

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB Nos. 24-0137 BLA
and 24-0469 BLA

PENNY DENISE KIRK
(o/b/o and Widow of ROBERT F. KIRK)

Claimant-Respondent

v.

DOUBLE S MINING, INCORPORATED

and

WEST VIRGINIA COAL WORKERS'
PNEUMOCONIOSIS FUND

Employer/Carrier-
Petitioners

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Party-in-Interest

NOT-PUBLISHED

DATE ISSUED: 08/05/2025

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order Finding Good Cause to Decide this Case on the Record and Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Chris M. Green and Wes A. Shumway (Spilman Thomas & Battle, PLLC),
Charleston, West Virginia, for Employer and its Carrier.

William M. Bush, Acting Counsel for Administrative Appeals (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE, Administrative Appeals Judge, and ULMER, Acting Administrative Appeals Judge.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2022-BLA-05294) and Decision and Order Finding Good Cause to Decide this Case on the Record and Awarding Benefits (2024-BLA-05590) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on December 8, 2020,¹ and a survivor's claim filed on January 23, 2023.

In the miner's claim, the ALJ credited the Miner with at least eighteen years of underground coal mine employment and found Claimant qualified as a dependent pursuant to 20 C.F.R. §725.205 for augmentation of benefits.² On the merits, the ALJ found

¹ This is the Miner's second claim for benefits. The district director denied his prior claim, filed on January 14, 2019, for failing to establish he was totally disabled. Director's Exhibit 1. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he 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(c); *see White v. New White Coal Co.*, 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(c)(3). Because the Miner did not establish total disability in his prior claim, Claimant had to submit new evidence establishing that element of entitlement to obtain review of the merits of the Miner's current claim. 20 C.F.R. §725.309(c); *see White*, 23 BLR at 1-3; Director's Exhibit 1.

² Claimant is the widow of the Miner, who died on January 8, 2023, and is pursuing the Miner's claim on behalf of his estate as well as pursuing her own survivor's claim. March 13, 2023 Order Granting Motion to Substitute Party.

Claimant established the Miner had simple clinical and legal pneumoconiosis.³ She also found Claimant established the Miner had complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). The ALJ further found the Miner's complicated pneumoconiosis arose out of his coal mine employment and thus awarded benefits. 20 C.F.R. §718.203(b).

In the survivor's claim, the ALJ issued an order to show cause as to why the case should not be decided on the record. Employer responded, again requesting a hearing. The ALJ thereafter issued a decision and order on the record, finding that Claimant is the eligible surviving spouse of the Miner and thus found Claimant automatically entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).⁴

On appeal in the miner's claim, Employer argues the ALJ erred in finding Claimant established the Miner had complicated pneumoconiosis.⁵ Neither Claimant nor the Acting Director, Office of Workers' Compensation Programs (the Director), has filed a response.

On appeal in the survivor's claim, Employer contends the ALJ erred in deciding Claimant is an eligible survivor and awarding benefits without holding a hearing as Employer requested. The Director responds, conceding that the ALJ erred in failing to

³ "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁴ Section 422(l) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

⁵ We affirm, as unchallenged on appeal, the ALJ's finding that the Miner had at least eighteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 710, 1-711 (1983); Decision and Order at 8. We also affirm her unchallenged findings that the Miner had simple clinical and legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 38.

hold a hearing as 20 C.F.R. §725.452(d) requires, but argues the error is harmless because the ALJ is correct in finding that evidence in the miner's claim establishes Claimant's entitlement to benefits in the miner's subsequent claim and therefore to survivor's benefits under Section 422(l) of the Act.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Miner's Claim

Invocation of the Section 411(c)(3) Presumption—Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities greater than one centimeter in diameter that would be 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 that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc). The ALJ found the computed tomography (CT) scan evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(c). Weighing the evidence together, the ALJ found Claimant established the Miner had the disease.⁷ Decision and Order at 8, 10.

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 60; Hearing Transcript at 34.

⁷ The ALJ found the x-ray evidence supports a finding of simple clinical pneumoconiosis but does not support a finding of complicated pneumoconiosis. Decision and Order at 17; 20 C.F.R. §718.304(a). She also found the biopsy evidence does not address pneumoconiosis and thus does not aid in establishing the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(b). We affirm these determinations as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

Other Medical Evidence – 20 C.F.R. §718.304(c)

CT Scans and the Miner's Treatment Records

The ALJ considered three interpretations of two CT scans taken on March 18, 2022, and April 8, 2022.⁸ Decision and Order at 32-34. Dr. Crum read the March 18, 2022 CT scan as positive for complicated pneumoconiosis. Claimant's Exhibit 4. He identified a 1.6-centimeter large opacity located in the Miner's right upper lobe, lobulated in shape, and appearing to occlude or compress an adjacent bronchus, which he opined had an "equal possibility" to represent either complicated pneumoconiosis or lung cancer. *Id.* at 1. In addition, he identified a nodule, 1.75-centimeter in greatest dimension, consistent with a Category A large opacity within the middle-right lung, which he opined is consistent with complicated pneumoconiosis. *Id.* at 1-2. He also confirmed the presence of small opacities consistent with simple clinical pneumoconiosis. *Id.* at 1.

Dr. Adcock read the March 18, 2022 CT scan as negative for complicated pneumoconiosis but noted the presence of a 1.6-centimeter opacity in the central right upper lobe and also noted "mildly posteriorly" displaced bronchus. Employer's Exhibit 7 at 1-2. He opined the opacity is not consistent with complicated pneumoconiosis and offered differential diagnoses including benign lesions, such as a bronchial cyst and hamartoma, or a neoplasm. *Id.* But he did read the CT scan as positive for simple clinical pneumoconiosis in the form of small opacities of "low profusion" concentrated in the mid-lung fields. *Id.* at 1. He opined the 1.6-centimeter large opacity is unlikely to be complicated pneumoconiosis given the lack of small opacities generally and in the region of the mass specifically, and in consideration of the morphology of the opacity.⁹ Dr. Adcock also read the April 8, 2022 PET [positron emission tomography]/CT scan, stating

⁸ We affirm, as unchallenged on appeal, the ALJ's finding that CT scans are medically acceptable and relevant to establishing the presence of complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.107(b); Decision and Order at 33. The April 8, 2022 CT scan included positron emission tomography (PET) imaging. Employer's Exhibits 3, 8. As Employer indicates, no PET scan specifically diagnosed complicated pneumoconiosis. Employer's Brief at 16. The ALJ's statement concluding that the chest CT/PET scan evidence establishes complicated pneumoconiosis appears to be a scrivener's error. Decision and Order at 38.

⁹ Dr. Adcock observed the 1.6-centimeter mass was "without apparent fibrotic element" and uniformly rounded with well-defined circumscribed margins. Employer's Exhibit 7 at 2.

his findings were unchanged from his reading of the March 18, 2022 CT scan.¹⁰ Employer's Exhibit 8 at 1-2. He indicated "the scan is not helpful with respect to implicating or excluding complicated [pneumoconiosis]" given that large opacities of pneumoconiosis can demonstrate a "wide variety" of PET uptake. *Id.*

There is also imaging in the Miner's treatment records from Charleston Area Medical Center from March 7, 2018 to July 6, 2022. Employer's Exhibits 2-4. The Miner underwent a CT scan of his abdomen and pelvis on March 7, 2018, that showed basilar atelectasis and a three-millimeter nodule in his right middle lobe. Employer's Exhibit 2 at 1. Another CT scan of the Miner's abdomen and pelvis on October 12, 2018, showed emphysema, a small left pleural effusion, and "minimal subpleural nodularity" in the right lung similar to the "old study." *Id.* at 12. Chest CT scans dated February 11, 2020, and September 24, 2020, both showed "numerous nodules" seen throughout the mid upper lung zones bilaterally, and noted a left upper lobe nodule measuring four millimeters. *Id.* at 14, 18.

An abdomen and pelvis CT scan dated March 5, 2021, indicated the presence of a "small noncalcified nodule" in the right lateral lung base, along with emphysema. Employer's Exhibit 3 at 1-2. A chest x-ray obtained July 14, 2021, noted a "perihilar reticular" opacity "again seen." *Id.* at 5. In his reading of the March 18, 2022 CT scan, the Miner's treating physician identified "multiple numerous" nodules within the mid upper lung zones, and a stable fissural nodule present in the right lung. Employer's Exhibit 3 at 7-8. He also identified the interval development of a 1.4 x 1.4 x 1.2-centimeter nodule in the right upper lobe which he stated "[s]hould be considered malignant until proven otherwise." *Id.* The report of the Miner's April 8, 2022 PET/CT scan showed a standardized uptake value (SUV) of 4.2 for the 1.4-centimeter upper lobe nodule identified in the March 18, 2022 CT scan reading, and enlarged, partially calcified mediastinal and hilar lymph nodes demonstrating SUV values of five to thirteen.¹¹

¹⁰ In this reading, Dr. Adcock found the 1.6 centimeter right upper lobe mass demonstrated modest PET avidity. Employer's Exhibit 8 at 1. He excluded bronchial cyst as a possible diagnosis for the large mass due to the presence of uptake and noted that various forms of cancer remained possible etiologies. *Id.* at 2.

¹¹ In assessing the option of providing radiation therapy for the Miner, the consulting physician determined treatment would target a malignant neoplasm in the upper right lobe, but noted that the calcified mediastinal and hilar lymph nodes are likely related to coal workers' pneumoconiosis due to their stability since 2015. Employer's Exhibit 4. The Miner agreed to receive radiation therapy. *Id.*

The ALJ noted that Drs. Crum's and Adcock's readings similarly identify simple pneumoconiosis, emphysema, and a 1.6-centimeter nodule in the right upper lobe, which compressed adjacent bronchus. Decision and Order at 35. She noted that Dr. Crum indicated the 1.6-centimeter nodule could represent a large opacity of complicated pneumoconiosis or cancer. *Id.* Dr. Adcock opined it did not represent complicated pneumoconiosis, but provided several differential diagnoses, including cancer. *Id.* The ALJ found both doctors provided equivocal diagnoses regarding the 1.6-centimeter opacity. *Id.* However, she noted that Dr. Crum, unlike Dr. Adcock, also identified a second large opacity, in the mid-right lung, which he indicated was consistent with complicated pneumoconiosis, Category A. *Id.* Given the similar findings made by both readers with respect to other findings, she found Dr. Crum's reading of the March 18, 2022 CT scan¹² more thorough than Dr. Adcock's reading, and more supported by the Miner's treatment records, which confirmed the existence of multiple nodules. Decision and Order at 35. Thus, she accorded greater weight to Dr. Crum's reading of the March 18, 2022 CT scan. *Id.*

Addressing Dr. Adcock's reading of the April 8, 2022 CT scan,¹³ the ALJ found his reading equivocal as he failed to give a definitive diagnosis or etiology for the 1.6-centimeter nodule he identified and thus accorded his reading little weight. *Id.* at 36. Considering the CT scan evidence as a whole, she gave the most weight to Dr. Crum's more thorough reading of the March 18, 2022 CT scan and thus found the CT scan evidence supports a finding of simple and complicated pneumoconiosis. *Id.*

Employer argues the ALJ erred in weighing the CT scan evidence. Employer's Brief at 15-17. It contends the Miner's treatment records and x-ray evidence better support Dr. Adcock's reading. *Id.* We find Employer's argument unpersuasive.

As the ALJ noted, the Miner's treatment records consistently documented the presence of multiple nodules, in both the middle and upper lung zones. *See* Decision and Order at 35-38; Employer's Exhibits 2, 3. Specifically, in the Miner's treatment records,

¹² In her discussion of the CT scan evidence, the ALJ at times refers to a "March 8, 2022" CT scan. Decision and Order at 35-36. But there is no "March 8, 2022" CT scan of record; rather, there is only a March 18, 2022 CT scan. *See* Employer's Exhibits 3, 7; Claimant's Exhibit 4. Thus, we assume this is a scrivener's error.

¹³ In the ALJ's discussion of the CT scan evidence, the ALJ refers to an "April 18, 2022" CT scan. Decision and Order at 35-36. But there is no "April 18, 2022" CT scan of record; rather, there is only the April 8, 2022 CT scan. *See* Employer's Exhibits 3, 8. Again, we assume this is a scrivener's error.

the Miner's treating physician highlighted the presence of a "stable fissural nodule" in the right lung separate from the large lesion in the right upper lobe that he suspected to be cancer on the March 18, 2022 CT scan. Employer's Exhibit 3 at 8. The ALJ thus acted within her discretion in concluding Dr. Crum's reading is more credible as being more thorough and consistent with the Miner's treatment records than Dr. Adcock's reading. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (ALJ has the discretion to weigh the evidence and draw inferences); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (ALJ has exclusive power to make credibility determinations and resolve inconsistencies in the evidence); Decision and Order at 35-36.

We also reject Employer's argument that the ALJ should have credited Dr. Adcock's readings as better supported by the x-ray evidence.¹⁴ Employer's Brief at 16. As the ALJ noted, the CT scans were taken more recently than the x-rays of record. Decision and Order at 17. The ALJ thus permissibly found the x-ray evidence, which does not support a finding of complicated pneumoconiosis, does not undermine the positive CT scan evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43, 1-49-52 (2023); Decision and Order at 17, 38.

Medical Opinions

The ALJ also considered the medical opinions of Drs. Werntz, Basheda, Go, and Zaldivar. Decision and Order at 28-29. The ALJ found that Drs. Werntz and Basheda did not address the existence of complicated pneumoconiosis. *Id.* at 28; *see* Director's Exhibits 78, 86, 89; Employer's Exhibits 1, 11. Dr. Go reviewed the March 18, 2022 CT scan and April 8, 2022 PET/CT scan findings and opined that lung cancer was a concern with complicated pneumoconiosis another possibility, concluding he was unable to exclude complicated pneumoconiosis but would review additional records once the Miner was more fully evaluated. Claimant's Exhibit 3. Finally, Dr. Zaldivar opined that the Miner did not have complicated pneumoconiosis based on his review of the medical records, including the CT scan and x-ray evidence as well as the Miner's treatment records. Director's Exhibit 91; Employer's Exhibit 10.

The ALJ discredited Dr. Go's opinion as equivocal and found Dr. Zaldivar's opinion neither well-reasoned nor well-documented. *Id.* We affirm the ALJ's findings regarding their opinions as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR

¹⁴ The record contains four interpretations of two x-rays dated December 16, 2020, and July 14, 2021. Director's Exhibit 78; Claimant's Exhibits 1, 2; Employer's Exhibit 9. Each interpretation is positive for simple pneumoconiosis but negative for complicated pneumoconiosis. *Id.*

710, 1-711 (1983). The ALJ also found Drs. Basheda's and Werntz's opinions were not probative as to complicated pneumoconiosis because they did not address the issue. Decision and Order at 29. As a result, she found the medical opinion evidence inconclusive on the issue. *Id.* Employer argues the ALJ erred in discrediting Drs. Basheda's and Werntz's opinions. Employer's Brief at 8-13; *see* Employer's Closing Argument at 15-16 (addressing Drs. Basheda's and Werntz's opinions, which it contends exclude complicated pneumoconiosis). Employer's contention has merit.

Dr. Basheda reviewed the readings of the Miner's CT scans and x-rays and indicated that there were no large opacities documented by the Miner's treating physicians other than the development of a mass in the right upper lung that was determined to be bronchogenic cancer. Employer's Exhibit 11 at 14. He opined that a radiologist suspecting cancer in a patient would document opacities as small as two to three millimeters, so that if there was a large opacity, it would be documented and clearly visible. *Id.* at 15-16. Further, he opined that because the Miner underwent radiation therapy, the oncologist and radiation medicine doctors "must have been very convinced or absolutely sure" that the right upper lobe mass was cancer.¹⁵ *Id.* at 16-17. Noting that he did not review any of the CT scan results himself and acknowledging the "inconsistency" demonstrated by Dr. Crum's positive diagnosis for complicated pneumoconiosis, Dr. Basheda testified that the majority of readings found no evidence of complicated pneumoconiosis. *Id.* at 15, 28.

Thus, the ALJ's finding that Dr. Basheda's opinion "did not specifically address the presence of complicated pneumoconiosis" is not supported by substantial evidence. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 28. Dr. Basheda's opinion specifically addresses the issue of complicated pneumoconiosis and is thus relevant to whether Claimant established that the Miner had the disease. As the ALJ failed to consider and weigh all relevant evidence in coming to her determinations, remand is required and we therefore vacate the ALJ's finding that Dr. Basheda did not address the existence of complicated pneumoconiosis. *See* 30 U.S.C. §923(b); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (ALJ's failure to consider all relevant evidence requires remand).

Further, Dr. Werntz indicated the Miner did not have any large opacities based on Dr. DePonte's reading of the December 16, 2020 x-ray, and Dr. Werntz diagnosed the Miner with simple clinical pneumoconiosis based on his consideration of the December 16, 2020 and July 14, 2021 x-ray readings. Director's Exhibit 78 at 3, 16; Director's

¹⁵ Dr. Basheda noted the appearance of the mass in less than two years is "extremely unusual" for complicated pneumoconiosis. Employer's Exhibit 11 at 28.

Exhibit 89 at 4. Thus, the ALJ also erred in finding Dr. Werntz “did not address the existence of complicated pneumoconiosis.” Decision and Order at 28.

Therefore, we vacate the ALJ’s finding that the medical opinion evidence is inconclusive regarding complicated pneumoconiosis.¹⁶ Decision and Order at 29; 20 C.F.R. §718.304(c). Because we have vacated the ALJ’s weighing of the medical opinion evidence, we further vacate her conclusion that Claimant invoked the Section 411(c)(3) presumption. Decision and Order at 38.

Remand Instructions – Miner’s Claim

On remand, the ALJ must weigh Drs. Basheda’s and Werntz’s opinions on complicated pneumoconiosis. 20 C.F.R. §718.304(c). She must consider the explanations for the physicians’ conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533; *Melnick*, 16 BLR at 1-33. She must then weigh all relevant evidence of complicated pneumoconiosis together and resolve any conflicts. *See Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56. In doing so, she must adequately explain the bases for her conclusions as the Administrative Procedure Act (APA) requires.¹⁷ *See Wojtowicz*, 12 BLR at 1-165.

If the ALJ finds Claimant has met her burden to establish complicated pneumoconiosis, she will have invoked the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. If the ALJ finds Claimant has invoked the Section 411(c)(3) presumption, then she has established entitlement to benefits, as Employer has not challenged the ALJ’s findings that Claimant invoked the presumption that the Miner’s complicated pneumoconiosis arose out of his coal mine employment and that Employer did not rebut it. 20 C.F.R. §718.203(b); Decision and Order at 39; *see Skrack*, 6 BLR at 1-711.

¹⁶ We make no determination regarding the credibility or weight of Drs. Basheda’s and Werntz’s opinions; the ALJ must address all the relevant evidence in the first instance. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

¹⁷ The Administrative Procedure Act, 5 U.S.C. §§500-591, requires that every adjudicatory decision include “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If the ALJ finds that Claimant is unable to invoke the irrebuttable presumption, she must consider whether the evidence establishes the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Because Claimant established the Miner had at least eighteen years of underground coal mine employment, if the ALJ finds she has established a totally disabling respiratory or pulmonary impairment, she will have invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and the ALJ must then consider whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1).

However, if Claimant fails to establish total disability affirmatively or pursuant to the Section 411(c)(3) presumption, the ALJ must deny benefits as Claimant will have failed to establish an essential element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Survivor's Claim

Because we have vacated the award of benefits in the miner's claim, we also vacate the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(l) of the Act. 30 U.S.C. §932(l). We also address Employer's argument that the ALJ failed to hold a hearing in the survivor's claim as Employer requested.

After the district director awarded survivor's benefits under Section 422(l) of the Act, Employer timely requested a hearing before the Office of Administrative Law Judges and indicated that it disagreed with the district director's finding that Claimant is the surviving spouse of the Miner. Survivor's Claim (SC) Director's Exhibits 7, 12.

The case was assigned to the ALJ, who issued a Notice of Assignment and Order to Show Cause Why Case Should Not Be Decided on the Record on June 5, 2024. The ALJ noted she awarded benefits in the miner's claim and thus Claimant is subject to automatic entitlement under Section 422(l) of the Act. Order to Show Cause at 2. She determined that "no new evidence or evidentiary development is necessary" to find Claimant is an eligible survivor and that a hearing is not necessary unless the parties show cause why a decision on the record cannot be made without a hearing, providing the parties until July 12, 2024, to respond. *Id.*

The Director agreed that a hearing is not required and did not object to the claim being decided on the record. Director's Response to Court's Order to Show Cause. Employer responded on July 12, 2024, disagreeing with a summary award of survivor's benefits and maintaining its request for a hearing. Employer's Response to Order to Show Cause.

In her Decision and Order Finding Good Cause to Decide this Case on the Record and Awarding Benefits (SC Decision and Order), the ALJ rejected Employer's arguments and found no cause to hold a hearing. She found that no fact-finding is needed to decide Claimant's status as an eligible survivor of the Miner based on the parties' stipulation that Claimant was the Miner's wife and his dependent in the miner's claim; the marriage certificate of Claimant and the Miner; and the Miner's death certificate showing Claimant as the Miner's wife at the time of his death. SC Decision and Order at 2-3. The ALJ found there is no contrary evidence and that Employer has not asserted that Claimant is not an eligible survivor of the deceased Miner. *Id.* at 3. In addition, the ALJ rejected Employer's argument that a hearing is needed to address the medical issues given that the determination of eligibility to benefits in the miner's claim is not yet final and subject to appeal. *Id.* Accordingly, the ALJ found that neither party showed cause why the case should not be decided on the record and thus found Claimant entitled to automatic survivor's benefits based on the award of benefits in the miner's claim. *Id.*

Employer argues the ALJ erred in finding Claimant is an eligible survivor based on the record and in denying its request for a hearing. SC Employer's Brief at 13-20. The Director agrees the ALJ erred in not holding the requested hearing. SC Director's Response Brief at 2. However, he urges the Board to affirm the award of benefits in the survivor's claim, contending the ALJ's error is harmless as the evidence conclusively establishes Claimant is entitled to survivor's benefits under Section 422(l). *Id.*

The Act and regulations mandate that an ALJ hold a hearing on any claim whenever a party requests such a hearing, *see* 20 C.F.R. §§725.421(a), 725.450, 725.451, unless one of the following exceptions applies: 1) the right to a hearing is waived, in writing, by the parties, 20 C.F.R. §725.461(a); 2) a party requests summary judgment and the ALJ determines there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, 20 C.F.R. §725.452(c); or 3) the ALJ notifies the parties by written order of his or her belief that a hearing is not necessary, allowing at least thirty days for the parties to respond, and no party requests that a hearing be held. 20 C.F.R. §725.452(d).

As noted above, the parties agree that none of these exceptions for holding a hearing were applicable before the ALJ. Moreover, even if the Director's argument that such error was harmless had merit, this contention is no longer pertinent as we have vacated the award of benefits in the miner's claim. *See* SC Director's Response Brief at 2-3. Thus, on remand, we instruct the ALJ to hold the hearing Employer requested in the survivor's claim unless she finds one of the regulatory exceptions applicable. *See* 20 C.F.R. §§725.452(c),(d); 725.461(a).

Remand Instructions—Survivor’s Claim

On remand, after addressing Employer’s hearing request, should the ALJ award benefits in the miner’s claim and find Claimant establishes her dependency, Claimant is derivatively entitled to benefits in the survivor’s claim. 30 U.S.C. §932(*l*). If the ALJ denies benefits in the miner’s claim, the ALJ must consider whether Claimant can establish dependency and that the Miner’s death was due to pneumoconiosis. 20 C.F.R. §718.205. In making her determinations, the ALJ must consider all relevant evidence, set forth her findings in detail, and explain her underlying rationale as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, we affirm in part and vacate in part the ALJ’s Decision and Order Awarding Benefits and Decision and Order Finding Good Cause to Decide this Case on the Record and Awarding Benefits, and remand the cases to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

GLENN E. ULMER
Acting Administrative Appeals Judge