BRB No. 10-0263 BLA

CHRISTINE SIZEMORE (Widow of CLARENCE SIZEMORE)	)	
Claimant-Respondent	)	
v.	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/16/2011
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Maia S. Fisher (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 Awarding Benefits (2007-BLA-5942) of Administrative Law Judge Alice M. Craft (the administrative law judge) with respect to a survivor's claim 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). Based on claimant's

August 3, 2006 filing date,[1] the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718. Initially, the administrative law judge determined that the miner's (Mr. Sizemore) employment as a bull dozer and a high lift operator with Shamrock Coal Company met the definition of a miner pursuant to 20 C.F.R. §§725.101(a)(19), 725.202(a), that Shamrock Coal was Mr. Sizemore's last coal mine employer, and that Shamrock Coal (employer) was, therefore, the properly designated responsible operator. In addition, the administrative law judge credited Mr. Sizemore with at least twenty years of coal mine employment, based on his Social Security earnings statements.

Addressing the merits of entitlement in this survivor's claim, the administrative law judge found the biopsy and medical opinion evidence sufficient to establish the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (4), and that Mr. Sizemore's clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).[2] The administrative law judge further found that Mr. Sizemore's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that Mr. Sizemore's employment with employer was coal mine employment, as defined by the Act, and therefore, erred in finding that employer was liable for the payment of any benefits that may be due in this case. In addition, employer contends that the administrative law judge erred in finding that the medical evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (4), arguing that the administrative law judge erred in weighing the conflicting evidence. Employer further contends that the administrative law judge erred in finding the evidence sufficient to establish that Mr. Sizemore's death was due to pneumoconiosis pursuant to Section 718.205(c). Claimant has not responded to employer's appeal.

The Director, Office of Workers' Compensation Programs (the Director), requested an extension of time to file a brief in response to employer's appeal. By Order dated May 18, 2010, the Board granted the Director's request for the extension to file a response brief and, at the same time, instructed the Director that the response brief should also address the impact on this case, if any, of Section 1556 of Public Law No. 111-148,

[1] Claimant is the widow of the miner, Clarence Sizemore (Mr. Sizemore), who died on July 5, 2006. Director's Exhibit 10. Claimant filed her claim for survivor's benefits on August 3, 2006. Director's Exhibit 2.

[2] Administrative Law Judge Alice M. Craft (the administrative law judge) further found that, to the extent she also found legal pneumoconiosis established, a finding of causality was subsumed in that finding. Decision and Order at 37-38.

which amended the Act with respect to the entitlement criteria for certain claims, 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). In addition, the Board granted the other parties thirty days, from the date of the Order, to file supplemental briefs addressing the impact on this case, if any, of the amendments. *Sizemore v. Shamrock Coal Co.*, BRB No. 10-0263 BLA (May 18, 2010)(unpub. Order).

The Director, in a limited response,[3] contends that the administrative law judge applied the correct legal standard in determining that Mr. Sizemore's work for employer was coal mine employment as defined by the Act and that employer was, therefore, the properly designated responsible operator. In addition, the Director, addressing the impact of the 2010 amendments to the Act, states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. However, the Director further asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), and for the possible submission of additional evidence, would be required, as the present claim was filed after January 1, 2005, was pending on March 23, 2010, and the administrative law judge credited Mr. Sizemore with more than fifteen years of coal mine employment.[4]

In a supplemental brief addressing the impact of the 2010 amendments, employer also contends that the amendment to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), is not applicable in this case, but that amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), may be applicable, based on the filing date of the survivor's claim. However, employer contends that Section 411(c)(4) is not applicable in this case because claimant has not submitted evidence sufficient to establish invocation of the Section 411(c)(4)

[3] The Director, Office of Workers' Compensation Programs (the Director), states that he will not file a substantive response brief addressing employer's allegations of error with regard to the administrative law judge's findings on the merits of entitlement. Director's Brief at 2 n.1.

[4] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is, in pertinent part, a rebuttable presumption that the miner's death was due to pneumoconiosis, 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

presumption. In particular, employer reiterates its arguments that the administrative law judge erred in finding that Mr. Sizemore's employment with it qualified as coal mine employment. Employer contends, therefore, that claimant failed to establish the requisite fifteen years of qualifying coal mine employment to establish invocation of the Section 411(c)(4) presumption. However, employer contends that, if the Board determines that the amendment applies, the record must be reopened and it be permitted to develop evidence addressing the new standard.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co*., 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Definition of a Miner/Responsible Operator:

Initially, employer contends that the administrative law judge erred in finding that Mr. Sizemore's work for Shamrock Coal satisfied the situs and function prongs of the test required to show that Mr. Sizemore was a "miner" under the Act. Employer contends, therefore, that the administrative law judge erred in finding it liable for the payment of benefits. Employer's Brief at 10-15. In particular, employer contends that the administrative law judge failed to provide valid reasons for finding that Mr. Sizemore's

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Mr. Sizemore was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 5.

work for Shamrock Coal qualified as the work of a "miner" under the Act. Employer argues that Mr. Sizemore's testimony at the time of his 1991 hearing before Administrative Law Judge Edward J. Murty, Jr., established that his job duties, pushing coal onto the unit trains at the Manchester worksite, were not sufficient to establish either the situs or function prongs necessary for establishing qualifying coal mine employment. Employer contends that neither Mr. Sizemore's job duties (pushing already cleaned coal onto the unit trains), nor the location of the job site at Manchester (which was over thirty miles from both the mine site and the preparation plant at Redland), was sufficient to satisfy the requirement that Mr. Sizemore's employment be conducted at a coal mine site or preparation facility and involve the extraction or preparation of coal. Employer's Brief at 12-14.

The Director responds, arguing that employer's contentions are without merit. The Director contends that the administrative law judge applied the correct legal standard in determining that Mr. Sizemore's employment with employer satisfied both the situs and function prongs of the test required to meet the elements of qualifying coal mine employment under the Act. Director's Brief at 5-8. Specifically, the Director contends that coal preparation includes the processing and loading of coal up to the point of retail distribution and that the term "mine" is broadly defined to include the land, structures and property used in the extraction and/or preparation of coal. *Id*. at 6-7. Consequently, the Director urges affirmance of the administrative law judge's determination that Mr. Sizemore's employment with employer constituted qualifying coal mine employment, and, therefore, that the administrative law judge properly designated employer as the responsible operator.

The regulations set forth two definitions of a miner. Pursuant to Section 725.101(a)(19), a miner is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 20 C.F.R. §725.101(a)(19). Under Section 725.202(a), a miner is "any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a situs-function test in determining whether an individual is a "miner" under the Act. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir. 1989). The situs portion of the test requires that a person's work occurred in or around a coal mine or coal preparation facility. *Id*. An individual meets the function requirement if his or her work was necessary and integral to the extraction or preparation of coal. *Id*. The Sixth Circuit has also held that "[t]hose whose tasks are merely convenient but not vital or essential to

production and/or extraction are generally not classified as 'miners.'" *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922, 12 BLR 2-271, 2-278 (6th Cir. 1989).

In this case, the administrative law judge explained her basis for finding that Mr. Sizemore's work satisfied the situs-function test, noting that the regulations provide that the loading of coal is part of the coal preparation process and, therefore, that "the [m]iner's work for the Employer constituted the last necessary step in the preparation process." Decision and Order at 7. In particular, the administrative law judge considered Mr. Sizemore's 1991 hearing testimony, where he testified that his job duties included operating a bull dozer or a high lift to load coal onto the trains, which entailed pushing the coal into chutes to load the trains. Decision and Order at 5; ALJ's Exhibit 1 at 20-21 (1991 Hearing Transcript at 18-19). In addition, Mr. Sizemore testified that he cleaned up the tunnels after the trains had been loaded, and that all his job duties exposed him to a good deal of coal dust. *Id*. The administrative law judge, therefore, found that Mr. Sizemore's work involved the preparation of coal and met the "function" prong of the test for determining that Mr. Sizemore was a "miner." *Id*.

With regard to the situs prong, the administrative law judge noted that the loading facility was many miles from either the mine site or the Redland preparation plant. Decision and Order at 5; ALJ's Exhibit 1 at 37-38 (1991 Hearing Transcript at 35-36). Nonetheless, the administrative law judge found that, under the regulations, because the loading of coal is considered coal mine employment, as it is the last necessary step in the coal preparation process, and Mr. Sizemore worked at a coal loading facility, the location of his coal mine employment met the situs prong of the test for determining that Mr. Sizemore was a miner. *Petracca*, 884 F.2d at 931, 13 BLR at 2-41-42; Decision and Order at 5-7. The administrative law judge, therefore, found that Mr. Sizemore's job duties for employer satisfied the test for determining that Mr. Sizemore was a "miner" under the Act. Decision and Order at 7. In addition, the administrative law judge found that, while Mr. Sizemore was employed as a miner for other coal companies, employer was Mr. Sizemore's last coal mine employer.[6] The administrative law judge, therefore, found that employer was the responsible operator for the payment of benefits.

[6] While Shamrock Coal Company (employer), based on Mr. Sizemore's testimony at his 1991 hearing, contests Mr. Sizemore's status as a "miner" and its status as the designated responsible operator in this survivor's claim, these same issues were conceded by employer at the 1991 hearing. Specifically, at the 1991 hearing before Administrative Law Judge Edward J. Murty, Jr., counsel for employer withdrew the issue of responsible operator, stating "Shamrock was the last employer for whom this man worked for a period of more than one year…. Yes, I believe it was coal mine employment." ALJ's Exhibit 1 at 45 (1991 Hearing Transcript at 43, lines 10-16); *see* Decision and Order at 5. The administrative law judge, however, does not rely on employer's concession in the miner's claim in rendering her findings in this claim.

The issue of whether a worker is a miner is a factual finding to be made by the administrative law judge. *See Price v. Peabody Coal Co*., 7 BLR 1-671 (1985). Herein, the administrative law judge considered Mr. Sizemore's testimony regarding his job duties while employed for employer, and rationally determined that these duties met the test for determining that Mr. Sizemore was a "miner," based on her finding that the job of loading coal onto the trains was the last necessary step in the coal preparation process, and occurred at the Manchester loading site, where the coal was brought for loading onto trains. Under the facts of this case, we affirm the administrative law judge's determination that Mr. Sizemore's work satisfied the situs and function prongs of the test required to establish that he was a "miner." *See* 20 C.F.R. §725.202(a); *Petracca*, 884 F.2d at 931, 13 BLR at 2-41-42. Further, as the administrative law judge found that employer was the last coal mine employer to employ Mr. Sizemore in coal mine employment for more than one year, we affirm the administrative law judge's responsible operator finding.

Section 718.202(a)(2)

Addressing the merits of the survivor's claim, the administrative law judge found the biopsy and medical opinion evidence sufficient to establish the existence of pneumoconiosis. Pursuant to Section 718.202(a)(2), the administrative law judge considered the biopsy report submitted by Dr. Citak, containing a gross description of the tissue sample, as well as a microscopic description of his findings. Decision and Order at 8; Director's Exhibit 20 at 45. Dr. Citak examined tissue obtained during Mr. Sizemore's March 22, 2001 mediastinoscopy, which consisted of lymph node tissue, and opined that the two specimens obtained show lymph node with anthrasilicosis. *Id*. Specifically, Dr. Citak diagnosed "anthrasilicosis and changes consistent with origin in old hyalinized granuloma, no tumor seen." *Id*. The administrative law judge also noted that Dr. Rodrigues, Mr. Sizemore's pulmonologist, diagnosed "mediastinal adenopathy secondary to anthracosis and previous granulomatous infection." Director's Exhibit 20 at 53.

With respect to this biopsy evidence, the administrative law judge, while noting that the biopsy specimen consisted of lymph node tissue and no lung tissue, nonetheless found that the biopsy evidence provided conclusive evidence that Mr. Sizemore had clinical pneumoconiosis. Decision and Order at 33. In particular, the administrative law judge found that, because the pathological analysis of lymph nodes may sustain a finding of clinical pneumoconiosis, and the diagnosis of anthracosis and anthrosilicosis is included in the regulatory definition of clinical pneumoconiosis, the biopsy evidence in this case is sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(2). *Id*.

In challenging the administrative law judge's finding that the biopsy evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(2), employer contends that the administrative law judge erred in according determinative weight to the biopsy evidence because it was not reported in compliance with the quality standards set forth at 20 C.F.R. §718.106. Specifically, employer contends that, contrary to the administrative law judge's finding, there was "no macroscopic or microscopic visualization of any portion of lung tissue," and, therefore, the requirements of Section 718.106 were not met. In particular, employer contends that the administrative law judge erred in failing to adequately explain her finding that this evidence, which did not contain any lung tissue, was in compliance with Section 718.106, and was, therefore, sufficient to meet claimant's burden to prove the existence of clinical pneumoconiosis at Section 718.202(a)(2).

Employer's assertions have merit, in part. However, we note, initially, that, contrary to employer's contention, because Dr. Citak's pathology report was developed as part of Mr. Sizemore's treatment, it is not subject to the quality standards set forth at Section 718.106. 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of West Virginia/Apogee Coal Co.*, 24 BLR 1-78, 1-92 (2008). Consequently, it was not error for the administrative law judge to consider it, even though it did not specifically conform to the requirements of Section 718.106.

Regarding the issue of whether a diagnosis of anthracosis in a miner's lymph nodes can be considered a diagnosis of clinical pneumoconiosis at Section 718.202(a)(2), the Board has held that this a question of fact that must be resolved by the administrative law judge based upon the evidence before him or her. *See Bueno v. Director, OWCP*, 7 BLR 1-337 (1984); *see also Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104, 1-114 (2001). The regulations at 20 C.F.R. §718.201(a)(1) include anthracosis, anthracosilicosis, and anthrosilicosis within the definition of clinical pneumoconiosis. *See Hapney*, 22 BLR at 1-114. However, the regulations require that any disease that satisfies the definition of clinical pneumoconiosis must be "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).

While the administrative law judge acknowledged that Mr. Sizemore's biopsy did not contain any lung tissue, she did not further discuss her weighing of the evidence in terms of whether the biopsy diagnosis was sufficient to satisfy the definition of clinical pneumoconiosis at Section 718.201(a)(1), as Dr. Citak failed to discuss his finding in terms of the amount of particulate matter in the lungs or indicate whether there was any fibrotic reaction in the lung tissue, as required by the regulations. *See* 20 C.F.R. §718.201(a)(1); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore,

vacate the administrative law judge's determination that claimant established the existence of clinical pneumoconiosis at Section 718.202(a)(2) based on Dr. Citak's opinion, and remand the case for additional consideration. On remand, the administrative law judge must determine whether Dr. Citak's findings constitute a finding of clinical pneumoconiosis, as defined at 20 C.F.R. §§718.201(a)(1), 718.202(a)(2).

Section 718.202(a)(4)

Employer also challenges the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer argues that the administrative law judge erred in failing to adequately explain the bases for her conclusion that the weight of the medical opinion evidence was sufficient to establish the existence of both clinical and legal pneumoconiosis. In particular, employer contends that the administrative law judge erred in failing to explain her decision to credit the opinions of Drs. Jenkins and Penman that Mr. Sizemore had clinical and legal (chronic obstructive pulmonary disease due to coal mine employment) pneumoconiosis, over the contrary opinions of Drs. Rosenberg and Vuskovich.

In light of our decision to vacate the administrative law judge's finding that the biopsy evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(2), we also vacate her finding of both clinical and legal pneumoconiosis at Section 718.202(a)(4), as she relied on her Section 718.202(a)(2) findings to weigh the credibility of the conflicting medical opinion evidence. The case is, therefore, remanded for the administrative law judge to re-evaluate the relevant medical opinion evidence at Section 718.202(a)(4), if necessary.[7] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

In weighing the medical opinion evidence on remand, the administrative law judge should fully discuss each of the medical opinions, taking into account the relative qualifications of the physicians, the persuasiveness and detail of the physicians' explanations, and the underlying documentation. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see generally Martin v. Ligon Preparation Co.*, 400 F.3d 302,

[7] A finding of either clinical or legal pneumoconiosis at one subsection of 20 C.F.R. §718.202(a) is sufficient to establish the requisite element of pneumoconiosis for eligibility under the Act. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). However, findings of either clinical and/or legal pneumoconiosis may be pertinent to the administrative law judge's finding of death causation at 20 C.F.R. §718.205(c).

23 BLR 2-261 (6th Cir. 2005). Moreover, on remand, the administrative law judge must more fully discuss the weight she accords the opinion of Dr. Jenkins, specifically discussing his status as Mr. Sizemore's treating physician under the criteria set forth at Section 718.104(d). 20 C.F.R. §718.104(d); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Section 718.205(c)

Pursuant to Section 718.205(c), the administrative law judge found that the record contained three medical opinions relevant to the cause of Mr. Sizemore's death, namely the opinions of Drs. Jenkins, Rosenberg and Vuskovich. The administrative law judge found that Dr. Jenkins, Mr. Sizemore's treating physician, identified respiratory failure as the cause of Mr. Sizemore's death, and also noted the contribution of emphysema, atrial fibrillation and coronary artery disease. Decision and Order at 38; Director's Exhibits 10, 20, 44. Likewise, the administrative law judge found that Dr. Rosenberg opined that Mr. Sizemore's death was due to respiratory failure and an acute cardiac event, but opined that coal dust exposure did not contribute to Mr. Sizemore's respiratory condition. Decision and Order at 38; Employer's Exhibits 1, 3. The administrative law judge found that Dr. Vuskovich attributed Mr. Sizemore's death entirely to his cardiac condition, opining that Mr. Sizemore did not have a disabling pulmonary condition. Decision and Order at 38; Employer's Exhibits 4, 5. Finding that Dr. Vuskovich's opinion was inconsistent with the opinions of the other physicians, the administrative law judge accorded his opinion little weight. Decision and Order at 38-39. Resolving the conflict between the opinions of Drs. Jenkins and Rosenberg, the administrative law judge afforded greater weight to the opinion of Dr. Jenkins because he, like the administrative law judge, found the existence of both clinical and legal pneumoconiosis. *Id*. Consequently, the administrative law judge found, based on the opinion of Dr. Jenkins, that the medical opinion evidence was sufficient to establish that Mr. Sizemore's death was due to pneumoconiosis at Section 718.205(c).

In challenging the administrative law judge's finding that the weight of the medical opinion evidence was sufficient to establish that Mr. Sizemore's death was due to pneumoconiosis pursuant to Section 718.205(c), employer contends that the administrative law judge erred in failing to provide valid reasons for crediting the opinion of Dr. Jenkins. In particular, employer contends that that administrative law judge erred in failing to fully discuss her decision to credit the opinion of Dr. Jenkins, in light of the inconsistencies in the statements made by Dr. Jenkins on Mr. Sizemore's death certificate and those made in his medical report. Employer's Brief at 37-39. In addition, employer contends that the administrative law judge erred in crediting the opinion of Dr. Jenkins, over the contrary opinions of Drs. Rosenberg and Vuskovich, based on his status as Mr. Sizemore's treating physician. Employer also argues that the administrative law judge

failed to determine whether the opinion of Dr. Jenkins was reasoned and documented. *Id*. at 40-44.

In light of our decision to vacate the administrative law judge's finding that the evidence was sufficient to establish the existence of both clinical and legal pneumoconiosis, *see* discussion *supra*, at pp. 10-15, we also vacate the administrative law judge's finding that the evidence was sufficient to establish the that Mr. Sizemore's death was due to pneumoconiosis pursuant to Section 718.205(c).

In sum, on remand, the administrative law judge must determine whether the evidence establishes the existence of either clinical pneumoconiosis arising out of coal mine employment, or legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Trumbo v. Reading Anthracite, Co.*, 17 BLR 1-85 (1993). She must then reconsider the medical opinion evidence relevant to the issue of death causation and determine whether the weight of the credible evidence is sufficient to meet claimant's burden at Section 718.205(c). *See Williams*, 338 F.3d at 518, 22 BLR at 2-655.

Section 411(c)(4)

Further, in light of our decision to vacate the administrative law judge's award of benefits, we agree with the Director that the administrative law judge must first consider whether claimant is entitled to invocation of the presumption that Mr. Sizemore's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), *see* discussion *supra*, at p. 4. In so doing, the administrative law judge must determine whether Mr. Sizemore had fifteen years of underground coal mine employment or whether the conditions of his coal mine employment were substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). In addition, the administrative law judge must determine whether Mr. Sizemore was totally disabled at 20 C.F.R. §718.204(b). *See* 30 U.S.C. §921(c)(4). If the administrative law judge determines that the presumption is invoked, she should then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge must 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).

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 for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge