BRB Nos. 12-0064 BLA
and 12-0065 BLA

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| JUDITH A. PEGG<br>(Widow of LARRY PEGG) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | DATE ISSUED: 09/27/2012 |
| CONSOLIDATION COAL COMPANY | ) | |
| Employer-Petitioner | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Second Remand of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2004-BLA-5226, 2011-BLA-5966) of Administrative Law Judge Pamela J. Lakes awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a miner's claim filed on July 8, 2002, and a survivor's claim[1] filed on June 17, 2010. The miner's claim is before the Board for the third time.[2]

When the miner's claim was most recently before the Board, pursuant to employer's appeal, the Board vacated the administrative law judge's findings that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and that the miner's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Specifically, the Board held that the administrative law judge erred in declining to admit and consider two computerized tomography (CT) scan interpretations by Dr. Fino, pursuant to the Board's instructions on remand. *Pegg v. Consolidated Coal Co.*, BRB No. 09-0707 BLA, slip op. at 7 (Sept. 29, 2010) (unpub.) (*Pegg II*). The Board therefore directed the administrative law judge to admit and consider Dr. Fino's CT scan interpretations, and reconsider whether the medical opinions establish the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). The Board further directed the administrative law judge to determine, if necessary, whether pneumoconiosis was a substantially contributing cause of the miner's total disability. 20 C.F.R. §718.204(c); *Pegg II*, slip op. at 8.

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[1] Claimant is the surviving spouse of the miner, who died on May 31, 2010 during the pendency of employer's second appeal to the Board. Director's Exhibit 11. After the Board's second remand, the administrative law judge substituted claimant for the miner in the miner's claim, and consolidated the claim with the survivor's claim.

[2] The procedural history of this case is detailed in the Board's last decision. *Pegg v. Consolidated Coal Co.*, BRB No. 09-0707 BLA, slip op. at 2-4 (Sept. 29, 2010) (unpub.) (*Pegg II*). In its initial decision, the Board affirmed the administrative law judge's determination, based on the parties' stipulation, that the miner worked for at least thirty-two years in coal mine employment, and her findings that claimant established the existence of pneumoconiosis by x-ray evidence at 20 C.F.R. §718.202(a)(1), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv). *L.P.* [*Pegg*] *v. Consolidation Coal Co.*, BRB No. 08-0131 BLA, slip op. at 2 n.1, 5 (Oct. 29, 2008) (*Pegg I*). However, the Board vacated the administrative law judge's finding that the miner had pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and her finding of disability causation at 20 C.F.R. §718.204(c). *Id.* at 7-10.

On remand, relevant to the miner's claim, the administrative law judge admitted and considered Dr. Fino's CT scan interpretations, and reconsidered the medical opinion evidence regarding the existence of pneumoconiosis, pursuant to the Board's directions on remand. The administrative law judge found that claimant established that the miner had pneumoconiosis arising out of his coal mine employment. 20 C.F.R. §§718.202(a)(1) and (4), 718.203(b); 2011 Decision and Order on Second Remand at 8. The administrative law judge further found that the medical opinion evidence established that the miner was totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). 2011 Decision and Order on Second Remand at 11. Accordingly, the administrative law judge awarded benefits in the miner's claim.

In adjudicating the survivor's claim, the administrative law judge noted that Section 1556 revived Section 932(*l*) of the Act, which 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 survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Because claimant filed her survivor's claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death, the administrative law judge awarded benefits in the survivor's claim pursuant to amended Section 932(*l*).

On appeal, employer contends that the administrative law judge did not comply with the Board's remand instructions, in finding that the miner suffered from pneumoconiosis at 20 C.F.R. §718.202(a)(4). Additionally, employer argues that the administrative law judge erred in finding that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Finally, employer contends that the administrative law judge erred in awarding benefits in the survivor's claim pursuant to Section 932(*l*). Claimant responds, urging affirmance of the administrative law judge's Decision and Order on Second Remand. The Director, Office of Workers' Compensation Programs, has filed a limited response, asserting that if the Board affirms the award of benefits in the miner's claim, it should also affirm the award in the survivor's claim pursuant to 30 U.S.C. §932(*l*). In a reply brief, employer reiterates its previous contentions regarding the survivor's claim.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[3] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 4. 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 (1989) (en banc).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**The Miner's Claim**

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

We first address employer's contention that the administrative law judge's erred in finding that the miner suffered from clinical and legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4).[4] In considering the medical evidence, on remand, the administrative law judge initially admitted Dr. Fino's interpretations of the June 2004 and February 2005 CT scans, pursuant to the Board's remand instructions. The administrative law judge found that the CT scan interpretations were equivocal, and neither supported nor undermined her prior finding, affirmed by the Board, that the x-ray evidence established the existence of clinical pneumoconiosis.[5] 2011 Decision and Order on Second Remand at 7; *see Pegg I*, slip op. at 5.

Turning to the medical opinion evidence relevant to the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge incorporated, by reference, her previous summary of the facts and law, and considered the medical opinions of Drs. Lenkey, Saludes, Fino, and Altmeyer. Dr. Lenkey,[6] the

[4] Clinical pneumoconiosis is defined as "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[5] As employer does not challenge the administrative law judge's evaluation of the computerized tomography (CT) scans on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Dr. Lenkey, who treated the miner, submitted two medical reports and testified at two depositions in connection with the miner's claim. Director's Exhibits 22, 25; Claimant's Exhibit 5; Employer's Exhibit 10. In a medical report dated July 20, 2001,

miner's treating physician, and Dr. Saludes,[7] the Department of Labor examining physician, diagnosed clinical pneumoconiosis by x-ray and legal pneumoconiosis, in the form of mixed chronic obstructive pulmonary disease (COPD) and restrictive airways disease, due to both coal mine dust exposure and smoking. Director's Exhibits 13, 22, 25, 27; Claimant's Exhibit 5; Employer's Exhibit 10. Drs. Fino[8] and Altmeyer[9] opined

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Dr. Lenkey opined that the miner suffered from coal workers' pneumoconiosis and a "marked pulmonary physiologic impairment with marked air flow limitation and hypercarbia[,] as well as significant deoxygenation." Director's Exhibit 22. Furthermore, Dr. Lenkey concluded that coal workers' pneumoconiosis and the miner's smoking history contributed to the miner's impairment equally. *Id.* In a subsequent medical report, Dr. Lenkey reiterated his belief that the miner's coal mine dust exposure and smoking history contributed equally to the miner's pulmonary disease, further clarifying that the miner's obesity did not affect "his oxygenation or pulmonary function testing in any significant manor [sic]." Claimant's Exhibit 5.

[7] Dr. Saludes conducted the Department of Labor-sponsored pulmonary evaluation on November 6, 2002, and was deposed on March 24, 2003. Director's Exhibits 13, 27. He concluded that the miner was obese and suffered from coal workers' pneumoconiosis, as well as chronic obstructive pulmonary disease (COPD). Director's Exhibit 13. Dr. Saludes opined that seventy-five percent of the miner's pulmonary impairment was related to the miner's COPD and obesity, while twenty-five percent was related to his coal mine dust exposure. *Id.*; Director's Exhibit 27 at 31.

[8] Dr. Fino, who submitted an April 29, 2003 consultative medical report and testified at two depositions, diagnosed the miner as suffering from obstructive lung disease, chronic obstructive bronchitis, and emphysema, which he opined were related to the miner's smoking history. Employer's Exhibits 3 at 8; 8 at 10, 16-17. Additionally, Dr. Fino diagnosed a restrictive lung impairment, which he attributed to the miner's obesity and "a non-occupational pulmonary fibrotic process." mployer's Exhibits 3 at 9; 8 at 15-16. After reviewing additional testing, Dr. Fino revised his opinion to conclude that the miner had a purely restrictive impairment, due solely to obesity. Employer's Exhibit 11 at 12-17. Therefore, Dr. Fino concluded that, while the miner suffered from a respiratory impairment, it was unrelated to his exposure to coal mine dust. Employer's Exhibit 3 at 9.

[9] Dr. Altmeyer, who provided a medical report and was deposed on two occasions, opined that "the physical examination, chest x-ray and physiologic parameters are not consistent with simple coal workers' pneumoconiosis . . . ." Director's Exhibit 24 at 7. Further, while he diagnosed the miner as having a restrictive ventilatory impairment and a mild to moderate obstructive impairment, Dr. Altmeyer attributed the restrictive

that the miner did not suffer from clinical pneumoconiosis or any coal mine dust-related lung disease. Director's Exhibit 24; Employer's Exhibits 1, 3, 8, 9, 11.

Having found that the recently admitted CT scan evidence did not weigh for or against a finding of pneumoconiosis and, therefore, did not impact her prior findings, the administrative law judge relied on her prior analysis of the medical opinion evidence, which she incorporated by reference. 2011 Decision and Order on Second Remand at 7-8. The administrative law judge found the opinion of Dr. Lenkey to be well-reasoned and documented, and entitled to additional weight as that of the miner's treating physician, pursuant to 20 C.F.R. §718.104(d)(1)-(5). 2009 Decision and Order on Remand at 6; 2007 Decision and Order at 28-29. The administrative law judge accorded less weight to Dr. Saludes' opinion, as based on a more limited review of the evidence, but found it nonetheless reasoned and corroborative of Dr. Lenkey's opinion. 2009 Decision and Order on Remand at 6; 2007 Decision and Order at 28-29.

By contrast, the administrative law judge discounted the opinions of Drs. Fino and Altmeyer as inadequately explained and based, in part, on negative x-rays, in contravention of her finding that the x-ray evidence as a whole established the existence of pneumoconiosis, and as based on a February 2005 pulmonary function study, which was not in compliance with the quality standards at 20 C.F.R. §718.103. 2009 Decision and Order on Remand at 6; 2007 Decision and Order at 37; Employer's Exhibit 9 at 25. Relying on the opinion of Dr. Lenkey, as supported by the opinion of Dr. Saludes, the administrative law judge concluded that the medical opinion evidence established the existence of clinical and legal pneumoconiosis, at 20 C.F.R. §718.202(a)(4). 2011 Decision and Order on Second Remand at 8.

Employer argues that the administrative law judge, on remand, erred by not reconsidering the medical opinions of Drs. Lenkey, Saludes, Fino, and Altmeyer, as instructed by the Board. Employer contends that the administrative law judges' findings do not provide substantial evidence to support a determination that claimant established the existence of clinical and legal pneumoconiosis. Employer argues further that the administrative law judge failed to weigh the medical opinions, together with the other medical evidence of record, to determine whether a preponderance to the evidence establishes the existence of pneumoconiosis, as required by *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-209 (4th Cir. 2000). Employer's Brief at 9-10.

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impairment to the miner's obesity, and the obstructive impairment to the miner's smoking history and possible asthma. *Id.* at 7-8; Employer's Exhibits 1 at 26, 37-39; 9 at 21, 23-24. Therefore, he concluded that the miner's impairment was unrelated to his exposure to coal mine dust. Director's Exhibit 24 at 7-8.

After consideration of the administrative law judge's Decision and Order on Second Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Second Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Contrary to employer's contention, the administrative law judge appropriately incorporated her findings from her two prior decisions into her Decision and Order on Second Remand and, thus, the reasons for her findings are discernible.

Additionally, the administrative law judge complied with the Board's remand instructions, by admitting Dr. Fino's CT scan interpretations, and considering whether the CT scan evidence supported a finding of clinical pneumoconiosis. 2011 Decision and Order on Second Remand at 7-8. Evaluating the medical opinions, the administrative law judge permissibly found that the opinions of Drs. Fino and Altmeyer, that the miner did not suffer from clinical pneumoconiosis, were undermined by their substantial reliance on negative x-ray readings, contrary to her own conclusion that the x-rays, as a whole, are positive for the existence of clinical pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34**,** 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42**,** 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214 n.15 (2002) (en banc); 2009 Decision and Order on Remand at 4-5. Relevant to the existence of legal pneumoconiosis, the administrative law judge permissibly discounted the opinions of Drs. Fino[10] and Altmeyer,[11] finding that

[10] In his written report, Dr. Fino diagnosed an obstructive respiratory impairment, due to the miner's smoking history, and a restrictive respiratory impairment, due to "a non-occupational pulmonary fibrotic process" and obesity. Employer's Exhibit 3 at 9. In his subsequent deposition, Dr. Fino clarified that the miner's restrictive impairment was primarily due to idiopathic interstitial pulmonary fibrosis, and while it was possible that "some" of the miner's impairment was due to obesity, it did not contribute "to the extent that you would rule out lung disease." Employer's Exhibit 8 at 15-16. The administrative law judge observed that, in Dr. Fino's second deposition, taken after he had reviewed CT scans that ruled out the presence of pulmonary fibrosis, Dr. Fino revised his opinion to conclude that the miner's restrictive impairment was due solely to obesity. Employer's Exhibit 11 at 12-17. The administrative law judge permissibly found that, as Dr. Fino did not attempt to reconcile his opinion with his earlier conclusion, that the miner was not sufficiently obese to cause the degree of restriction demonstrated on objective testing, his opinion was unreasoned. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Dolzanie v. Director, OWCP*, 6 BLR 1-865, 1-867 (1984); 2011 Decision and Order on Second Remand at 10-11; 2009 Decision and Order on Remand at 3, 6; 2007 Decision and Order at 31, 37-38.

both physicians had relied, in part, on non-conforming pulmonary function studies to conclude that the miner did not have an obstructive impairment, and that neither had adequately explained their conclusion that the miner's restrictive impairment was due to obesity. *See Hicks*, 138 F.3d at 533-34**,** 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42**,** 21 BLR at 2-275-76; 2011 Decision and Order on Second Remand at 10-11; 2009 Decision and Order on Remand at 3, 6; 2007 Decision and Order at 31, 37-38.

The administrative law judge also considered, as instructed, whether Dr. Lenkey's reliance, in part, on a November 2005 pulmonary function study that is not contained in the record, affected the credibility of his diagnoses. 2011 Decision and Order on Second Remand at 7; 2009 Decision and Order on Remand at 6; 2007 Decision and Order at 37-38. She permissibly concluded that, despite his reliance on the study, Dr. Lenkey's opinion, as corroborated by Dr. Saludes' opinion, is nonetheless more persuasive than the opinions of Drs. Fino and Altmeyer because, as a treating physician who saw the miner frequently over a five year period, "Dr. Lenkey's actual diagnosis of pneumoconiosis did not rest on the [pulmonary function studies] alone . . . and his assessment of the relative contributions of coal mine dust and smoking only varied insofar as he was trying to come up with a best estimate based upon the epidemiological data."[12] See 20 C.F.R. 718.104(d)(1-)(5); *see Hicks*, 138 F.3d at 533-34**,** 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42**,** 21 BLR at 2-275-76; 2009 Decision and Order on Remand at 6, n.7.

Thus, substantial evidence supports the administrative law judge's permissible finding that Dr. Lenkey's opinion, diagnosing clinical pneumoconiosis and relating the miner's respiratory impairment to both smoking and his thirty-two years of coal mine

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[11] The administrative law judge noted that Dr. Altmeyer, like Dr. Fino, diagnosed a restrictive impairment, based on the miner's FVC results, and concluded that it was due to obesity. 2007 Decision and Order at 38; Employer's Exhibit 9 at 21. The administrative law judge permissibly concluded that Dr. Altmeyer did not explain how the objective testing supported his conclusion, in light of the fact that the miner's 2002 pulmonary function study produced higher FVC values than the 2005 pulmonary function study, when the miner actually weighed more in 2002 than he did in 2005. *See Underwood*, 105 F.3d at 949, 21 BLR at 2-28; *Clark*, 12 BLR at 1-155; 2007 Decision and Order at 38.

[12] The administrative law judge contrasted Dr. Lenkey's opinion with that of Dr. Fino, who, "when confronted with additional data that called into question his original opinion [attributing part of the miner's impairment to an unknown fibrotic process], . . . accepted obesity as the sole cause for [c]laimant's respiratory problems – even though he had discounted that possibility earlier." 2007 Decision and Order on Remand at 6.

dust exposure, as corroborated by the opinion of Dr. Saludes, was better reasoned and documented than the opinions of Drs. Fino and Altmeyer as to the existence of clinical and legal pneumoconiosis. *See Hicks*, 138 F.3d at 533-34**,** 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42**,** 21 BLR at 2-275-76; 2011 Decision and Order on Second Remand at 7-8; 2009 Decision and Order on Remand at 6; 2007 Decision and Order at 30. Therefore, we affirm the administrative law judge's finding that claimant established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge further acted in conformity with the Board's remand instructions by reconsidering the x-ray evidence, CT scans, and medical opinion evidence in a manner consistent with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-209 (4th Cir. 2000). The administrative law judge found that the medical opinion evidence, and the evidence as a whole, established the existence of both clinical and legal pneumoconiosis. 20 C.F.R. §718.202(a)(1), (4); 2011 Decision and Order on Second Remand at 7-8; 2009 Decision and Order on Remand at 6.

Therefore, the administrative law judge properly complied with the Board's remand instructions and gave sufficient reasons for crediting the opinion of Dr. Lenkey, supported by the opinion of Dr. Saludes, over the contrary medical evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Employer has failed to establish that the administrative law judge's decision to accord the greatest weight to the opinion of Dr. Lenkey was irrational, and we therefore affirm the administrative law judge's credibility determination. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). We are therefore unable to conclude that the administrative law judge abused her discretion in finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), as she addressed, on remand, the Board's concerns and the relevant medical evidence. *See Hicks*, 138 F.3d at 533-34**,** 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42**,** 21 BLR at 2-275-76. Accordingly, we affirm the administrative law judge's finding of pneumoconiosis arising out of coal mine employment.[13] 20 C.F.R. §§718.202(a), 718.203(b).

Employer also challenges the administrative law judge's finding that the miner's total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).

[13] Employer concedes that, in light of the miner's thirty-two years of coal mine employment, claimant would be entitled to the rebuttable presumption that the miner's pneumoconiosis arose out of coal mine employment, if the evidence established the existence of pneumoconiosis. 20 C.F.R. §718.203(b); Employer's Brief at 10. The administrative law judge found that employer did not rebut this presumption, which employer does not challenge on appeal. *See supra*, n. 6.

Employer's Brief at 10-12. In considering whether the evidence established that the miner was totally disabled due to pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Lenkey, Saludes, Fino, and Altmeyer. Dr. Lenkey opined that the miner was totally disabled from his prior coal mine employment, and that at least fifty-percent of his disability was due to pneumoconiosis. Director's Exhibit 22; Claimant's Exhibit 5. Similarly, Dr. Saludes concluded that the miner was totally disabled from his last coal mine job, and that twenty-five percent of his disability was due to pneumoconiosis. Director's Exhibit 13. In contrast, while Drs. Fino and Altmeyer opined that the miner was totally disabled from a respiratory impairment, they further opined that the miner's coal mine dust exposure did not contribute to his disability. Director's Exhibit 24; Employer's Exhibit 3. The administrative law judge relied on the opinions of Drs. Lenkey and Saludes, and discounted the opinions of Drs. Fino and Altmeyer, in part, because they did not diagnose clinical or legal pneumoconiosis. 2011 Decision and Order on Second Remand 10.

Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Fino and Altmeyer, in part, because their opinions that the miner did not suffer from clinical or legal pneumoconiosis were contrary to the administrative law judge's findings, and central to their reasons for finding that the miner's respiratory disability was unrelated to his coal mine dust exposure. *See Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Abshire*, 22 BLR at 1-214 n.15; 2011 Decision and Order on Second Remand at 10. The administrative law judge further discounted the opinions of Drs. Fino and Altmeyer because neither physician adequately explained his conclusion that the miner's disabling restrictive impairment was due to obesity. *See Hicks*, 138 F.3d at 533-34**,** 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42**,** 21 BLR at 2-275-76; 2011 Decision and Order on Second Remand at 10-11. Moreover, as the administrative law judge rationally relied on the reasoned and documented opinion of Dr. Lenkey, as corroborated by the opinion of Dr. Saludes, to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on their opinions to find that the miner was totally disabled due, in part, to legal pneumoconiosis. *See Scott*, 289 F.3d at 269, 22 BLR at 2-384*; Toler*, 43 F.3d at 116, 19 BLR at 2-83. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). As claimant has established each element of entitlement, we affirm the award of benefits in the miner's claim.

**The Survivor's Claim**

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to survivor's benefits pursuant to amended Section 932(*l*). Employer argues that retroactive

application of amended Section 932(*l*) is unconstitutional, as a violation of its due process rights and as an unlawful taking of its property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that the operative date for determining eligibility under amended Section 932(*l*) is the date the miner's claim was filed, not the date the survivor's claim was filed. Additionally, employer argues that conflicting language contained in other sections of the Act requires a survivor to establish that the miner's death was due to pneumoconiosis, negating the automatic entitlement provision of amended Section 932(*l*).[14] Employer's Brief at 21-49. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-76-85 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342); *see also B&G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 244 & n.12, 25 BLR 2-13, 2-28 & n.12 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

In this case, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(*l*): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is entitled to receive benefits pursuant to amended Section 932(*l*). 30 U.S.C. §932(*l*).

[14] Employer's additional argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is affirmed.

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