

BRB No. 10-0175 BLA

MILDRED KEENER)
(Widow of FRANKLIN KEENER))
)
 Claimant-Respondent)
)
 v.)
) DATE ISSUED: 12/15/2010
 SOUTHERN OHIO 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 Awarding Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Rita Roppolo (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05671) of Administrative Law Judge Janice K. Bullard rendered on a survivor's claim filed on June 30, 2006, 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).¹ The administrative law judge credited the miner with 32.67 years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge acknowledged employer's concession that the miner had pneumoconiosis, she also considered the evidence of record and determined that claimant established the existence of the disease pursuant to 20 C.F.R. §718.202(a)(2), (4). The administrative law judge further found that claimant established that the miner's pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b) and that pneumoconiosis was a contributing cause of the miner's death under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings at 20 C.F.R. §718.205(c). Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a letter in which he indicated that he would not submit a substantive response, unless requested to do so by the Board.² The Director also noted, however, that if the Board vacates the award of benefits and remands this case for further proceedings, the Board should instruct the administrative law judge to consider claimant's entitlement under Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.³ Neither

¹ Franklin Keener, the miner, died on March 31, 2006. Director's Exhibits 2, 17. During his lifetime, the miner filed four claims, all of which were denied.

² We affirm the administrative law judge's findings that the miner worked for 32.67 years as a coal miner and that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as they are unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ Relevant to this survivor's claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes that the miner had at least fifteen years of qualifying coal mine employment, and that the miner had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. Section 422(l) of the Act, as amended, which permits a qualified survivor of a miner who filed a successful claim for benefits to be automatically entitled to survivor's benefits, without the burden of reestablishing entitlement, is not applicable in the current claim as the record reflects that all of the miner's claims were denied.

employer nor claimant has submitted any pleadings regarding the application of the amendments to this case.

To determine whether this case must be remanded for consideration of invocation of the rebuttable presumption of death due to pneumoconiosis, we will first address employer's allegations of error regarding the administrative law judge's findings at 20 C.F.R. §718.205(c).

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. 20 C.F.R. §718.205(c)

A. Claimant's Burden of Proof

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For a survivor's claim filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis caused the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or if claimant establishes invocation of the irrebuttable presumption of death due to pneumoconiosis.⁵ 20 C.F.R. §§718.205(c)(2),

⁴ The record is not entirely clear as to whether the miner worked in Ohio or West Virginia. However, the administrative law judge found that the miner's coal mine employment was in West Virginia and employer acknowledges that the administrative law judge's determination appears to be correct. Decision and Order at 20 n.8; Employer's Brief at 5 n.1. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁵ In addition, relevant to this survivor's claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes that the miner had at least fifteen years of qualifying coal mine employment, and that the miner had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. Amended

(4), 718.304. 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); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1992); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000).

B. The Administrative Law Judge's Findings

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the miner's death certificate, signed by Dr. DeMarco, and the medical opinions of Drs. Farnsworth, Schaaf, Basheda and Oesterling. With respect to the death certificate, the administrative law judge noted that Dr. DeMarco listed end stage kidney disease as the sole cause of death. Decision and Order at 22; Director's Exhibit 17. The administrative law judge gave no weight to the death certificate, as Dr. DeMarco's credentials are not of record and there are no medical records contemporaneous to the miner's death establishing the extent of the treatment that Dr. DeMarco provided to the miner. Decision and Order at 22.

Regarding the medical opinions, the administrative law judge found that Drs. Farnsworth and Schaaf agreed that pneumoconiosis hastened the miner's death, while Drs. Basheda and Oesterling concluded that the miner's pneumoconiosis was too mild to have hastened his death. Decision and Order at 21, 23-25; Director's Exhibit 17; Claimant's Exhibit 1; Employer's Exhibits 3, 7-9, 16, 17. The administrative law judge accorded greater weight to Dr. Farnsworth's opinion, that pneumoconiosis made the miner more susceptible to bronchopneumonia, a contributing factor in the miner's death, based upon Dr. Farnsworth's status as a treating physician. Decision and Order at 22. The administrative law judge further determined that Dr. Farnsworth's opinion is supported by Dr. Schaaf's testimony, that the miner's pneumoconiosis substantially contributed to his death, in light of his thirty-five years of coal mine employment and the histological evidence of pneumoconiosis.⁶ *Id.* The administrative law judge credited Dr.

Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a qualified survivor of a miner who filed a successful claim for benefits is automatically entitled to survivor's benefits, is not applicable in the current claim, as the record indicates that all of the miner's claims were denied.

⁶ In his April 18, 2008 report, Dr. Schaaf stated that pneumoconiosis substantially contributed to the miner's death, "based first on the existence of coal workers' pneumoconiosis as documented histologically." Claimant's Exhibit 1. Dr. Schaaf further indicated that the "complicating factor of [the miner's] coal workers' pneumoconiosis is the subsequent development of pneumonia." *Id.* At his deposition, Dr. Schaaf reiterated his opinion, that the miner's pre-existing coal workers' pneumoconiosis contributed to his death, because it impaired his ability to withstand the pneumonia. Claimant's Exhibit 2

Schaaf's explanation, that pneumoconiosis led to the miner's "inability to fend off the development of pneumonia and infection, which was, in Dr. Schaaf's opinion, one of the acute causes of the [m]iner's death." *Id.* at 23.

The administrative law judge determined that Dr. Basheda's opinion, that the miner's pneumoconiosis was too mild to have hastened his death, was entitled to less weight than the opinions of Drs. Farnsworth and Schaaf, because he did not address all of the evidence relevant to the miner's pulmonary condition.⁷ Decision and Order at 24. Similarly, the administrative law judge accorded less weight to Dr. Oesterling's opinion, that pneumoconiosis was not a contributing cause of the miner's death, because Dr. Oesterling did not provide an adequate explanation for his conclusions.⁸ *Id.* at 25. The

at 20-22. Dr. Schaaf concluded that he did not know whether the miner's kidney disease played a role in his death, stating, "I was not there and there is no data about its worsening at the time of death." *Id.* at 22. Dr. Schaaf acknowledged that kidney disease "leads to fluid retention, leads to immune compromise, that leads to infection of all kinds." *Id.* Dr. Schaaf also opined that kidney failure can cause fluid retention, but the autopsy reports described the miner as merely "having a little bit of fluid in his lungs." *Id.* at 36.

⁷ In a report dated August 10, 2007, Dr. Basheda stated there was pathologic and radiographic evidence of simple pneumoconiosis, but there was no physiologic evidence of pulmonary or respiratory impairment secondary to the miner's significant coal dust exposure. Employer's Exhibit 7. Dr. Basheda also disputed the diagnosis of chronic obstructive pulmonary disease, based upon his review of a July 16, 1985 pulmonary function study. *Id.* Dr. Basheda concluded, therefore, that the miner's death was not caused, contributed to, or hastened by any chronic dust disease arising out of coal mine employment. *Id.* In his deposition, Dr. Basheda reiterated his opinion that chronic renal failure, hypertension and coronary disease were the chief causes of the miner's death and stated that renal failure, not coal workers' pneumoconiosis, is a primary risk factor for pneumonias acquired in care facilities, including hospitals. Employer's Exhibit 17 at 20-21.

⁸ In his May 30, 2007 report, Dr. Oesterling stated that he reviewed the histological slides of the miner's lungs and heart and a needle biopsy of the miner's kidney. Employer's Exhibit 2. He opined that the miner had mild to moderate micronodular coal workers' pneumoconiosis and enlargement and fibrosis of the lymph nodes. *Id.* Dr. Oesterling stated that these findings appeared to be insufficient to alter pulmonary function and, therefore, pneumoconiosis was not a factor in hastening, precipitating or causing the miner's death. *Id.* Dr. Oesterling further opined that the primary changes within the miner's lungs were not caused by coal dust, but were related

administrative law judge further determined that the opinions of both Drs. Basheda and Oesterling were entitled to diminished weight, because their view, that the miner's heart disease was a significant factor in his death, conflicted with Dr. Farnsworth's opinion, that the miner's cardiac condition was stable. *Id.* at 24-25. Accordingly, the administrative law judge determined that Dr. Farnsworth's opinion, as supported by Dr. Schaaf's opinion, was sufficient to establish that pneumoconiosis was a substantial contributing cause to the miner's death under 20 C.F.R. §718.205(c)(2), (5).

C. Employer's Arguments

Employer argues that the administrative law judge erred in omitting Dr. Bush's autopsy report from consideration under 20 C.F.R. §718.205(c). We agree. In his report, Dr. Bush noted that he reviewed slides obtained during the miner's autopsy, the survivor's claim form, the miner's death certificate, and Dr. Franyutti's autopsy report. Employer's Exhibit 5. Based on a review of the autopsy slides, Dr. Bush diagnosed a minimal degree of simple coal workers' pneumoconiosis. *Id.* With respect to the role that pneumoconiosis played in the miner's death, Dr. Bush stated, "[t]he minimal coal worker's disease in the lungs could not have been a contributing factor to death." *Id.* The administrative law judge included Dr. Bush's report in her summary of the autopsy evidence, but indicated:

I have discounted that portion of Dr. Bush's opinion that appears to be derived from sources other than the autopsy report, such as [c]laimant's claim file and the death certificate. As [e]mployer has submitted the opinions of two other physicians, Dr. Bush's opinions on other than the autopsy exceed the limitations on evidence imposed by 20 C.F.R. §725.414.

Decision and Order at 14 n.7. When rendering her findings under 20 C.F.R. §718.205(c), the administrative law judge did not refer to Dr. Bush's opinion regarding the cause of the miner's death.

The administrative law judge acted within her discretion in stating that she would essentially redact any part of Dr. Bush's autopsy report that strayed into the realm of a full medical report, because employer had reached its limit of two affirmative medical reports. Nevertheless, we cannot affirm the administrative law judge's apparent decision to exclude Dr. Bush's opinion from her consideration of whether claimant established that pneumoconiosis was a contributing cause of the miner's death. 20 C.F.R. §725.414(a)(3)(i); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007). The

to changes secondary to chronic passive pulmonary congestion and resultant interstitial fibrosis. *Id.*

administrative law judge did not render an explicit finding that Dr. Bush's opinion on the issue of death causation was derived from sources other than the autopsy report. Because her decision to exclude Dr. Bush's opinion is not properly explained, she has failed to comply with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §432(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); see *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Accordingly, we must vacate the administrative law judge's determination that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c) and remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must render an explicit finding as to whether Dr. Bush's opinion regarding the extent to which pneumoconiosis contributed to the miner's death is based upon evidence beyond the scope of an autopsy report. If the administrative law judge determines that Dr. Bush relied upon his review of the slides and Dr. Franyutti's autopsy report, she must consider Dr. Bush's opinion under 20 C.F.R. §718.205(c).

Regarding Dr. Oesterling's opinion, employer argues that the administrative law judge erred in failing to consider Dr. Oesterling's opinion in its entirety, in finding that his conclusions with respect to the cause of the miner's death were based on conjecture, and in shifting the burden of proof to the employer to rule out coal workers' pneumoconiosis as a substantially contributing factor in the miner's death. Employer's arguments have merit. Contrary to the administrative law judge's finding, Dr. Oesterling identified the evidence supporting his view that coronary artery disease played a major role in the miner's death. Dr. Oesterling specifically indicated that his diagnosis of progressive ischemic cardiomyopathy was based on his direct observation of tissue slides from the miner's heart, on which he observed an evolving area of heart attack, interstitial fibrosis from previous muscle death, occurring several days prior the miner's death.⁹

⁹ Although Dr. Oesterling also referred in general to the medical records, in stating that there is evidence that the miner had coronary artery disease, hypercholesterolemia, hypertension, and arteriosclerosis, Employer's Exhibit 2 at 5, he cited the histological slides in his report and deposition in finding that that the miner experienced progressive ischemic cardiomyopathy that caused his chronic passive pulmonary congestion. Employer's Exhibits 2, 18. He explained that this created a cyclical process, with congestion affecting the miner's lung function, which accelerated the ischemic changes in the heart, leading to more passive congestion and fluid and less oxygen in the blood and greater damage to the heart. Employer's Exhibit 2. He opined that progressive ischemic

Employer's Exhibit 2 at 6. In addition, in finding that Dr. Oesterling did not explain why the one percent impact of pneumoconiosis on the miner's lung did not render it a substantial contributing cause of death, the administrative did not consider that Dr. Oesterling stated that the changes in the interstitium due to coal dust exposure were modest and "[in]sufficient in magnitude to produce any measurable change in function" in the miner's lungs.¹⁰ Employer's Exhibit 18 at 16. Dr. Oesterling further explained that the miner's acute bronchial pneumonia, which was one cause of the miner's demise, was unrelated to pneumoconiosis because the pathological evidence did not show dust in and around the airways. *Id.* at 20.

Because the administrative law judge did not consider Dr. Oesterling's opinion in its entirety, we must vacate her finding that Dr. Oesterling's opinion is entitled to less weight. On remand, the administrative law judge must fully address Dr. Oesterling's report and deposition testimony pursuant to 20 C.F.R. §718.205(c). *See Wojtowicz*, 12 BLR at 1-165.

Employer also alleges that, in according substantial weight to Dr. Farnsworth's opinion, the administrative law judge failed to consider that Dr. Farnsworth did not treat the miner in the year preceding his demise and did not have the opportunity to review the opinions of Drs. Oesterling, Basheda and Bush, who discussed the miner's condition at the time of his death. Employer further argues that the administrative law judge erred in according less weight to the opinions of Drs. Oesterling, Basheda and Bush because their

myocardopathy would result in bouts of cardiac arrhythmia and would have ended with an acute episode of cardiac arrest and death. *Id.* Dr. Oesterling also stated that the miner's renal failure was very significant prior to, and at the time of his death, that his kidney biopsy revealed acute tubular necrosis. *Id.* Dr. Oesterling opined that renal failure was a precipitating reason for the miner's terminal admission and would have been a significant contributing cause of his death. *Id.*

¹⁰ Dr. Oesterling stated:

In higher levels of [clinical pneumoconiosis], it can cause problems. As we begin to get into severe macronodular disease, progressive massive fibrosis, we begin to have some compression of the airways. When that happens, we then have mucous and fluids trapped behind those areas of narrowing and, again, this is an ideal culture medium. So those people are far more prone to pulmonary infections. These small areas that we saw in this interstitium just don't involve significant sized airways. We don't have that type of a change with this level of disease.

Employer's Exhibit 18 at 21.

assessment of the miner's cardiac disease conflicted with that of Dr. Farnsworth, who indicated that the miner's cardiac condition was stable. We hold that employer's contentions have merit.

In a letter dated November 28, 2006, Dr. Farnsworth stated, "[i]t is my belief, based on [the miner's] autopsy that the coal workers' pneumoconiosis and his resultant bronchopneumonia and pleural effusions did contribute to the [miner's] death."¹¹ Director's Exhibit 17. In his deposition testimony, however, Dr. Farnsworth indicated that he did not know the miner's condition at the time of death in March 31, 2006, and that he had not seen the miner since January 3, 2005, because he was being treated by Dr. DeMarco. Employer's Exhibit 4 at 17, 19-22. Employer correctly maintains that the administrative law judge did not adequately explain his crediting of Dr. Farnsworth's view, that the miner's cardiac condition was stable at the time of his death, over the contrary views of Drs. Basheda and Oesterling. Drs. Basheda and Oesterling supported their diagnoses of damage to the miner's heart that occurred close to the time of his death by their review of slides containing heart tissue, while the basis of Dr. Farnsworth's opinion is unclear. Director's Exhibit 17; Claimant's Exhibit 1; Employer's Exhibits 3, 7-9, 16, 17.

Because the administrative law judge did not address Dr. Farnsworth's assertion, that he had no knowledge of the miner's condition in the year prior to his death, or the basis for his conclusion that the miner's heart disease was stable, we must vacate her finding that Dr. Farnsworth's opinion regarding the cause of the miner's death is well-reasoned and well-documented. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). The administrative law judge must reconsider Dr. Farnsworth's opinion on remand and address these factors.

Regarding Dr. Schaaf's opinion, that pneumoconiosis was a substantially contributing cause of the miner's death, employer is correct in contending that, in weighing this opinion, the administrative law judge should have addressed Dr. Schaaf's statement that he did not have any information regarding the extent to which pneumoconiosis affected the miner's pulmonary function, as this is relevant in determining whether Dr. Schaaf's opinion is documented and reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Similarly, employer is correct in maintaining that

¹¹ Dr. Franyutti performed the autopsy and prepared a report dated March 31, 2006. Director's Exhibit 17. In his final pathological diagnoses, Dr. Franyutti listed simple coal workers' pneumoconiosis, serosal fibrosis and anthracosilicotic nodules in the subserosal stroma of the lungs, interstitial fibrosis, microcalcification of the alveoli lumen, bronchopneumonia, bilateral pleural effusions, and bilateral parietopleural adhesions. *Id.* Dr. Franyutti did not offer an opinion as to the cause of the miner's death.

the administrative law judge should have considered whether Dr. Schaaf provided an adequate explanation for his conclusion that pneumoconiosis, regardless of its extent, is a contributing factor in any death in which pneumonia plays a role.¹² *Id.* We also agree with employer that the administrative law judge did not address the conflict between Dr. Schaaf's statement that the autopsy evidence showed that there was little fluid in the miner's lungs and Dr. Oesterling's diagnosis of severe passive pulmonary congestion with edema. *Id.* We vacate, therefore, the administrative law judge's crediting of Dr. Schaaf's opinion regarding the link between pneumoconiosis and the miner's death and instruct him to reconsider Dr. Schaaf's opinion on remand.

With respect to the administrative law judge's consideration of Dr. Basheda's opinion, that the miner's death was unrelated to pneumoconiosis, however, we reject employer's contention that the administrative law judge erred in stating that Dr. Basheda did not consider all of the medical evidence of record relevant to the miner's pulmonary condition. Dr. Basheda acknowledged the miner's symptoms of shortness of breath, chronic cough, and wheezing, and stated that it is "clear" that the miner's symptoms "progressed" or "worsened" prior to his death, and relied on the results of objective testing from 1985, or earlier, to conclude that there was no evidence that the miner's pneumoconiosis caused any respiratory or pulmonary impairment. Employer's Exhibit 7. The administrative law judge rationally determined that Dr. Basheda's opinion was entitled to diminished weight, as he did not address the diagnoses of chronic obstructive pulmonary disease rendered by other reviewing physicians, was unaware that "the miner was using oxygen in the last years of his life," and relied upon "remote pulmonary function study results." Decision and Order at 24-25; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 151 (1989) (*en banc*).

In light of our determination that the administrative law judge erred in omitting Dr. Bush's autopsy report from consideration, and did not properly weigh the opinions of Drs. Basheda, Oesterling, Farnsworth and Schaaf, we must vacate the administrative law judge's finding that claimant established that pneumoconiosis was a substantially contributing cause of the miner's death under 20 C.F.R. §718.205(c)(2), (5). When reconsidering this issue on remand, the administrative law judge must place the burden on claimant to establish, by a preponderance of the reasoned and documented evidence, that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). *See Sparks*, 213 F.3d at 190, 22 BLR at 2-259; *Shuff v. Cedar*

¹² Employer specifically argues that, although Dr. Schaaf reviewed the reports of Drs. Basheda, Oesterling and Bush, he did not reconcile his view with their conclusion that the miner's pneumoconiosis was too mild to have caused or contributed to his death.

Coal Co., 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

II. Applicability of the Amendments to the Act

In light of the filing date of the survivor's claim and our decision to vacate the award of benefits, we direct the administrative law judge to initially determine, on remand, whether claimant is entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). If the administrative law judge finds that claimant has established invocation of the presumption at Section 411(c)(4), she should then consider whether employer has satisfied its burden to rebut the presumption.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge