BRB No. 08-0309 BLA

B.S. (Widow of and on behalf of W.S.) Claimant-Respondent v. ITMANN COAL COMPANY/ CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/29/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits of Pamela Lakes Wood, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton, and Hayes), Bluefield, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (2005-BLA-05015 and 2005-BLA-05185) of Administrative Law Judge Pamela Lakes Wood with respect to a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. In her initial Decision and Order, the administrative law judge found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The

administrative law judge also determined, therefore, that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis in the miner's claim and death due to pneumoconiosis in the survivor's claim.[1] Accordingly, the administrative law judge awarded benefits in both claims.

Employer filed an appeal with the Board. The Board vacated the administrative law judge's finding that the existence of complicated pneumoconiosis was established at 20 C.F.R. §718.304 in both the miner's claim and the survivor's claim and remanded the case for further consideration. [*B.A.S.*] *v. Itmann Coal Co.*, BRB No. 06-0459 BLA (Jan. 30, 2007) (unpub.). The Board also vacated the administrative law judge's exclusion of employer's rereadings of twenty-three digital x-rays contained in the miner's treatment records.[2] [*B.A.S.*], slip op. at 6. In addition, the Board vacated the administrative law judge's exclusion of Dr. Spagnolo's report dated December 5, 2003, and instructed the administrative law judge to require the parties to designate the evidence relevant to each claim. *Id*. at 8. The Board further directed the administrative law judge to apply separately the evidentiary limitations to each claim and to consider only the evidence

[1] Claimant, B.S., is the surviving spouse of the miner, W.S., who died on January 4, 2004. Director's Exhibit 36. The miner filed his claim for benefits on February 7, 2001. Director's Exhibit 2. Claimant filed her claim for survivor's benefits on January 23, 2004. Director's Exhibit 36. These claims were consolidated for decision. The remaining procedural history of these claims is set forth in the Board's previous decision and is incorporated herein. [*B.A.S.*] *v. Itmann Coal Co.*, BRB No. 06-0459 BLA (Jan. 30, 2007) (unpub.), slip op. at 2 n.1.

[2] The digital x-rays contained in the miner's treatment records were taken from 1999 until January 4, 2004, the date of the miner's death. Director's Exhibit 51. The administrative law judge determined that the digital x-ray readings in the treatment records could not be considered for the purpose of establishing the existence of pneumoconiosis because they did not satisfy the regulatory criteria or utilize the International Labour Organization (ILO) criteria. 2006 Decision and Order at 3, 7. The administrative law judge concluded that although the digital x-ray readings in the treatment records may be considered as "other evidence," they were entitled to little weight. *Id*. The Board held that the administrative law judge's refusal to find that good cause existed to allow employer to submit its rereadings of the digital x-rays contained in the miner's treatment records, and her reliance on these digital x-rays readings to support her finding that claimant established the existence of complicated pneumoconiosis, were inconsistent with what the Department of Labor intended in proposing 20 C.F.R. §725.414(a)(4) and deprived employer of a full and fair adjudication as discussed in the published comments on the regulations. [*B.A.S.*], slip op. at 3-6.

designated in each claim on the specific issues of entitlement.[3] *Id*. at 11. The Board also instructed the administrative law judge to reassess the credibility of the medical opinions. *Id*. at 13.

On remand, the administrative law judge issued an order instructing the parties to submit separate evidence summary forms for each claim. Administrative Law Judge Order (Oct. 23, 2007). In addition, the administrative law judge permitted both claimant and employer to submit one digital radiographic interpretation for each pertinent digital x-ray in the miner's treatment records. *Id*.

In her Decision and Order on Remand, the administrative law judge admitted various items of evidence into the record, while striking other items of evidence.[4] The administrative law judge found that the evidence in the miner's claim was sufficient to establish that the miner had complicated pneumoconiosis.[5] The administrative law judge further found that the weight of the remaining evidence, including the treatment records, the death certificate and the medical opinions, supported a finding that the opacities were representative of complicated pneumoconiosis and, thus, that the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304 was invoked in the miner's claim. Accordingly, the administrative law judge awarded benefits.

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[3] In light of its decision in *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*), the Board also held that the administrative law judge must consider whether Dr. Spagnolo's December 1, 2004 report was also admissible as part of employer's affirmative evidence in the miner's claim. [*B.A.S.*], slip op. at 7-8.

[4] The administrative law judge admitted Dr. Wheeler's interpretations of the digital x-rays into the record as evidence in both claims and admitted Dr. Spagnolo's December 1, 2004 and December 5, 2003 medical reports into the record in the survivor's claim. Decision and Order on Remand at 4; Director's Exhibit 31; Employer's Exhibits 1, 3, 6. The administrative law judge struck the x-ray reports of Drs. Scott and Scatarige from both claims, while striking Dr. Hippensteel's report from the survivor's claim. *Id*.; Director's Exhibit 31; Employer's Exhibits 1, 6. The administrative law judge also struck Dr. Rasmussen's discussion of Dr. Spagnolo's medical report from the miner's claim, but allowed in its entirety in the survivor's claim. *Id*.; Claimant's Exhibit 1.

[5] Pursuant to 20 C.F.R. §718.102(b), "[a] chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO-U/C 1971)[.]" 20 C.F.R. §718.102(b).

In the survivor's claim, the administrative law judge noted that much of the relevant evidence was the same as that considered in the miner's claim, except for the opinion of Dr. Spagnolo, which she found was entitled to little weight due to the physician's bias. The administrative law judge determined that the evidence of record was sufficient to invoke the irrebuttable presumption of death due to pneumoconiosis under 20 C.F.R. § 718.304 and awarded benefits accordingly.

On appeal, employer argues that in both claims, the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §718.304(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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.[6] 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).

The Miner's Claim

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if: (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

On appeal, employer has raised allegations of error regarding the administrative law judge's consideration of the digital x-ray readings, the medical opinions of Drs.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 3, 43.

Crisalli and Rasmussen, the treatment records, and the death certificate.[7] With respect to the digital x-ray evidence, the miner's treatment records contain readings of digital x-rays taken from 1999 until January 4, 2004, the date of the miner's death. Director's Exhibit 51. Although the physicians who interpreted the digital x-rays did not classify them under the system created by the International Labour Organization (ILO), they made diagnoses consistent with complicated pneumoconiosis. *Id.* Employer submitted Dr. Wheeler's rereadings of these x-rays, which the physician recorded on ILO forms. Employer's Exhibits 1, 6. Dr. Wheeler indicated that the digital x-rays were not classifiable under the ILO system and commented that they supported a diagnosis of an inflammatory disease process other than coal workers' pneumoconiosis. *Id*.

The administrative law judge credited the digital x-ray readings contained in the miner's treatment records, stating that "while they are not appropriately interpreted using the ILO classification system, there is no indication that, as part of a diagnostic and treatment battery, digital x-rays are unacceptable or 'suspect,' or even that they are in any way inferior to analog x-rays." Decision and Order on Remand at 10. The administrative law judge further found that "[e]mployer has not established the acceptability of its reinterpretation of the digital radiographs found in [the miner's] treatment records, as is required by the regulations and explicated in the Board's prior holdings." *Id.* The administrative concluded, therefore, that "Dr. Wheeler's interpretations or comments concerning the digital x-rays carry little weight and do not effectively rebut the conclusions of [the miner's] treating physicians." *Id*.

Employer contends that the administrative law judge's consideration of the digital x-ray evidence under 20 C.F.R. §718.304(c) was irrational and inconsistent. Specifically, employer argues that the administrative law judge failed to provide a valid rationale for distinguishing between the original interpretations of the digital x-rays and Dr. Wheeler's rereadings of these x-rays. This contention has merit.

The Board has held that prior to considering digital x-rays as evidence of the presence or absence of pneumoconiosis, an administrative law judge must determine, on a case-by-case basis, whether the proponent of the evidence has established that digital x-rays are "medically acceptable and relevant to establishing or refuting a claimant's

[7] We affirm, as unchallenged on appeal, the administrative law judge's findings that the analog x-ray evidence was in equipoise as to the source of the large opacities viewed on the miner's x-rays, that Dr. Hippensteel's opinion diagnosing complicated pneumoconiosis was entitled to little, if any, weight, and that Dr. Shahan's CT scan reading neither supported nor undermined a finding of complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 6, 10, 15.

entitlement to benefits" as provided in 20 C.F.R. §718.107(b). 20 C.F.R. §718.107(b); *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(J. Boggs, concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting). In the present case, the administrative law judge essentially determined that because the digital x-ray readings in the treatment records were performed for diagnostic purposes, they are implicitly medically acceptable, despite the absence of ILO classifications. Decision and Order on Remand at 10. Conversely, the administrative law judge found that Dr. Wheeler's rereadings, which the physician acknowledged could not be performed in accordance with the ILO classification system, failed to satisfy the requirements of 20 C.F.R §718.107(b). Decision and Order on Remand at 10.

The administrative law judge's analysis is flawed, however, as the relevant inquiry concerns the medical acceptability and relevance of digital x-ray technology as it pertains to the diagnosis of pneumoconiosis. It does not concern the identity of the reader or the purpose for which the digital x-ray reading was performed. *Webber*, 23 BLR at 1-133; Harris, 23 BLR at 1-16. Therefore, the administrative law judge's disparate treatment of the digital x-ray evidence in this case does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, we vacate the administrative law judge's finding that the digital x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[8]

With respect to the medical opinion evidence, employer has challenged the administrative law judge's weighing of the opinions of Drs. Rasmussen and Crisalli. Dr. Rasmussen examined the miner on October 22, 2001 and reviewed the miner's medical records. Dr. Rasmussen determined that the miner had complicated pneumoconiosis. Director's Exhibit 9; Claimant's Exhibit 1. Dr. Crisalli examined the miner on May 13,

[8] Employer alternatively argues that the administrative law judge's analysis of the x-ray evidence was improper because she failed to require that the "digital x-ray films" be classified pursuant to ILO guidelines. Employer's Brief at 7. We reject employer's contention, as the regulation requiring classification under the ILO system applies only to chest x-rays recorded on film. *See* 20 C.F.R. §718.102(a); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting).

2003 and reviewed the miner's medical records. Dr. Crisalli concluded that the miner did not suffer from pneumoconiosis in any form. Director's Exhibit 31.

The administrative law judge determined that Dr. Rasmussen's diagnosis of complicated pneumoconiosis was well reasoned and well documented. Decision and Order on Remand at 16. In contrast, the administrative law judge found that Dr. Crisalli's opinion was entitled to little weight, as the physician's rejection of Dr. Smith's positive x-ray reading for complicated pneumoconiosis established that he was biased. *Id*. at 14. The administrative law judge concluded that "the medical opinion evidence in the [m]iner's [c]laim significantly weighs in favor of finding complicated pneumoconiosis" and that "the other evidence for consideration under subsection (c) also supports a finding of complicated pneumoconiosis." *Id*. at 16.

Employer contends that in weighing the medical opinions under 20 C.F.R. §718.304(c), the administrative law judge erred in finding that the opinion of Dr. Crisalli was biased. Employer's Brief at 7-8. The Board held in its prior decision that it was irrational for the administrative law judge to strike from Dr. Crisalli's opinion any references to inadmissible evidence, but then discredit Dr. Crisalli's opinion based upon his rejection of Dr. Smith's positive x-ray reading for complicated pneumoconiosis, which was not of record. [*B.A.S.*], slip op. at 11. We can discern no reason to alter our prior holding. Because Dr. Smith's x-ray interpretation is not in the record, any statement that Dr. Crisalli made regarding his reasons for rejecting it has no significance.[9] Although Dr. Crisalli's accompanying rationale for preferring the x-ray interpretations performed by Drs. Wheeler and Scott, which were admitted into the record, could be considered in assessing the credibility of Dr. Crisalli's opinion, the administrative law judge did not explicitly rely upon the latter in finding that Dr. Crisalli is biased. Thus, we vacate the administrative law judge's finding and instruct the administrative law judge to reconsider Dr. Crisalli's opinion on remand without reference to evidence that was not admitted into the record. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*).

Employer contends further that the administrative law judge erred in crediting Dr. Rasmussen's opinion under 20 C.F.R. §718.304(c), as Dr. Rasmussen's finding of complicated pneumoconiosis was merely a restatement of Dr. Patel's positive x-ray reading. This contention is without merit. The administrative law judge acted within her discretion as fact-finder in determining that Dr. Rasmussen based his diagnosis of complicated pneumoconiosis on multiple factors including x-rays, the progression of the miner's respiratory problems, and the presence of an alveolar inflammatory process. *See*

[9] Dr. Crisalli indicated at his deposition that unlike Dr. Smith, Drs. Wheeler and Scott only record changes attributable to coal dust exposure on the ILO form. Employer's Exhibit 8 at 26-27.

Sterling Smokeless Coal Company v. Akers, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); Decision and Order on Remand at 16; Director's Exhibits 8, 9; Claimant's Exhibit 1.

In light of the foregoing, however, we vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c) and that, when weighed together, the evidence relevant to 20 C.F.R. §718.304(a)-(c) is sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis. On remand, the administrative law judge must reconsider whether the digital x-ray readings and rereadings are medically acceptable and relevant to establishing or refuting claimant's entitlement to benefits in accordance with 20 C.F.R. §718.107(b). In so doing, the administrative law judge must apply the same standard to each party as a proponent of the interpretations of the digital x-rays. *See Webbe*r, 23 BLR at 1-133; *Harris*, 24 BLR at 1-16. After the administrative law judge has determined whether the digital x-ray evidence supports a finding of complicated pneumoconiosis, the administrative law judge must reconsider, under 20 C.F.R. §718.304(c), the credibility of the diagnoses of complicated pneumoconiosis contained in the treatment records and on the miner's death certificate, to the extent that they were premised upon an x-ray reading. The administrative law judge must also reconsider whether the medical opinions of record support a finding of complicated pneumoconiosis. When weighing this evidence, the administrative law judge must consider the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge must also be mindful that in determining whether the evidence relevant to 20 C.F.R. §718.304(c) is sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis, she must assess whether the condition diagnosed could reasonably be expected to reveal a result equivalent to the methods described in 20 C.F.R. §718.304(a) and (b). *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560 (4th Cir. 1999). If the administrative law judge finds that claimant has satisfied the terms of 20 C.F.R. §718.304(c), she must reconsider whether, when weighed together, the evidence relevant to 20 C.F.R. §718.304(a)-(c) is sufficient to establish the existence of complicated pneumoconiosis. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick*, 16 BLR at 1-33-34.

The Survivor's Claim

In determining that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 in the survivor's claim, the administrative law judge relied, in part, upon her improper consideration of the digital

x-ray evidence in the miner's claim. Decision and Order on Remand at 18-19. We must vacate, therefore, the administrative law judge's finding. We also vacate the award of benefits and remand the case to the administrative law judge for reconsideration of the digital x-ray evidence and the other relevant evidence in accordance with the instructions set forth above.

In order to promote judicial efficiency, we will also address employer's specific allegation of error regarding the administrative law judge's consideration of Dr. Spagnolo's opinion under 20 C.F.R. §718.304(c) in the survivor's claim. Employer asserts that the administrative law judge erred in determining that Dr. Spagnolo's opinion was entitled to little weight due to his bias. Dr. Spagnolo reviewed the miner's medical records, including several x-ray interpretations, and concluded that the miner did not have pneumoconiosis in any form. Director's Exhibit 31; Employer's Exhibit 3. The administrative law judge found that Dr. Spagnolo's opinion was entitled to little weight because he relied on Dr. Crisalli's opinion, which the administrative law judge had discredited, and further found that Dr. Spagnolo exhibited bias by indicating that he relied upon Dr. Wheeler's negative x-ray reading due to his status as a "pre-eminent radiologist." Decision and Order on Remand at 18; Employer's Exhibit 3. The administrative law judge stated:

> Dr. Spagnolo has effectively acknowledged and discounted the several physicians of record who diagnosed complicated pneumoconiosis and, instead, adopted the reading of a single reader - Dr. Wheeler. I have already determined that Dr. Wheeler's credentials, while worthy of respect, do not warrant additional weight afforded to his x-ray interpretations. Dr. Spagnolo, concluding that [the miner] does not suffer from pneumoconiosis, has stated that he impermissibly exhibited preferential treatment toward Dr. Wheeler's interpretations. Such a predisposition to accept the conclusions of one physician over several others, each equally qualified under the regulations, suggests bias and does not make for a reliable, objective medical opinion. I therefore find that Dr. Spagnolo's credibility has been undermined.

Decision and Order on Remand at 18.

Employer maintains that the administrative law judge did not provide a valid rationale for her finding that Dr. Spagnolo's opinion was biased. This contention has merit. The administrative law judge noted correctly that she was not required to give additional weight to Dr. Wheeler's x-ray interpretations based upon factors other than his status as a Board-certified radiologist and B reader. *Worhach v. Director,* OWCP, 17 BLR 1-105 (1993); Decision and Order on Remand at 5. The administrative law judge

did not explain, however, why Dr. Spagnolo's reference to these factors constituted an unfair or irrational preference for Dr. Wheeler's readings.[10] Decision and Order on Remand at 18. In addition, employer notes correctly that the administrative law judge did not apply the same standard in considering Dr. Rasmussen's opinion in the miner's claim. Dr. Rasmussen reviewed medical reports that included both positive and negative x-ray interpretations, but indicated that he relied upon Dr. Patel's positive reading. Director's Exhibit 9; Claimant's Exhibit 1. In contrast to her analysis of Dr. Spagnolo's opinion in the survivor's claim, the administrative law judge did not address the significance of Dr. Rasmussen's reliance upon a single reading to the exclusion of the conflicting interpretations. Decision and Order on Remand at 15-16. Because the administrative law judge did not provide a valid rationale for her finding that Dr. Spagnolo's opinion was biased and did not apply a consistent standard of review, we vacate her finding with respect to Dr. Spagnolo's opinion and instruct the administrative law judge to reconsider this opinion on remand when addressing the merits of entitlement in the survivor's claim. As indicated, when reassessing the probative value of the medical opinions admitted in the survivor's claim on remand, the administrative law judge must consider the physicians' qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge should also reconsider Dr. Spagnolo's opinion in light of her weighing of Dr. Crisalli's opinion on remand.

[10] Employer, citing *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), notes that if a professorship in radiology is an acceptable basis upon which a fact-finder can resolve conflicts between experts, it should be acceptable for a physician as well. Employer's Brief at 8.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration of both the miner's claim and the survivor's claim 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