B large opacities. LM Claimant's Exhibit 1. Dr. Patel, a dually qualified physician, read this x-ray as positive for pneumoconiosis and identified Category A large opacities. LM Director's Exhibit 18. Dr. Wheeler interpreted the December 30, 2002 film as negative for pneumoconiosis. LM Director's Exhibit 29.

The administrative law judge stated that:

> [T]here are four positive interpretations by dually qualified physicians, and three negative interpretations by dually qualified physicians. Based on the preponderance of positive ILO interpretations by dually qualified physicians, I find that [claimant] has established by a preponderance of the x-ray evidence that [the miner] had pneumoconiosis.

Decision and Order at 27. The administrative law judge further found that narrative x-ray reports in the miner's treatment records that did not include an ILO classification but mentioned pneumoconiosis or opacities "support and document the positive ILO interpretations of Drs. Alexander and Patel." *Id*. at 28. The administrative law judge then reiterated her finding, based upon "the preponderance of the ILO interpretations by dually qualified physicians, as supported by the narrative interpretations," that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *Id*.

Employer argues that the administrative law judge erred in neglecting to weigh readings of the film dated September 24, 2003, that were admitted into the record in the miner's claim. Employer also alleges that the administrative law judge erred in resolving the conflict in the ILO interpretations by relying solely upon the numerical superiority of positive readings by dually qualified physicians without further inquiring into the

[6] Dr. Binns read the December 30, 2002 film for quality purposes only. LM Director's Exhibit 19.

respective qualifications of the physicians. Lastly, employer alleges that the administrative law judge erred in according weight to the narrative x-ray interpretations.

These contentions have merit. At the hearing in this case, the administrative law judge addressed separately the admissibility of the evidence developed in conjunction with the survivor's claim and the evidence developed in conjunction with the miner's claim. With respect to the miner's claim, the administrative law judge admitted, *inter alia*, LM Director's Exhibit 30, which includes Dr. Wheeler's negative reading of an x-ray dated September 24, 2003, and LM Claimant's Exhibit 1, which includes Dr. Alexander's reading of that film as positive for pneumoconiosis and a Category B large opacity. Hearing Transcript at 28. When discussing the admissibility of Dr. Alexander's report dated November 20, 2004, the parties agreed that the doctor's interpretation of the film obtained on September 24, 2003 was designated by claimant as rebuttal evidence under 20 C.F.R. §725.414(a)(2)(ii). *Id*. at 32, 33. However, in the portion of the Decision and Order in which the administrative law judge considered the x-ray evidence relevant to the miner's claim, she did not address either Dr. Wheeler's negative reading of the September 24, 2003 x-ray or Dr. Alexander's positive reading of the same x-ray. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); Decision and Order at 4.

In addition, the administrative law judge did not fully address the x-ray readers' qualifications in determining that the existence of pneumoconiosis was established. Section 718.202(a)(1) provides that in evaluating conflicting x-ray evidence, "consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays." 20 C.F.R. §718.202(a)(1). In this case, the administrative law judge looked only to whether the x-ray readers were B readers and/or Board-certified radiologists and did not consider additional qualifications such as professorships in radiology or involvement in the development of the Department of Labor's B reader program.[7] *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); LM Director's Exhibit 46; LM Claimant's Exhibit 1; LM Employer's Exhibits 4, 8.

Moreover, the administrative law judge's treatment of the narrative x-ray interpretations that mentioned opacities consistent with pneumoconiosis as evidence of pneumoconiosis pursuant to Section 718.202(a)(1) is not in accordance with applicable law. Under 20 C.F.R. §718.102(b), an x-ray interpretation that is not classified in accordance with the ILO/UICC system does not constitute evidence of pneumoconiosis under Section 718.202(a)(1). 20 C.F.R. §718.102(b); *see also Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting),

[7] Drs. Wheeler and Scott are professors of radiology. LM Employer's Exhibits 4, 8. Dr. Alexander has held an assistant professorship in radiology. LM Director's Exhibit 46; LM Claimant's Exhibit 1. Dr. Wheeler was involved in the creation of the B reader program at the Department of Labor. LM Employer's Exhibits 4, 8.

aff'd on recon., 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). In light of the foregoing, we vacate the administrative law judge's finding that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis in the miner's claim pursuant to Section 718.202(a)(1) and remand this case to the administrative law judge for reconsideration of this evidence.[8] In weighing the newly submitted x-ray evidence on remand, the administrative law judge must clarify whether Dr. Wheeler's interpretation of the film dated September 24, 2003 was designated by employer and admitted into the record. *See* LM Director's Exhibit 30; Hearing Transcript at 28. The administrative law judge must then consider all of the properly admitted new x-ray readings and must address the full range of qualifications of the readers.

Under Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Alexander, Koenig, Rasmussen, Zaldivar, Naeye, Oesterling and Wheeler. Based upon his review of x-rays, CT scans, lung biopsy reports, PET scan reports, and the miner's medical records, Dr. Alexander determined that the miner suffered from simple and complicated pneumoconiosis and lung cancer. LM Director's Exhibit 46; LM Claimant's Exhibits 1, 3, 10. Dr. Koenig reviewed the same materials and indicated that the miner had simple and complicated pneumoconiosis and lung cancer. LM Claimant's Exhibits 6, 8. Dr. Rasmussen examined the miner on December 30, 2002 at the request of the Department of Labor, recorded the miner's work and medical histories and obtained an EKG, a chest x-ray, a pulmonary function study, and a blood gas study. Dr. Rasmussen diagnosed coal workers' pneumoconiosis with a Category A large opacity, chronic bronchitis, and possible heart disease. LM Director's Exhibit 12. Dr. Zaldivar examined the miner on September 24, 2003. Based upon an x-ray, a pulmonary function study, and a blood gas study, and his review of the miner's medical records, Dr. Zaldivar diagnosed simple pneumoconiosis and cancer in the right lung. LM Director's Exhibit 30. Drs. Naeye and Oesterling reviewed biopsy evidence and the miner's medical records and determined that the biopsy evidence was insufficient to support a diagnosis of either simple or complicated pneumoconiosis. LM Director's Exhibit 31; LM Employer's Exhibits 12, 14. Dr. Wheeler reviewed x-rays, CT scans, and Dr. Koenig's report and indicated that the miner did not have either simple or complicated pneumoconiosis. LM Employer's Exhibits 11, 17, 21.

The administrative law judge weighed these medical reports and determined that the opinions of Drs. Alexander and Koenig were entitled to greatest weight, as they "are

[8] We reject, however, employer's suggestion that the administrative law judge is required to give greater weight to the x-ray interpretations of Drs. Wheeler, Scott, and Alexander because they read a series of x-rays, whereas Dr. Patel read only one. Employer's Brief in Miner's Claim at 46. The administrative law judge was not required to address this factor.

the only physicians who have addressed the totality of the medical evidence of record." Decision and Order at 34. The administrative law judge further found that the opinions of Drs. Zaldivar, Naeye, Oesterling, and Wheeler were based on a "woefully inadequate consideration of the medical evidence," as they "addressed selective medical evidence, without taking into account highly relevant findings." *Id*. at 35. The administrative law judge concluded, therefore, that the "abundantly well-reasoned opinions of Dr. Alexander and Dr. Koenig, as supported by the report of Dr. Rasmussen, [the miner's] medical records, and the results of objective testing" were sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). *Id*.

Employer argues that the administrative law judge's finding under Section 718.202(a)(4) cannot be affirmed, as the administrative law judge engaged in a selective analysis of the evidence. Employer contends specifically that the administrative law judge credited the opinions of Drs. Alexander and Koenig without adequately determining whether they are supported by the underlying documentation and without resolving the conflicts between their conclusions regarding the significance of the radiological and biopsy evidence and those expressed by Drs. Zaldivar, Naeye, Oesterling, and Wheeler. Employer's allegations have merit.

In diagnosing pneumoconiosis, both Drs. Alexander and Koenig relied upon x-ray evidence, the weight of which the administrative law judge determined is positive for both simple and complicated pneumoconiosis. Decision and Order at 27. In light of our decision to vacate the administrative law judge's weighing of the x-ray evidence under Section 718.202(a)(1), however, we cannot affirm the administrative law judge's finding that the opinions of Drs. Alexander and Koenig are well-supported by the underlying objective evidence. In addition, Drs. Alexander and Koenig based their opinions upon their understanding that the March 31, 2003 biopsy of the miner's right lung was diagnostic of complicated pneumoconiosis – a premise that is contrary to the administrative law judge's finding that the biopsy evidence is insufficient to establish the existence of pneumoconiosis. Decision and Order at 31. The administrative law judge did not address the impact of this factor upon the credibility of the opinions of Drs. Alexander and Koenig. The administrative law judge also did not accurately summarize Dr. Zaldivar's opinion when she indicated that Dr. Zaldivar was unaware that the biopsy performed on the miner's right lung after a PET scan showed a possible malignancy was, in fact, negative for cancer. In his report, Dr. Zaldivar acknowledged this biopsy. LM Director's Exhibit 30. Employer is incorrect, however, in asserting that the administrative law judge erred in according significant weight to Dr. Rasmussen's opinion pursuant to Section 718.202(a)(4). In weighing the relevant newly submitted medical opinions, the administrative law judge merely determined that Dr. Rasmussen's diagnoses of simple and complicated pneumoconiosis supported the opinions of Drs. Alexander and Koenig without making a separate finding as to whether Dr. Rasmussen's findings were entitled to great weight. Decision and Order at 35. Nevertheless, because the administrative law judge did not accurately characterize the relevant evidence and did

not resolve the conflict between her finding regarding the biopsy evidence of record and her crediting of the opinions of Drs. Alexander and Koenig, we vacate the administrative law judge's determination that the existence of pneumoconiosis was established at Section 718.202(a)(4). *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Tackett*, 7 BLR at 1-706.

On remand, the administrative law judge must reconsider whether the newly submitted evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). When determining the weight to which each newly submitted medical opinion is entitled, the administrative law judge must consider "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (6th Cir. 1998). The administrative law judge is also required by the Administrative Procedure Act to resolve all conflicts in the evidence and set forth the rationale underlying her findings.[9] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

Employer also challenges the administrative law judge's finding that the irrebuttable presumption of total disability due to pneumoconiosis was invoked in the miner's claim. As provided in Section 411(c)(3)(A) of the Act, as implemented by Section 718.304, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a)-(c). In this case, the administrative law judge did not make an explicit finding as to whether the evidence satisfied the terms of Section 718.304(a)-(c), but rather stated that "the issue is the etiology of the large and stable masses that appeared on the miner's x-rays from 1997 onward." Decision and Order at 35. The administrative law judge reiterated her prior determination, under Section 718.202(a)(4),

[9] Employer maintains that the administrative law judge misinterpreted Dr. Wheeler's statement that he did not need to refer to medical literature to support his opinion that the miner's radiological and biopsy evidence is not consistent with a diagnosis of simple or complicated pneumoconiosis. Employer also notes that Dr. Wheeler did, in fact, cite studies confirming his views regarding the progression of complicated pneumoconiosis. In addition, employer asserts that the administrative law judge did not fully consider the respective qualifications of Drs. Wheeler and Koenig when assessing their comments regarding the newly submitted radiological evidence.

that the newly submitted medical opinions in which Drs. Alexander and Koenig diagnosed complicated pneumoconiosis were entitled to the greatest weight. *Id*. at 35-36. The administrative law judge then stated that "employer has not met its burden to affirmatively show that the masses that appear on x-ray as category A and B opacities are due to a disease process other than pneumoconiosis." *Id*. at 36.

Employer argues that the administrative law judge improperly shifted the burden of proof to employer and did not render separate findings of fact under Section 718.304(a)-(c), as required by the decision of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). These contentions have merit. As indicated above, the administrative law judge stated that employer had the burden "to affirmatively show that the masses that appear on x-ray as category A and B opacities are due to a disease process other than pneumoconiosis." Decision and Order at 36. The court in *Scarbro* held that when the x-ray evidence "*vividly displays*" the presence of large opacities as defined in prong (A), this evidence "only loses force" if the *other types* of medical evidence described in 30 U.S.C. §921(c)(3), as implemented by Section 718.304, of the Act affirmatively show "that the opacities are not there or are not what they seem to be."[10] *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (emphasis added). In this case, the administrative law judge did not render a finding as to whether the x-ray evidence "vividly displays" Category A and/or B large opacities. Indeed, rather than explicitly addressing the x-ray evidence under Section 718.304(a), the administrative law judge appeared to rely upon her finding that the existence of pneumoconiosis was established at Section 718.202(a)(1), which we have vacated. In addition, the administrative law judge shifted the burden of proof to employer by indicating that once evidence was submitted which showed large masses in the miner's lungs, the burden shifted to employer to establish either the absence of large opacities or that the large opacities were not related to pneumoconiosis or coal dust exposure. This contravenes the principle that "claimant retains the burden of proving the existence of" complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993).

We vacate, therefore, the administrative law judge's finding that the miner has established invocation of the irrebuttable presumption of total disability due to

[10] In a unpublished case issued by the United States Court of Appeals for the Fourth Circuit, the court held that the administrative law judge's interpretation of its decision in *Scarbro* is incorrect. The court indicated that, contrary to the administrative law judge's analysis, "*Scarbro* only holds that once the claimant presents legally sufficient evidence of large opacities classified as category A, B, or C in the ILO system, he is likely to win unless there is contrary evidence." *Clinchfield Coal Co. v. Lambert*, No. 06-1154, slip op. at 2 (4th Cir. Nov. 17, 2006) (unpub.)(citations omitted). The court emphasized that the burden of proof remains with the claimant at all times. *Id*.

pneumoconiosis set forth in Section 718.304. On remand, the administrative law judge must first determine whether the evidence relevant to each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then she must weigh the evidence at subsections (a), (b), and (c) together before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established.[11] *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1146, 17 BLR at 2-118; *Melnick v. Consolidation Coal Co*, 16 BLR 1-31, 1-33 (1991) (*en banc*). The administrative law judge cannot base a finding of invocation of the irrebuttable presumption upon the mere introduction of legally sufficient evidence of complicated pneumoconiosis.[12] *Id*. When weighing the newly submitted x-ray and medical opinion evidence, the administrative law judge must comply with the remand instructions set forth concerning her reconsideration of the newly submitted evidence at Section 718.202(a)(1) and (a)(4).[13]

[11] Employer contends correctly that the administrative law judge cannot discredit the x-ray and CT scan interpretations of physicians who found abnormalities consistent with tuberculosis or granulomatous diseases because she found no evidence in the record that claimant had ever been treated for those conditions. Employer's Brief at 29; Decision and Order at 37-38. Employer correctly notes that Dr. Wheeler explained that the granulomatous abnormalities on the miner's lungs could result from histoplasmosis or any inflammatory process. Employer's Brief at 29; LM Employer's Exhibits 11, 17, 21. Furthermore, contrary to the administrative law judge's finding, it is not employer's burden to prove the exact etiology of the miner's x-ray findings. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993) ("The claimant retains the burden of proving the existence of the disease.").

[12] On remand, if the administrative law judge determines that the miner had complicated pneumoconiosis, she must determine whether the miner is entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, and further consider whether the presumption has been rebutted. *See* 20 C.F.R. §718.203(b); *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

[13] In specific reference to 20 C.F.R. §718.304, employer asserts that the biopsy evidence is not supportive of Dr. Alexander's and Dr. Koenig's diagnoses of complicated pneumoconiosis in light of the administrative law judge's finding, pursuant to Section 718.202(a)(2), that the biopsy evidence was insufficient to establish the existence of pneumoconiosis. Employer also maintains that Dr. Wheeler stated unequivocally at his deposition that anthracotic pigment, standing alone, does not support a diagnosis of pneumoconiosis. *See* LM Employer's Exhibit 21 at 55-56. In addition, employer alleges that Dr. Naeye's finding of cancer in both of the miner's lungs is corroborated by Dr.

Because we have vacated the administrative law judge's findings under Sections 718.202(a) and 718.304, we must also vacate her determination that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d) in the miner's subsequent claim. The administrative law judge must reconsider this finding in light of her consideration of the newly submitted evidence on remand pursuant to Sections 718.202(a) and 718.304. If the administrative law judge finds that the irrebuttable presumption of total disability due to pneumoconiosis is not invoked in the miner's claim, but that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis or total disability by a preponderance of the evidence, she must then address the merits of entitlement based upon a consideration of all of the evidence of record in the miner's claim.

The Survivor's Claim

The miner died on January 14, 2005. Claimant filed an application for benefits on February 24, 2005. Survivor's Claim (SC) Director's Exhibit 2. In considering entitlement in the survivor's claim, the administrative law judge determined that the x-ray evidence and biopsy evidence were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(2). Decision and Order at 42. The administrative law judge further found, however, that claimant established the existence of pneumoconiosis under Section 718.202(a)(4), based upon the medical opinions of Drs. Alexander and Koenig. *Id*. The administrative law judge also determined that the presumption that the miner's pneumoconiosis arose out of coal mine employment, set forth in Section 718.203(b), was invoked and was not rebutted. *Id*. With respect to Section 718.205(c), the administrative law judge stated that Dr. Stanley's "medical report on [the miner's] death certificate, as supported by his treatment records, is sufficient to support a finding that [the miner's] pneumoconiosis contributed to his death from lung cancer." *Id*. at 43; LM Director's Exhibit 56; SC Director's Exhibits 11-13. The administrative also determined that claimant invoked the irrebuttable presumption of death due to pneumoconiosis pursuant to Section 718.304. Accordingly, she awarded benefits in the survivor's claim. Decision and Order at 13.

To establish entitlement to survivor's benefits, 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. §§718.3,

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Oesterling's examination of the miner's lung biopsy slides and Dr. Smith's interpretation of the PET scan.

718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). Failure to establish any one of these elements precludes entitlement to benefits. *Anderson*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge did not properly weigh the medical opinions relevant to the existence of pneumoconiosis. Pursuant to Section 718.202(a)(4), the administrative law judge relied upon her consideration of the medical opinion evidence in the miner's claim to determine that the reports in which Drs. Alexander and Koenig diagnosed pneumoconiosis outweighed the contrary opinions of Drs. Wheeler, Zaldivar, Naeye, and Oesterling. Decision and Order at 42. In light of our decision to vacate the administrative law judge's findings under Section 718.202(a)(4) in the miner's claim, we must also vacate her findings at Section 718.202(a)(4) in the survivor's claim. The administrative law judge must reconsider the medical opinion evidence in accordance with her weighing of this evidence on remand in the miner's claim.

Employer also argues that the administrative law judge erred in finding that the death certificate constituted a reasoned and documented medical report sufficient to satisfy claimant's burden of proof to establish that pneumoconiosis was a contributing cause of the miner's death under Section 718.205(c). Employer's contention has merit. In crediting the death certificate, the administrative law judge determined that Dr. Stanley's identification of complicated pneumoconiosis as a cause of the miner's death on the death certificate was corroborated by the evidence of record and supported by Dr. Stanley's records of his treatment of claimant. Decision and Order at 42; SC Director's Exhibits 11-13. Because we have vacated the administrative law judge's finding that the existence of complicated pneumoconiosis was established pursuant to Section 718.304, based upon virtually the same evidence admitted in the survivor's claim, the administrative law judge's determination that Dr. Stanley's identification of complicated pneumoconiosis as a cause of death is consistent with the evidence of record must also be vacated.[14] In addition, although the administrative law judge determined that the death

[14] The evidence admitted in the survivor's claim included one fewer x-ray reading that was classified under the ILO system as positive for both simple and complicated pneumoconiosis. *See* Decision and Order at 42.

certificate was documented by Dr. Stanley's treatment records, she did not identify the material in the records that supports Dr. Stanley's opinion and she did not address the fact that the death certificate contains no explanation of how pneumoconiosis contributed to the miner's death. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-325; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Thus, we vacate the administrative law judge's finding that claimant established that pneumoconiosis was a contributing cause of the miner's death pursuant to Section 718.205(c).

Finally, the administrative law judge also considered whether claimant was entitled to the irrebuttable presumption of death due to pneumoconiosis set forth in Section 718.304. The administrative law judge determined, based upon her weighing of the medical opinions in the miner's claim, that claimant invoked the presumption and identified this as an alternative basis for the award of benefits in the survivor's claim. Because we have vacated the administrative law judge's findings at Section 718.304 in the miner's claim, we must also vacate her finding that claimant was entitled to the irrebuttable presumption in the survivor's claim. On remand, the administrative law judge must reconsider this issue in light of her reconsideration of the evidence in accordance with the Board's remand instructions.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge