



BRB No. 14-0139 BLA

BARBARA A. COPLEY	)	
(Widow of HOWARD COPLEY)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	DATE ISSUED: 02/09/2015
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

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

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2010-BLA-05463) of Administrative Law Judge Adele H. Odegard awarding benefits on a survivor's claim<sup>1</sup>

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<sup>1</sup>Claimant is the widow of the miner, Howard Copley, who died on April 28, 2009. Director's Exhibit 8. Claimant filed a claim for survivor's benefits on July 24, 2009. Director's Exhibit 2.

filed on July 24, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the second time. In our prior Decision and Order, we affirmed the administrative law judge's finding that claimant established that the miner had a totally disabling respiratory impairment and, further, that claimant was entitled to the presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.<sup>2</sup> *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-86 (2012). Regarding rebuttal of the Section 411(c)(4) presumption, the Board affirmed the administrative law judge's determination that employer did not affirmatively disprove the existence of clinical pneumoconiosis.<sup>3</sup> *Id.* at 1-87-88. However, because the administrative law judge erred in considering the issue of disability causation, rather than requiring employer to prove that the miner's death was unrelated to his coal mine employment, the Board vacated the administrative law judge's finding that employer did not establish rebuttal and vacated the award of benefits. *Id.* at 1-90. The Board remanded this case for the administrative law judge to determine whether employer rebutted the Section 411(c)(4) presumption by proving that the miner's death did not arise in whole, or in part, out of dust exposure in his coal mine employment.<sup>4</sup> *Id.*

On remand, the administrative law judge initially considered whether employer affirmatively established the absence of legal pneumoconiosis, because such a

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<sup>2</sup> Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

<sup>3</sup> "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 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).

<sup>4</sup> The Board also noted that, while the administrative law judge determined that payment of benefits should commence effective January 2009, "the month in which the miner died," 2011 Decision and Order at 17, the miner's death certificate indicates that he died on April 28, 2009. *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-84 n.2 (2012); *see* Director's Exhibit 8.

determination was relevant to determining whether employer established that the miner's death was not caused by pneumoconiosis. The administrative law judge determined that the opinions of Drs. Oesterling, Bush, Rosenberg and Spagnolo were insufficient to disprove a causal connection between the miner's chronic obstructive pulmonary disease (COPD)/emphysema and his coal mine employment. On the issue of death causation, the administrative law judge discredited these same opinions, because the physicians did not rule out a causal relationship between COPD/emphysema and the pneumonia that was the primary cause of the miner's death. Accordingly, the administrative law judge determined that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner's death was not due to pneumoconiosis, and she awarded benefits.

On appeal, employer alleges that the administrative law judge applied an incorrect standard when considering whether it proved that the miner did not have legal pneumoconiosis. Employer also contends that the administrative law judge did not properly weigh the opinions of Drs. Oesterling, Bush, Rosenberg and Spagnolo. Employer further maintains that the administrative law judge erred in failing to weigh the death certificate and the medical opinion of Dr. Racadag on the issue of death causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief in this appeal.

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.<sup>5</sup> 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. Rebuttal of the Section 411(c)(4) Presumption**

### **A. Disproving the Existence of Legal Pneumoconiosis**

In light of the administrative law judge's determination that claimant invoked the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal. 20 C.F.R. §718.305(d)(2). In her prior Decision and Order, the administrative law judge found that the evidence

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<sup>5</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

established that the miner had clinical pneumoconiosis and that employer failed, therefore, to rebut the presumption by disproving the existence of pneumoconiosis. 2011 Decision and Order at 10. Those findings were affirmed by the Board and are not before us in this appeal. *Copley*, 25 BLR at 1-87.

On remand, the administrative law judge applied the regulations issued by the Department of Labor to implement the statute, and found that employer did not establish rebuttal under the methods set forth therein. 20 C.F.R. §718.305; 78 Fed.Reg. 59,115 (Sept. 25, 2013). In so doing, the administrative law judge acknowledged the Board's affirmance of her findings with respect to the existence of clinical pneumoconiosis and stated:

Because clinical pneumoconiosis is established, and the regulation states that the [20 C.F.R.] §718.305 presumption is rebutted only if the employer establishes that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201," I find it is necessary also to address the evidence on the issue of legal pneumoconiosis.

Decision and Order on Remand at 9. Accordingly, the administrative law judge considered the opinions of Drs. Oesterling, Bush, Rosenberg and Spagnolo.<sup>6</sup>

Dr. Oesterling reviewed the autopsy slides and observed the presence of bullous emphysema, which he attributed to "cigarette smoke inhalation." Director's Exhibit 16 at 4. Dr. Oesterling further stated that "[t]his is a far more logical explanation for his severe bullous emphysema than the relatively modest coal dust changes that are present." *Id.* Dr. Bush reviewed the autopsy report and tissue slides, and detected the presence of centrilobular emphysema, with "[s]ome sections show[ing] sloughed alveolar macrophages containing brown pigment consistent with tobacco pigment or iron." Director's Exhibit 17 at 2. Dr. Bush also opined that the miner's COPD may have caused a respiratory impairment, but the COPD was related to the miner's "centrilobular emphysema with the goblet cell and mucus gland hyperplasia." *Id.* Dr. Bush further indicated that "[t]hese are not changes related to pneumoconiosis, but are most often the consequence of smoking." *Id.* Dr. Rosenberg reviewed medical records and reports and diagnosed minimal coal workers' pneumoconiosis and emphysema related to smoking. Employer's Exhibits 1, 4. Dr. Spagnolo performed a record review and observed that a combination of asthmatic bronchitis and chronic tobacco abuse caused the miner to

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<sup>6</sup> The administrative law judge noted that Dr. Racadag, the autopsy prosector, reported that claimant suffered from bullous emphysema and that this condition contributed to the miner's death. Decision and Order on Remand at 9; Director's Exhibit 9.

develop respiratory bronchiolitis and bullous emphysema. Employer's Exhibit 2. Dr. Spagnolo also stated that the miner's bullous emphysema was unrelated to his coal mine employment. *Id.*

On weighing Dr. Oesterling's opinion, the administrative law judge concluded:

Dr. Oesterling stated that it was "more likely" that the [m]iner's bullous emphysema was due to smoking rather than coal mine employment, based on the "relatively modest dust changes." DX 16. I find that Dr. Oesterling's opinion, by addressing only a likelihood of the cause of the [m]iner's condition, does not rule out an occupationally-based etiology to the miner's bullous emphysema, and does not indicate that no part of the miner's emphysema was related to his coal mine employment.

Decision and Order on Remand at 9. Regarding Dr. Bush's opinion, the administrative law judge determined, "because Dr. Bush stated that only some of the emphysema showed . . . brown pigment that could be related to non-occupational exposure, I will conclude that Dr. Bush did not entirely rule out an occupational source for the miner's emphysema." Decision and Order on Remand at 11; Director's Exhibit 17. The administrative law judge gave little weight to Dr. Rosenberg's opinion because he relied on Dr. Bush's conclusion regarding the source of the miner's bullous emphysema, and pulmonary function study results that were "remote in time and of unknown validity." Decision and Order on Remand at 11; Employer's Exhibits 1, 4. The administrative law judge also discredited Dr. Spagnolo's opinion as he relied, in part, on the same pulmonary function study results. Decision and Order on Remand at 11; Employer's Exhibit 2. The administrative law judge further observed that Dr. Spagnolo relied on the premise that there is no relationship between bullous emphysema and coal dust exposure, which "may be inconsistent with the Department of Labor's policy position . . . ." Decision and Order on Remand at 11, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000). Based on these findings, the administrative law judge concluded, "[e]mployer was unable to establish, by a preponderance of evidence, that no part of the [m]iner's COPD/emphysema was related to the [m]iner's coal mine employment." Decision and Order on Remand at 11.

Employer alleges that the administrative law judge applied an incorrect standard when considering whether it disproved the existence of legal pneumoconiosis, as "[t]he regulations do not require that 'no part' of a lung disease or impairment be due to coal dust exposure." Employer's Brief at 11. Employer further maintains that the administrative law judge did not properly weigh the opinions of its experts.

Employer's contentions have merit, in part. The regulation at 20 C.F.R. §718.305(d)(2)(i) provides that an employer can rebut the presumption of death due to

pneumoconiosis by establishing that the miner did not have “[l]egal pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2)” and “[c]linical pneumoconiosis as defined in 20 C.F.R. §718.201(a)(1) . . . .” 20 C.F.R. §718.305(d)(2)(i)(A), (B). Therefore, in contrast to 20 C.F.R. §718.305(d)(2)(ii), which provides that rebuttal is established by proving that “no part of the miner’s death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201(a),” there is no qualifying or prescriptive language accompanying the requirement in 20 C.F.R. §718.305(d)(2)(i). Accordingly, we hold that the administrative law judge erred in transferring the “no part” standard from 20 C.F.R. §718.305(d)(2)(ii) to her consideration of whether employer established that the miner did not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(A). We vacate, therefore, the administrative law judge’s finding that employer failed to establish rebuttal by this method, and remand the case to her for reconsideration.

Regarding the administrative law judge’s discrediting of Dr. Oesterling’s opinion, employer is correct in alleging that the administrative law judge did not accurately describe the doctor’s conclusions. The administrative law judge observed that Dr. Oesterling failed to provide a definite opinion ruling out the existence of legal pneumoconiosis, as he concluded that the miner’s COPD/emphysema was “more likely” due to smoking than coal dust exposure. Decision and Order at 9, *citing* Director’s Exhibit 16. What Dr. Oesterling actually reported was:

These structures [vascular islands indicative of bullous emphysema] are commonly seen in patients who have emphysema related to cigarette smoke inhalation. This is a far *more logical* explanation for his severe bullous emphysema than the relatively modest coal dust changes that are present.

Director’s Exhibit 16 at 4. Because the administrative law judge did not correctly set forth Dr. Oesterling’s opinion, we must vacate her finding that this opinion was insufficient to establish rebuttal of the Section 411(c)(4) presumption. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-26 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). She must reconsider Dr. Oesterling’s opinion on the issue of legal pneumoconiosis on remand.

With respect to Dr. Bush’s opinion, employer asserts correctly that the administrative law judge’s finding that Dr. Bush failed to effectively conclude that the coal dust exposure did not play a causal role in the miner’s COPD/emphysema, is based on the administrative law judge’s own interpretation of the medical data. As set forth above, the administrative law judge noted, “Dr. Bush stated that only some of the emphysema showed . . . brown pigment that could be related to non-occupational exposure, *I will conclude that Dr. Bush did not entirely rule out an occupational source for the miner’s emphysema.* Decision and Order on Remand at 11 (emphasis added). The administrative law judge did not account for, however, Dr. Bush’s statements that

“[c]oal dust exposure or pneumoconiosis did not contribute to respiratory impairment or disability in [claimant],” and “[t]he degree and extent of coal dust disease was too limited to have caused impairment or disability.” Director’s Exhibit 17 at 3. Thus, we must vacate the administrative law judge’s finding that Dr. Bush’s opinion was insufficient to rebut the Section 411(c)(4) presumption. *See Marcum v. Director*, OWCP, 11 BLR 1-23 (1987). The administrative law judge is required to reconsider Dr. Bush’s opinion on remand.

Employer has accurately identified similar flaws in the administrative law judge’s weighing of Dr. Rosenberg’s opinion that the miner did not have legal pneumoconiosis and that pneumoconiosis played no role in the miner’s death. The first reason that the administrative law judge gave for discrediting Dr. Rosenberg’s opinion was that he relied on Dr. Bush’s conclusion as to the cause of the miner’s COPD/emphysema. Decision and Order on Remand at 11. In light of our decision to vacate the administrative law judge’s discrediting of Dr. Bush’s opinion in this regard, we must also hold that her initial rationale for discrediting Dr. Rosenberg’s opinion is not a valid one. The administrative law judge further found that Dr. Rosenberg’s opinion on the issue of legal pneumoconiosis was entitled to little weight because he relied on pulmonary function studies that were “remote in time and of unknown validity.” *Id.* In so doing, the administrative law judge did not explicitly consider the portions of Dr. Rosenberg’s opinion in which he identified other factors in support of his determination that the miner’s COPD/emphysema was not legal pneumoconiosis, and appeared to minimize the extent to which he relied on the pulmonary function study evidence.<sup>7</sup> Employer’s Exhibits 1 at 6-7 and 4 at 11-21. We must, therefore, vacate the administrative law judge’s finding that Dr. Rosenberg’s opinion on the issue of legal pneumoconiosis was entitled to little weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). On remand, the administrative law judge must reconsider the weight to which Dr. Rosenberg’s opinion is entitled.

Employer also alleges that the administrative law judge erred in finding that Dr. Racadag’s diagnosis of legal pneumoconiosis outweighed the opinions of its experts. The administrative law judge determined that Dr. Racadag’s “notation of bullous emphysema as a subheading under the diagnosis of ‘simple coal worker’s pneumoconiosis – nodular’” constituted a diagnosis of legal pneumoconiosis. Decision and Order on Remand at 9, *quoting* Director’s Exhibit 9. The administrative law judge

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<sup>7</sup> Dr. Rosenberg testified at his deposition that, “[f]or whatever it’s worth, although the pulmonary function tests were not valid, [the miner] did demonstrate significant bronchodilator responses[,] based on the various data that was recorded with respect to all the pulmonary function tests.” Employer’s Exhibit 4 at 21.

credited Dr. Racadag's conclusion as to whether the nodules in the miner's lungs represented the presence of coal dust over the contrary opinions of Drs. Oesterling, Bush, Rosenberg and Spagnolo. Decision and Order on Remand at 9-11. As employer maintains, the administrative law judge did not adequately explain her finding in this regard and, therefore, did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a).<sup>8</sup> Thus, we vacate her finding and instruct her to reconsider this issue on remand and set forth her findings in detail, including the underlying rationale. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Notwithstanding the foregoing, we reject employer's contention that the administrative law judge erred in discrediting Dr. Spagnolo's opinion, that the miner's COPD/emphysema was unrelated to coal dust exposure, as he based his conclusion, in part, on pulmonary function studies "that were remote in time and of uncertain validity."<sup>9</sup> Decision and Order on Remand at 11. Unlike Dr. Rosenberg, Dr. Spagnolo did not indicate that he questioned the value of, or gave very little consideration to, the pulmonary function studies of record. Employer's Exhibit 2.

In sum, we have vacated the administrative law judge's finding that employer failed to rebut the presumed existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(2)(i)(A). On remand, the administrative law judge must reconsider the opinions of Drs. Oesterling, Bush, Rosenberg and Racadag to determine whether "any chronic respiratory or pulmonary impairment . . . [is] significantly related to, or substantially aggravated by, dust exposure in [the miner's thirty years of] coal mine employment." 20 C.F.R. §718.201(a)(2), (b) In so doing, the administrative law judge must consider the entirety of each opinion, render a finding as to the weight to which it is entitled, and set forth the underlying rationale, in compliance with the APA.

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<sup>8</sup> The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all 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. §932(a).

<sup>9</sup> Because the administrative law judge provided a valid rationale for discrediting Dr. Spagnolo's opinion, we need not address employer's allegation that the administrative law judge did not comply with the APA in stating that Dr. Spagnolo's view, that smoking is the sole cause of the miner's bullous emphysema, "may be inconsistent" with the Department of Labor's position, as set forth in the preamble to the 2001 regulations. Decision and Order on Remand at 11; *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

## B. Disproving Death Due to Pneumoconiosis

The administrative law judge considered whether employer could establish that the miner's death was not due to pneumoconiosis by establishing "that 'no part' of the [m]iner's death was caused by pneumoconiosis." Decision and Order on Remand at 11, *quoting* 20 C.F.R. §718.305(d)(2)(ii). She initially determined that the "weight of the medical opinion evidence is that a precipitating cause of the [m]iner's death was a bronchial pneumonia." Decision and Order on Remand at 11. The administrative law judge then noted that "some (not all)," of the physicians opined that the miner's COPD/emphysema may have played a role in the development of his bronchial pneumonia, the immediate cause of his death. *Id.* The administrative law judge found that Drs. Oesterling, Bush, Rosenberg and Spagnolo did not provide opinions that credibly excluded pneumoconiosis as a causal factor in the miner's death pursuant to 20 C.F.R. §718.305(d)(2)(ii). *Id.* at 12-13. She concluded, therefore, that employer failed to establish the second method of rebuttal.<sup>10</sup>

Because the administrative law judge relied on her findings as to the existence of legal pneumoconiosis when addressing the issue of death causation, we vacate her findings as to the opinions of Drs. Oesterling, Bush and Rosenberg, and instruct her to reconsider whether employer has established that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R. §]718.201." 20 C.F.R. §718.305(d)(2)(ii). On the specific issue of whether employer can disprove a causal connection between clinical pneumoconiosis and the miner's death, the administrative law judge must reconsider the opinions of Drs. Racadag, Bush and Rosenberg and resolve the conflict among them as to whether the nodules observed on autopsy were attributable to coal workers' pneumoconiosis. Employer is correct in maintaining that the administrative law judge did not adequately explain why she credited Dr. Racadag's conclusion, that a nodule approaching one centimeter in size represented coal workers' pneumoconiosis, over the contrary opinions of Drs. Bush and Rosenberg.<sup>11</sup> *See Wojtowicz*, 12 BLR 1-165.

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<sup>10</sup> In a footnote, employer states that it preserves for appeal its argument that the rebuttal standard set forth in the regulations at 20 C.F.R. §718.305(d)(2)(ii), and applied by the administrative law judge, is not valid. Because this argument is not raised for disposition before us, we will not address it.

<sup>11</sup> We reject employer's contention that the administrative law judge did not adequately discuss the weight that she accorded to the death certificate in which Dr. Bellam identified "simple coal workers' pneumoconiosis, nodular" as a cause of death. Director's Exhibit 8. The administrative law judge acknowledged that "the death certificate affirmatively ascribes the [m]iner's death to pneumoconiosis," and determined

In sum, we have vacated the administrative law judge’s finding that employer failed to rebut the presumed causal connection between pneumoconiosis and the miner’s death at 20 C.F.R. §718.305(d)(2)(ii). On remand, the administrative law judge must reconsider the opinions of Drs. Oesterling, Bush, Rosenberg and Racadag as they pertain to the issue of death causation. When addressing these opinions, the administrative law judge must consider the entirety of each opinion, render a finding as to the weight to which it is entitled and set forth the underlying rationale, in compliance with the APA. If the administrative law judge determines that employer has rebutted the Section 411(c)(4) presumption, she must consider whether claimant can establish entitlement to survivor’s benefits at 20 C.F.R. §718.205, without use of the presumption.

Accordingly, the administrative law judge’s Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings in accordance with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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correctly that “it does not aid [employer] in rebutting the presumption at [20 C.F.R.] §718.305 in any way.” Decision and Order on Remand at 5; *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).