

BRB No. 12-0208 BLA

FRANCIS B. FUNKA	)	
(o/b/o and Widow of JOHN F. FUNKA)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/30/2013
	)	
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 on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2007-BLA-5920) of Administrative Law Judge Ralph A. Romano (the administrative law judge) awarding benefits on both a miner's claim and a survivor's claim<sup>1</sup> filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp.

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<sup>1</sup> Claimant is the widow of the miner, who died on December 11, 2005. Director's Exhibit 97. In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate.

2011) (the Act). This case is before the Board for the third time.<sup>2</sup> In its most recent decision in this case, the Board, pursuant to employer's appeal, vacated the administrative law judge's award of benefits in both claims, and remanded the case for the administrative law judge to reassess and weigh all of the medical evidence relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Specifically, the Board held that the administrative law judge erred in granting an automatic deference to Dr. Holimon's autopsy report, as buttressed by Dr. Green's autopsy slides review, without determining the relative weight and credibility of all of the physicians' opinions. The Board instructed the administrative law judge to reconsider all of the relevant evidence at 20 C.F.R. §718.202(a), provide reasons for his credibility determinations, and address: Dr. Fino's criticisms of the inconsistencies contained in Dr. Green's textbook, upon which Dr. Green relied to conclude that the miner had coal workers' pneumoconiosis; Dr. Oesterling's opinion that the fibrogenesis evidence at autopsy was not consistent with a coal dust-induced lung disease due to the absence of an abundance of silica crystals; and Dr. Tomashefski's conclusion that, while the miner's medical records demonstrated a pulmonary impairment prior to his retirement from the coal mines in 1991, the miner's symptomatology, pulmonary function studies, prescription records, and autopsy indicated findings typical of idiopathic pulmonary fibrosis, not coal workers' pneumoconiosis. *F.F. [Funka] v. Consolidation Coal Co.*, BRB No. 08-0451 BLA (Mar. 26, 2009)(unpub.).

In his Decision and Order on Remand issued on December 20, 2011, the administrative law judge found that the weight of the evidence in the miner's claim was

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<sup>2</sup> The miner filed his application for benefits on June 5, 2003, which was denied by Administrative Law Judge Michael P. Lesniak on September 23, 2005. Director's Exhibits 2, 71. The miner filed an appeal with the Board, and on November 15, 2006, the Board remanded the case to the Office of Administrative Law Judges. *Funka v. Consolidation Coal Co.*, BRB No. 06-0134 BLA (Nov. 15, 2006)(unpub.).

The miner died on December 11, 2005. Director's Exhibit 97. Claimant filed a claim for survivor's benefits on August 22, 2006. Director's Exhibit 96. On May 3, 2007, at the request of the parties, Judge Lesniak granted claimant's request to re-open the record and remanded the claim to the district director to consolidate the miner's claim with the survivor's claim. Director's Exhibit 91; Hearing Transcript at 6.

Upon employer's request for a hearing, the case was assigned to Administrative Law Judge Ralph A. Romano, who awarded benefits on March 4, 2008 in the miner's claim and in the survivor's claim. On March 26, 2009, the Board vacated and remanded the case to Judge Romano. *F.F. [Funka] v. Consolidation Coal Co.*, BRB No. 08-0451 BLA (Mar. 26, 2009)(unpub.).

sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and disability causation pursuant to Section 718.204(c).<sup>3</sup> Accordingly, benefits were awarded in the miner's claim. With respect to the survivor's claim, the administrative law judge found that, given the filing date of her claim, claimant was automatically entitled to benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l), based on the award to her deceased husband.<sup>4</sup> Accordingly, the administrative law judge awarded benefits in the survivor's claim.

In the present appeal, employer contends that the administrative law judge failed to fully comply with the Board's remand instructions; that he shifted the burden of proof; and that his Decision and Order is internally inconsistent<sup>5</sup> and violates the Administrative

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<sup>3</sup> As employer conceded at the hearing that the miner was totally disabled, we affirm, as unchallenged on appeal, the administrative law judge's determination that the evidence established a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b); Decision and Order on Remand at 7; Hearing Transcript at 12; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>4</sup> On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to the survivor's claim, the amendments reinstated Sections 411(c)(4) and 422(l) of the Act. *See* Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(l)). Under amended Section 411(c)(4), if the miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). Under amended Section 422(l), a qualified survivor is automatically entitled to benefits without having to establish that the miner's death was due to pneumoconiosis, if the miner filed a successful claim and was eligible to receive benefits at the time of his death. 30 U.S.C. §932(l). The amendments do not apply to the miner's claim, as it was filed prior to January 1, 2005. Director's Exhibit 2.

<sup>5</sup> After finding that pneumoconiosis was established in the miner's claim, the administrative law judge stated that:

Because the burden falls on the miner in the living miner claim to establish by a preponderance of the evidence that he suffered from pneumoconiosis, I find that the miner has not met this burden. Consequently, the miner's claim has not established entitlement to benefits.

Decision and Order on Remand at 6 (internal citation omitted). Although employer contends that the administrative law judge's decision is unreasoned as a matter of law,

Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). Employer challenges the administrative law judge's weighing of the medical evidence in finding the existence of pneumoconiosis and disability causation established at 20 C.F.R. §§718.202(a) and 718.204(c), respectively. Claimant responds in support of the award of benefits, but agrees that the administrative law judge's Decision and Order is internally inconsistent due to a typing or editing error.<sup>6</sup> Employer has replied in support of its position. The

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Employer's Brief at 8-9, we agree with claimant that the quoted statement was clearly a typing error that should have been excised with proper editing, based on the totality of the administrative law judge's decision awarding benefits in both claims. Claimant's Response Brief at 6-7.

<sup>6</sup> Claimant also asserts that employer exceeded its evidentiary limitations under 20 C.F.R. §725.414, by submitting three medical opinions. In this regard, claimant contends that the report of Dr. Oesterling, while submitted as an autopsy report, is actually a medical opinion, because Dr. Oesterling reviewed and relied upon medical records in rendering his opinion. Claimant's Response Brief at 4-6. Employer asserts that claimant expressly waived such objections before the administrative law judge, and argues that Dr. Oesterling's report meets the requirements for a rebuttal autopsy report, because he reviewed the same medical records as the autopsy prosecutor. Employer's Reply Brief at 1-8.

We agree with claimant that the evidentiary limitations, pursuant to 20 C.F.R. §725.414, are mandatory and, as such, are not subject to waiver by the parties. 20 C.F.R. §§725.414, 725.456(b)(1); *see Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-74 (2004). If an administrative law judge determines that a physician relied upon inadmissible evidence, he may, in his discretion, exclude that report, redact the objectionable content, ask the physician to submit a new report, or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which his opinion is entitled. Exclusion is not the favored option. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007)(en banc); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-148 n.8 (2006).

Claimant's further contention, that Dr. Holimon's deposition testimony constitutes one of employer's medical reports, has no merit, as employer is entitled to cross-examine, by deposition, the prosecutor, whose autopsy report was submitted into the record and was given controlling weight by the administrative law judge. *See North American Coal Co. v. Miller*, 870 F.2d 948, 950-951, 12 BLR 2-222, 2-226-27 (3d Cir. 1989); *L.P. [Preston] v. Amherst Coal Co.*, 24 BLR 1-55, 1-63 (2008).

Director, Office of Workers' Compensation Programs, has declined to file a substantive brief.

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>7</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).

Employer challenges the administrative law judge's determination that the autopsy report of Dr. Holimon establishes the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a) and outweighs the contrary medical opinions of Drs. Fino, Oesterling, and Tomashefski. Employer asserts that, in finding Dr. Holimon's autopsy report to be well-reasoned and documented, the administrative law judge erred in failing to consider the entire record, resolve the conflicts in the evidence, and render sufficient findings to support his determination. With respect to the opinions of Drs. Fino, Oesterling, and Tomashefski, employer further asserts that the administrative law judge failed to fully comply with the Board's remand order; improperly shifted the burden of proof; mischaracterized the evidence; and erroneously determined that the doctors failed to explain why the miner's fibrosis was not caused by his coal mine employment. Employer requests that the case be remanded to a new administrative law judge to alleviate the administrative gridlock that has ensued. Employer's Brief at 9-29. Some of employer's arguments have merit.

In finding clinical pneumoconiosis established at Section 718.202(a), the administrative law judge credited the autopsy report of Dr. Holimon over the x-ray evidence<sup>8</sup> and the medical opinions of Drs. Green, Fino, Oesterling, and Tomashefski, which the administrative law judge found to be in equipoise. In considering the autopsy evidence at Section 718.202(a)(2), the administrative law judge credited the autopsy

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<sup>7</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner was employed in the coal mining industry in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

<sup>8</sup> Incorporating his findings from his prior decision, the administrative law judge found that the x-ray evidence is insufficient to establish pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order on Remand at 5. We affirm this finding, as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

report and deposition of Dr. Holimon,<sup>9</sup> who is Board-certified in anatomic and clinical pathology, and who provided a final anatomic diagnosis of “honeycomb lung (end stage lung disease)” and listed the following: “pneumoconiosis, diffuse alveolar space dilatation, parenchymal fibrosis, bronchial hyperplasia, metaplasia, pulmonary thromboemboli, acute pneumonitis, and lymph node anthracosis.” Director’s Exhibit 99; Employer’s Exhibit 1 at 17, 20. The administrative law judge determined that Dr. Holimon is well qualified to issue an opinion, and found that his report is well reasoned and documented, as “[he] based his report on the autopsy he performed,” and “he adequately described how he based his diagnosis of pneumoconiosis on the presence of honeycombing, fibrosis, and the presence of anthracotic pigment.” Decision and Order on Remand at 4. Noting that Dr. Oesterling,<sup>10</sup> also Board-certified in anatomic and

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<sup>9</sup> Dr. Holimon provided a microscopic description in his autopsy report, stating:

Within the lungs there is massive loss of normal alveolar parenchyma. There are areas of scarring with markedly dilated air spaces. Within the air spaces there is bronchial hyperplasia, metaplasia and some squamous metaplasia. There is some mucin secretion. The bronchial hyperplasia at time of gross autopsy was thought to be bronchoalveolar carcinoma; however, since much of this extension of bronchial mucosa into the air spaces has cells which have cilia and very clearly defined end plates, this is benign metaplasia and hyperplasia. There is also acute inflammation within much of the mucinous material within the dilated spaces.

Director’s Exhibit 99.

Dr. Holimon also provided deposition testimony on May 1, 2007. He stated that he diagnosed a dust induced disease of the lung, pneumoconiosis, but that he did not diagnose coal workers’ pneumoconiosis. Employer’s Exhibit 1 at 17-18, 20. Dr. Holimon testified that there was “a very heavy amount of black pigmentation” in the lung tissue based on “the lymph nodes and the recollection that I have of the autopsy,” Employer’s Exhibit 1 at 19, and opined that the pigment he saw was anthracotic pigment. Employer’s Exhibit 1 at 26. He based his opinion on the honeycomb lung and the blackened pigment in the thickened walls. Dr. Holimon did not have an opinion regarding whether the miner’s work in a coal mine caused or contributed to his lung disease. Employer’s Exhibit 1 at 20.

<sup>10</sup> Dr. Oesterling, who is Board-certified in anatomic and clinical pathology and nuclear medicine, reviewed the autopsy slides and stated that he would classify the disease process as “mild anthracotic pigmentation predominately within the pleural surfaces of the upper lobe.” He opined that the changes of anthracotic pigmentation present are insufficient to have altered the lung structure and/or function in any way. He

clinical pathology, reviewed a “plethora of evidence” in addition to the autopsy slides, the administrative law judge determined that his report was more properly classified as a medical opinion. Thus, the administrative law judge determined that Dr. Holiman’s autopsy report was entitled to probative weight, and that the autopsy evidence established the existence of pneumoconiosis at Section 718.202(a)(2). Decision and Order on Remand at 4; Director’s Exhibit 99; Employer’s Exhibit 1. In evaluating the conflicting medical opinions of record at Section 718.202(a)(4), the administrative law judge summarized the opinions of Drs. Oesterling, Fino,<sup>11</sup> Green,<sup>12</sup> and Tomashefski, and found

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noted the presence of hemosiderin, a breakdown byproduct of the red blood cells, and the absence of birefringent crystalline material, and attributed the “significant fibrosis” to hemosiderin, but not coal mine dust. He identified a “classic example of end stage lung, i.e. honeycombed lung [that] indicates that [the miner] has experienced diffuse interstitial pulmonary fibrosis” unrelated to coal dust exposure. Director’s Exhibit 103. He indicated that the critical determinant for diagnosing coal workers’ pneumoconiosis is the presence or absence of silicate and silica crystals. Employer’s Exhibit 7 at 37.

<sup>11</sup> Dr. Fino, who is Board-certified in internal medicine, reviewed numerous medical records, reports, and medical literature, and diagnosed diffuse interstitial pulmonary fibrosis of the idiopathic variety, which is not associated with coal dust inhalation. He stated that there was minimal anthracotic pigmentation present, no coal workers’ pneumoconiosis, and no deposition of anthracotic pigment within the pulmonary fibrosis; and that the miner’s pulmonary fibrosis, which caused disability and death, was not caused, or contributed to, by the inhalation of coal dust. Dr. Fino relied on the microscopic descriptions of the autopsy report and those of Drs. Oesterling and Tomashefski. Dr. Fino also stated that the clinical course of diffuse fibrosis due to coal dust progresses more slowly than that due to idiopathic pulmonary fibrosis. Employer’s Exhibits 4, 5 at 31.

<sup>12</sup> Dr. Green, who is Board-certified in anatomic pathology, reviewed the autopsy slides, numerous medical records, and medical reports, and provided a medical report dated October 5, 2007, and a deposition. His review of the slides indicated severe interstitial fibrosis with honeycombing in all lobes. He opined that “[the miner’s] severe and disabling interstitial fibrotic lung disease was causally related to his exposure to coal mine dust” and that “he showed occasional classic lesions of [coal workers’ pneumoconiosis], including coal dust macules and micronodules.” Claimant’s Exhibit 2. He opined that the fibrosis is mature and shows focal black pigmentation and birefringent particles (consistent with silica and silicates) within the fibrosis, however, a majority of the fibrosis is not significantly pigmented. Dr. Green also diagnosed chronic bronchitis; pulmonary vascular changes consistent with cor pulmonale; adult respiratory distress syndrome; foci of bronchopneumonia; pulmonary hemorrhage and large pulmonary

them to be in equipoise. Decision and Order on Remand at 5-6. In so finding, the administrative law judge accorded less weight to Dr. Fino's opinion, that the miner had interstitial pulmonary fibrosis unrelated to coal dust inhalation, because "[Dr. Fino] admitted that minimal anthracotic pigmentation was found within the Miner's fibrosis," and "[t]his statement was contradicted by all the other medical opinions of record."<sup>13</sup> Decision and Order on Remand at 6. Additionally, the administrative law judge found that Dr. Fino's statement, that "pigmentation would be more prominent if the miner had pneumoconiosis," was contrary to the testimony of Drs. Green and Oesterling, that coal dust can migrate out of the lung tissue. As Drs. Green and Oesterling are Board-certified pathologists, the administrative law judge concluded that they "have more expertise in making diagnoses using the slides." Decision and Order on Remand at 6; Employer's Exhibits 4, 5. However, the administrative law judge found that Dr. Green's diagnosis of pneumoconiosis was not well-reasoned, as the physician failed to address at his deposition the "apparent inconsistencies" between his testimony and his published works, as pointed out by Dr. Fino. Decision and Order on Remand at 6; Claimant's Exhibits 2, 3. Lastly, the administrative law judge noted that, while both Dr. Oesterling and Dr. Tomashefski<sup>14</sup> diagnosed interstitial fibrosis unrelated to coal dust, Dr. Oesterling based his diagnosis on an absence of silica crystals, while Dr. Tomashefski opined that silica

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emboli; chronic venous congestion with hemosiderin-laden macrophages in alveoli; and confluent silicotic lymph nodes in hilar lymph nodes. Claimant's Exhibits 2, 3.

<sup>13</sup> Employer correctly notes that substantial evidence does not support the administrative law judge's finding, as Drs. Oesterling and Tomashefski found mild or minimal anthracotic pigmentation within the fibrosis, and Dr. Green agreed that a majority of the fibrosis was not significantly pigmented. Employer's Brief at 25-26; Director's Exhibit 103; Claimant's Exhibit 1; Employer's Exhibit 2.

<sup>14</sup> Dr. Tomashefski reviewed the autopsy slides and diagnosed idiopathic pulmonary fibrosis based on his findings of diffuse, severe, end-stage interstitial fibrosis with honeycomb change. He stated that diffuse fibrosis due to coal dust is typically heavily impregnated with black pigment and is associated with other manifestations of coal workers' pneumoconiosis. He noted that there was negligible black pigment or birefringent crystals seen in the miner's lungs. Dr. Tomashefski based his opinion on the absence of coal macules and micronodules; a minimal amount of black pigment; and no silicotic nodules in the lungs, although a few silicotic nodules were present in the right hilar lymph nodes. Dr. Tomashefski also diagnosed a chronic left ventricular cardiac failure based on the presence of extreme pulmonary congestion and alveolar hemosiderin-laden macrophages. Dr. Tomashefski stated that in order to diagnose coal workers' pneumoconiosis, he would need to see coal macules, focal emphysema, or micronodules. Employer's Exhibits 2, 8.



crystals appeared to be present and based his diagnosis on the presence of minimal black anthracotic pigment. The administrative law judge determined that the opinions of Dr. Tomaszewski and Dr. Oesterling were both entitled to less weight, as Dr. Oesterling's finding of no silica crystals was contradicted by Dr. Tomaszewski, and Dr. Tomaszewski's conclusion, that minimal pigment indicated that the miner did not suffer from pneumoconiosis, was undermined by the opinions of Drs. Oesterling and Green, that anthracotic pigment could become cleared from the lungs over time. Decision and Order on Remand at 6; Director's Exhibit 103; Employer's Exhibits 2, 7, 8.

Based on the administrative law judge's weighing of the evidence, we are unable to affirm the award of benefits in both claims. We find merit to employer's argument that the administrative law judge failed to provide an adequate rationale for crediting Dr. Holimon's opinion as well-reasoned, well-documented, and sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2). Employer's Brief at 19-24. The administrative law judge explained that Dr. Holimon was well-qualified to issue an opinion, and that he "adequately described how he based his diagnosis of pneumoconiosis on the presence of honeycombing, fibrosis, and the presence [of] anthracotic pigment" shown on the autopsy he performed. Decision and Order on Remand at 4. However, the administrative law judge failed to evaluate Dr. Holimon's opinion in light of the other physicians' findings and subject it to the same scrutiny, nor did he reconcile Dr. Holimon's autopsy report, finding anthracotic material in the lymph nodes but not mentioning anthracotic pigmentation elsewhere, with his deposition testimony, that there was "a very heavy amount of black pigmentation" in the lung tissue, and that he could not attribute the diagnosed pneumoconiosis to coal dust exposure. Employer's Exhibit 1 at 17-20; Director's Exhibit 99; Decision and Order on Remand at 4. Further, in finding the opinions of Drs. Fino, Oesterling, Tomaszewski and Green to be in equipoise, the administrative law judge failed to resolve the conflict in the opinions regarding the presence or absence of pneumoconiosis on autopsy, and assign each opinion appropriate weight in light of its explanation, documentation and credibility. See *Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999). Rather, the administrative law judge identified the areas of disagreement, and found that all of these opinions were entitled to "less weight." Decision and Order at 6. The administrative law judge also failed to explain why the only medical opinion to attribute the miner's disability to pneumoconiosis, that of Dr. Green, was sufficiently reasoned to establish disability causation at Section 718.204(c), yet insufficiently reasoned to establish the existence of pneumoconiosis. Thus, because the administrative law judge failed to appropriately explain his credibility determinations in accordance with the APA, see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc), we vacate his findings of pneumoconiosis at Section 718.202(a) and disability causation at Section 718.204(c), and remand this case for further consideration of the relevant evidence.

On remand, the administrative law judge must initially determine whether Dr. Oesterling's report properly constitutes rebuttal autopsy evidence pursuant to 20 C.F.R. §725.414 and, if not, fashion an appropriate remedy. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007)(en banc). The administrative law judge must then determine whether the totality of the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 1-111 (3d Cir. 1997). If the administrative law judge finds that the overall weight of the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), he must then determine whether claimant has established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Turning to the survivor's claim, the administrative law judge found that claimant was automatically entitled to receive benefits pursuant to amended Section 932(l), based on the award of benefits in the miner's claim. Because we have vacated the award of benefits in the miner's claim, we must also vacate the award in the survivor's claim. In this case, it is undisputed that claimant filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; that the miner had at least fifteen years of underground coal mine employment; and that the miner suffered a totally disabling respiratory impairment at the time of his death. Thus, if the administrative law judge, on remand, awards benefits in the miner's claim, claimant is automatically entitled to benefits in the survivor's claim pursuant to amended Section 932(l). However, if the administrative law judge denies benefits in the miner's claim on remand, claimant will be entitled to invocation of the rebuttable presumption of death due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and the administrative law judge must determine whether employer has established rebuttal of the presumption with affirmative proof that the miner did not have pneumoconiosis, or that his death did not arise out of dust exposure in coal mine employment. *See Copley v. Buffalo Mining Co.*, BLR , BRB No. 11-0713 BLA (July 31, 2012); 77 Fed. Reg. 19,456, 19,475 (Mar. 30, 2012)(to be codified at 20 C.F.R. §718.305).

Finally, we reject employer's request that this case be remanded to a different administrative law judge because the case has reached the point of "gridlock." Employer's Brief at 10. In the absence of evidence of bias or intransigence on the administrative law judge's part, we find no compelling reason to order the assignment of this case to a different administrative law judge on remand. *See generally Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

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