



BRB Nos. 14-0068 BLA
and 14-0069 BLA

ELIZABETH DARLENE CANTLEY)
(Widow of and o/b/o JOHNNY RAY)
CANTLEY))

Claimant-Respondent)

v.)

GOLD RIVER MINING COMPANY)

DATE ISSUED: 01/30/2015

and)

WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)

Employer/Carrier-)
Petitioners)

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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

G. Todd Houck, Mullens, West Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Barry H. Joyner (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: HALL, Acting Chief Administrative Appeals Judge,
McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5636 and 2011-BLA-6131) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) rendered on both a miner's subsequent claim and a survivor's claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).¹ The administrative law judge credited the miner with 29.068 years of underground coal mine employment, and adjudicated the claims pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. Regarding the miner's claim, the administrative law judge found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304,² thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations. Alternatively, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as claimant established that the miner had more than 15 years

¹ Claimant is the widow of the miner. The miner filed his first claim on June 1, 1994. Miner's Claim Director's Exhibit 1. It was finally denied by the district director on March 13, 1995, because the miner did not establish any of the elements of entitlement. *Id.* The miner filed his second claim (a duplicate claim) on September 8, 1998. Miner's Claim Director's Exhibit 2. It was finally denied by a claims examiner on January 4, 1999, because the miner did not establish a material change in conditions, as he did not establish any of the elements of entitlement. *Id.* The miner filed this claim (a subsequent claim) on February 19, 2010. Miner's Claim Director's Exhibit 4. He died on March 22, 2011, while his claim was pending before the Office of Administrative Law Judges. Survivor's Claim Director's Exhibit 3. Claimant filed a survivor's claim on April 14, 2011. Survivor's Claim Director's Exhibit 2. She is also pursuing the claim of the miner on his behalf.

² While the administrative law judge found that there was no evidence to support a determination of complicated pneumoconiosis under 20 C.F.R. §718.304(a) and (c), she found that the autopsy evidence established the presence of complicated pneumoconiosis under 20 C.F.R. §718.304(b).

of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment.³ The administrative law judge also found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim, commencing as of March 2006, the month in which she determined that the evidence established that the miner became totally disabled due to pneumoconiosis.⁴ With respect to the survivor's claim, the administrative law judge found that claimant was automatically entitled to benefits under amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).⁵ Accordingly, the administrative law judge awarded survivor's benefits, commencing as of March 2011, the month in which the miner died.

On appeal, employer challenges the administrative law judge's finding that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) in the miner's claim. Specifically, employer challenges the administrative law judge's finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of total disability due to pneumoconiosis in the miner's claim. Further, employer contends that the administrative law judge erred in determining that March 2006 is the date from which benefits commence in the miner's claim. Lastly, employer challenges the administrative law judge's finding that claimant is entitled to survivor's benefits. Claimant responds, urging affirmance of the administrative law judge's Decision and Order Awarding Benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited letter brief, urging the Board to decline to address employer's assertion that the

³ In 2010, Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

⁴ The administrative law judge found that the miner's eligibility to receive benefits terminated effective February 2011 under 20 C.F.R. §725.502(c), as it was the month prior to the month in which the miner died.

⁵ The amendments also revived Section 422(*l*) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

administrative law judge improperly applied a “rule out” standard in considering rebuttal of the presumption at amended Section 411(c)(4), because it has no impact on this case. Further, while the Director states that he does not take a position on whether the miner was totally disabled as of March 2006, he nevertheless urges the Board to reject employer’s assertion that entitlement on the miner’s claim cannot predate April 2010.⁶

The Board’s scope of review is defined by statute. The administrative law judge’s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁷ 33 U.S.C. §921(b)(3), as incorporated into the Act 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 benefits in a miner’s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Pursuant to Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304 of the regulations, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers or suffered from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge must perform an equivalency determination to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the

⁶ Because the administrative law judge’s length of coal mine employment finding, and her findings that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and that the evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and (c) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁷ The record indicates that the miner was employed in the coal mining industry in West Virginia. Miner’s Claim Director’s Exhibits 1, 2, 5. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

irrebuttable presumption. Specifically, the court has held that “[b]ecause prong (A) sets out an entirely objective scientific standard” - i.e., an opacity on an x-ray greater than one centimeter - x-ray evidence provides the benchmark for determining what, under prong (B), is a “massive lesion” and what, under prong (C), is an equivalent diagnostic result reached by other means. *Scarbro v. Eastern Assoc. Coal Corp.*, 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). Further, the court has recognized that a diagnosis of massive lesions, standing alone, can satisfy the “statutory ground” for invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b). *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006).

Employer contends that the administrative law judge erred in finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) in the miner’s claim. Specifically, employer challenges the administrative law judge’s finding that the autopsy evidence established complicated pneumoconiosis at Section 718.304(b). The administrative law judge considered the autopsy reports of Drs. Dennis and Oesterling,⁸ both Board-certified pathologists. In considering the report of Dr. Dennis, the autopsy prosector, the administrative law judge noted that Dr. Dennis identified large lesions in the miner’s lungs and found the presence of “progressive massive fibrosis.” Decision and Order at 29. The administrative law judge also noted that Dr. Dennis observed that “one lesion in each lung was at least 2 centimeters in diameter, and another in the right lung was 1.2 centimeters.” *Id.* The administrative law judge mistakenly asserted that “Dr. Dennis did not explicitly state that any of the lesions would equate to an opacity of 1.0 centimeter or greater, on X-ray.” *Id.* The record reflects that Dr. Dennis testified that an x-ray taken in the appropriate plane, the apical lordotic view, from the apex of the lung, and in the appropriate direction, “would reflect the actual circumferential measurement,” even if it were a 2 centimeter module. Employer’s Exhibit 16 at 69. The doctor stated that the measurements he takes are of the actual fibrosis, which is reproducible by x-ray “because that seems to be [the evidence] they want.”⁹ Employer’s Exhibit 16 at 68.

⁸ In a report, based on an autopsy performed on March 23, 2011, Dr. Dennis diagnosed moderate to severe progressive massive fibrosis and macular development measuring 0.5 to 2 centimeters in diameter. Claimant’s Exhibit 7. In a December 28, 2011 report, based on pathological slides, Dr. Oesterling observed a significant pleural based nodular coal workers’ pneumoconiosis that was approaching macronodular size, and accompanying micronodular interstitial coal workers’ pneumoconiosis. Employer’s Exhibit 7. Dr. Oesterling found that Dr. Dennis’s diagnosis of progressive massive fibrosis was inaccurate because sections of lung tissue on the slides did not show a coal dust component that reached 2 centimeters in size. *Id.*

⁹ The administrative law judge thought that Dr. Dennis considered any

Based on her finding that no physician determined that nodules observed on autopsy evidence had an equivalency, on x-ray, of at least one opacity that was 1.0 centimeter or greater in diameter, the administrative law judge found that the irrebuttable presumption of disability due to pneumoconiosis was not established by means of an equivalency determination. Nonetheless, the administrative law judge correctly stated that “[t]he X-ray equivalency criterion in [Section] 718.304(a) is not the only means whereby complicated pneumoconiosis may be established, under the regulation.” Decision and Order at 29. Citing *Perry* and *Blankenship*, the administrative law judge determined that the miner had massive lesions in his lungs, as defined by the regulation at Section 718.304(b), based on Dr. Dennis’s finding that the miner had lesions that were at least 2 centimeters in size. The administrative law judge further stated, “based on the precedents of the [Fourth Circuit,] I find that, in the [m]iner’s specific case, these ‘massive lesions’ may be equivalent to opacities discerned by X-ray that meet the requirements of [Section] 718.304(a).” *Id.* at 32. The administrative law judge gave less weight to Dr. Oesterling’s findings that the miner did not have lesions at least 2 centimeters in diameter and that the largest pneumoconiotic lesion the miner had was 0.7 centimeters in size because she found that Dr. Oesterling was not able to accurately assess whether the nodules on the slides were at least 2 centimeters in size, as the slides that the doctor reviewed did not capture the full size of the lesions. In addition, the administrative law judge determined that Dr. Oesterling’s definition of progressive massive fibrosis required a coalescence of micro nodules, which is not consistent with the regulatory definition at Section 718.304(b), as interpreted by the court in *Perry* and *Blankenship*. *Id.* at 31. Hence, based on Dr. Dennis’s autopsy report, the administrative law judge found that the autopsy evidence established the presence of complicated pneumoconiosis at Section 718.304(b).

Employer asserts that the administrative law judge erred in finding Dr. Dennis’s autopsy report sufficient to establish the presence of complicated pneumoconiosis. Employer argues that an equivalency determination is necessary to establish complicated

requirement to address the equivalency of a visualized lesion to an x-ray to be “a bunch of crap.” Decision and Order at 23 n.40, citing Employer’s Exhibit 16 at 21. The administrative law judge’s confusion derived from Dr. Dennis’s stream of consciousness form of testimony, which overrode counsel’s interruptions and prevented efforts to obtain clarification. A careful reading of the doctor’s testimony indicates that he was rejecting as “a bunch of crap” any objection to his measurements based on autopsy slides or x-rays. He insisted that the measurements he takes are accurate. Employer’s Exhibit 16 at 21. Dr. Dennis went on to explain that the slides are not large enough to reflect the size of the macules he found. Employer’s Exhibit 16 at 21-23. He also observed that x-rays, too, may be unreliable. Although the doctor clearly stated that it is possible to capture on x-ray the actual size of the fibrosis, he cautioned that it depended upon the x-ray being taken in the correct plane and from the correct angle. Employer’s Exhibit 16 at 68-69.

pneumoconiosis at 20 C.F.R. §718.304(b) and relies upon the administrative law judge's incorrect statement that Dr. Dennis did not make such a determination. Employer's Brief at 8-9. Contrary to employer's assertion, the administrative law judge's finding that Dr. Dennis's autopsy report was sufficient to establish the presence of complicated pneumoconiosis at Section 718.304(b) is consistent with *Perry*. Although the Fourth Circuit has not overruled its holding, in either *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, or *Blankenship*, 177 F.3d at 243, 22 BLR at 560-61, that the "massive lesions" described at 20 C.F.R. §718.304(b) are those which, when x-rayed, would show as opacities greater than one centimeter, the court has recognized that evidence of massive lesions provided "another" ground, i.e., a "statutory ground," for invocation of the irrebuttable presumption. *Perry*, 469 F.3d at 365, 23 BLR at 2-384. Hence, the court provided two independent grounds to invoke the irrebuttable presumption at Section 718.304(b). In this case, the administrative law judge permissibly determined that Dr. Dennis's diagnosis of "progressive massive fibrosis" with macular development measuring 0.5 to 2 centimeters in diameter was sufficient to establish "massive lesions" and invoke the irrebuttable presumption at 20 C.F.R. §718.304(b). *Id.* We, therefore, reject employer's assertion that the administrative law judge erred in finding Dr. Dennis's autopsy report sufficient to establish the presence of complicated pneumoconiosis.

Employer also asserts that the administrative law judge erred in crediting Dr. Dennis's opinion over Dr. Oesterling's contrary opinion because the "[administrative law judge's] finding of a two-centimeter pneumoconiotic autopsy lesion is wholly based on Dr. Dennis's claim that he observed such a lesion in the lungs and simply did not include all of it on the autopsy slides." Employer's Brief at 14. As discussed, *supra*, Dr. Dennis described lesions in the miner's lungs that were 2 centimeters in diameter, whereas Dr. Oesterling opined that the largest lesion in either of the miner's lungs was 0.7 centimeters in diameter. The administrative law judge noted that Dr. Dennis's assessment of the size of the lesions in the miner's lungs was based on his observations in performing the autopsy. The administrative law judge also noted that "Dr. Dennis intimated in his deposition that the slides were not large enough to accommodate the largest lesions he saw." Decision and Order at 31 n.49. Hence, based on her finding that the slides prepared by Dr. Dennis did not accurately capture the full size of the lesions in the miner's lungs, the administrative law judge gave less weight to Dr. Oesterling's opinion that the miner did not have lesions that were at least 2 centimeters in diameter and that the largest pneumoconiotic lesion that the miner had was 0.7 centimeters in size. Further, the administrative law judge stated, "I credit Dr. Dennis'[s] report that he observed lesions of at least 2 centimeters in each of the [m]iner's lungs." *Id.* at 31. The administrative law judge permissibly accorded greater weight to the opinion of Dr. Dennis than to Dr. Oesterling's contrary opinion because Dr. Dennis's perspective as the autopsy prosector provided him with an advantage over Dr. Oesterling, the reviewing pathologist, in determining the size of the lesions on gross examination. *See Urgolites v. BethEnergy Mines*, 17 BLR 1-20, 1-23 (1992); *Gruller v. BethEnergy Mines, Inc.*, 16

BLR 1-3 (1991). Similarly in *Perry*, the employer's pathologist relied upon autopsy slides to dispute the reliability of the prosecutor's measurements. The court rejected employer's doctor's objection because he had "a partial picture, literally and figuratively." *Perry*, 469 F.3d at 366, 23 BLR at 2-386. Thus, we reject employer's assertion that the administrative law judge erred in crediting Dr. Dennis's opinion over Dr. Oesterling's contrary opinion.

Employer further asserts that the administrative law judge erred in crediting Dr. Dennis's autopsy report regarding the size of lesions in the miner's lungs, based on the doctor's surrender of his medical license. The administrative law judge stated that "[t]he documents [admitted into the record] indicate that Dr. Dennis, whose medical specialty was listed as pathology, was accused of misconduct relating to prescribing controlled substances, for the period from March 2011 to April 2012," and that "Dr. Dennis admitted misconduct and agreed to surrender his medical license for a period of two years." Decision and Order at 25. In considering the credibility of Dr. Dennis's opinion, the administrative law judge determined that the documentation regarding Dr. Dennis's conduct did not relate to his integrity in performing autopsies or in preparing autopsy reports. The administrative law judge therefore declined to conclude that "Dr. Dennis's opinion as a pathologist [was] not credible." *Id.* We hold that the administrative law judge permissibly exercised her discretion in finding that the suspension of Dr. Dennis's medical license did not affect the credibility of his opinion in this case. *See Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977). Thus, we reject employer's assertion that the administrative law judge erred in crediting Dr. Dennis's autopsy report.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Employer additionally asserts that the administrative law judge erred in failing to weigh the conflicting evidence together at 20 C.F.R. §718.304(a)-(c). Employer argues that, "[b]ecause the [administrative law judge] never weighs the x-ray and CT-scan evidence against the autopsy evidence, the [administrative law judge] never considers the possibility that Dr. Dennis is mistaken in diagnosing one or more lesions of complicated coal workers' pneumoconiosis." Employer's Brief at 8. Based on her weighing of the autopsy evidence, the administrative law judge found that claimant established the presence of complicated pneumoconiosis under 20 C.F.R. §718.304. The administrative law judge also stated that, "[i]n making this finding, I have considered that there is no X-

ray evidence of complicated pneumoconiosis.”¹⁰ Decision and Order at 32. An administrative law judge, within her discretion as trier-of-fact, may accord greatest weight to the autopsy evidence as the most reliable evidence regarding the presence of complicated pneumoconiosis. See *Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). In this case, the administrative law judge properly considered all of the record evidence in finding that claimant satisfied her burden under Section 718.304. See *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999). Thus, we affirm the administrative law judge’s finding that claimant established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304, thereby establishing that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) in the miner’s claim. Accordingly, we affirm the administrative law judge’s award of benefits in the miner’s claim on this basis.

We also affirm the administrative law judge’s alternative holding awarding benefits in the miner’s claim pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).¹¹ Employer does not dispute that the administrative law judge was correct in invoking the irrebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) because the miner had more than 15 years of qualifying coal mine employment and a totally disabling respiratory impairment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Rather, employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of total disability due to pneumoconiosis.¹² Specifically, employer asserts that the administrative law judge erred

¹⁰ The administrative law judge noted that “there is no evidence regarding the size of the [m]iner’s lung lesions, as observed by X-ray” and that “[t]here also is no evidence to support a determination of complicated pneumoconiosis under [Section] 718.304(c).” Decision and Order at 29.

¹¹ Because claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner’s pulmonary or respiratory impairment “did not arise out of, or in connection with,” coal mine employment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(d) (2014). The administrative law judge found that employer failed to establish rebuttal by either method.

¹² Because the administrative law judge’s finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) by showing the absence of pneumoconiosis is not challenged on appeal, we affirm this finding. See *Skrack*, 6 BLR at 1-711.

in weighing the opinions of Drs. Oesterling and Zaldivar. In addressing the issue of disability causation, the administrative law judge considered the reports of Drs. Oesterling, Zaldivar and Gaziano,¹³ as well as the medical treatment records of Drs. Boustani and Karam.¹⁴ The administrative law judge found that that the opinions of Drs. Zaldivar and Gaziano were not well-reasoned.¹⁵ In addition, the administrative law judge found that Dr. Oesterling's opinion was equivocal. Hence, the administrative law judge found that the evidence it did not establish rebuttal of the presumption that the miner's totally disabling respiratory or pulmonary impairment was due to pneumoconiosis.

Employer argues that the administrative law judge improperly discredited the opinions of Drs. Oesterling and Zaldivar. Contrary to employer's assertion, the administrative law judge permissibly discredited Dr. Oesterling's opinion because it is equivocal. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 36. Although Dr. Oesterling testified that the

¹³ In a December 28, 2011 report, Dr. Oesterling opined that the miner's coal workers' pneumoconiosis did not significantly hasten, contribute to, or cause his demise. Employer's Exhibit 7. Dr. Oesterling found that "a significant portion of [the miner's] respiratory abnormalities must be attributed to his smoking history, not just to his coal dust induced disease." *Id.* During a March 1, 2012 deposition, Dr. Oesterling opined that, while "I think there are other major problems that were producing his respiratory disability," the miner's coal dust related disease "could have produced minimal respiratory distress and could have had minimal impact." Employer's Exhibit 14 (Dr. Oesterling's Depo. at 32). In a November 10, 2010 report, Dr. Zaldivar opined that the miner had a severe pulmonary impairment caused by smoking. Miner's Claim Director's Exhibit 22. Further, in an April 17, 2012 report, Dr. Zaldivar opined that the miner had a disabling pulmonary impairment that was due entirely to smoking, and not to coal mine work. Employer's Exhibit 15. During a July 25, 2012 deposition, Dr. Zaldivar opined that pneumoconiosis did not cause or contribute to the miner's impairment. Employer's Exhibit 17 (Dr. Zaldivar's Depo. at 36, 46, 47). Dr. Gaziano, in an April 15, 2010 report and August 15, 2011 deposition, opined that the miner's chronic obstructive pulmonary disease related to underground coal dust exposure contributed to his severe pulmonary impairment. Miner's Claim Director's Exhibit 12; Employer's Exhibit 1 (Dr. Gaziano's Depo. at 15).

¹⁴ The administrative law judge found that "the medical treatment records of Dr. Boustani and Dr. Karam do not include opinions regarding the etiology of the [m]iner's disabling pulmonary impairment." Decision and Order at 38.

¹⁵ Employer does not challenge the administrative law judge's findings with regard to Dr. Gaziano's disability causation opinion.

pneumoconiosis he had seen on the miner's autopsy slides "could have produced minimal respiratory distress..." and was "insignificant in the cause of death," he qualified his opinion when asked whether he was answering "within a reasonable degree of medical certainty." Employer's Exhibit 14 (Dr. Oesterling's Depo. at 32-33). The doctor candidly stated:

Well, yes, I'm trying to. But my problem here is still that I'm having trouble resolving the slides that I got in this particular instance versus what the records would suggest. And therefore...I am making an opinion based on something that I'm not sure is totally reliable.

Employer's Exhibit 14 (Dr. Oesterling's Depo. at 33-34). In light of the doctor's admission that he lacked confidence in the correctness of his opinion, the administrative law judge permissibly discounted the doctor's opinion as equivocal.

In addition, the administrative law judge permissibly discredited Dr. Zaldivar's opinion because it is not well-reasoned. *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). The administrative law judge found that Dr. Zaldivar's opinion that the miner's impairment was due exclusively to smoking, and not pneumoconiosis, was based on a lack of CT scan and x-ray evidence of pneumoconiosis, which led him to conclude that the miner did not have complicated pneumoconiosis.¹⁶ Decision and Order at 37. The administrative law judge held that because autopsy evidence conclusively established complicated pneumoconiosis, "Dr. Zaldivar's hypothesis is inconsistent with the histological evidence." *Id.* Consequently, the administrative law judge reasonably determined that Dr. Zaldivar's disability causation opinion was not well-reasoned, as it was based on the erroneous assumption that the miner did not have complicated pneumoconiosis. *Id.* at 38; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Thus, we reject employer's assertion that the administrative law judge erred by discrediting the opinions of Drs. Oesterling and Zaldivar.¹⁷

¹⁶ The administrative law judge noted that "the more recent records [that Dr. Zaldivar] assessed consisted primarily, but not exclusively, of medical treatment records, such as CT scan and X-ray interpretations related to the [m]iner's various hospitalizations." Decision and Order at 37. The administrative law judge observed that, "[w]ith [] very few exceptions (and these are listed above), the treatment X-rays did not utilize the ILO classification for pneumoconiosis." *Id.* Moreover, the most recent CT scan upon which the doctor relied was administered almost six years prior to the miner's death. *Id.*

¹⁷ Employer also argues that the administrative law judge applied an improper

In view of the foregoing, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by proving that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), we affirm the administrative law judge's award of benefits in the miner's claim on this basis.

Employer further contends that the administrative law judge erred in determining that March 2006 is the date from which benefits commence in the miner's claim. Employer asserts that the administrative law judge erred by setting the date as March 2006, based on a single arterial blood gas study, while ignoring the remaining arterial blood gas studies of record. Employer avers that the significant disparities in the results of the arterial blood gas studies "is reason enough to doubt the tests' (sic) validity as an accurate assessment of disability." Employer's Brief at 53. Employer maintains that the earliest date from which benefits should commence is April 2010. We disagree.

After noting that the miner filed the instant claim in February 2010, the administrative law judge found that Dr. Gaziano's evaluation of the miner in April 2010 established that he was totally disabled due to pneumoconiosis by that date. The administrative law judge additionally noted that the qualifying values produced by the March 2, 2006 arterial blood gas study administered by Dr. Boustani reflected a finding of total disability, and that Dr. Boustani's contemporaneous medical treatment notes indicated that the miner had hypoxemia. Based on her determination that the March 2, 2006 arterial blood gas study was accurate and valid, the administrative law judge ordered benefits to commence as of March 2006 in the miner's claim.¹⁸ We decline to address employer's assertion that the March 2, 2006 arterial blood gas study was not valid because employer was required to raise any allegation regarding the validity of this study before the administrative law judge, which it did not do. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Orek v. Director, OWCP*, 10 BLR 1-51

rebuttal standard and improperly limited employer's ability to rebut the presumption at amended Section 411(c)(4). Because we hold that the administrative law judge permissibly discredited the opinions of employer's experts, we need not address employer's arguments regarding the rebuttal standard and limitations on rebuttal at amended Section 411(c)(4).

¹⁸ The administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) based on her weighing of all the evidence, including the 2006 qualifying arterial blood gas study, and on her finding that it established total respiratory disability. The administrative law judge also found that the presumption was not rebutted.

(1987). Because it is supported by substantial evidence, we affirm the administrative law judge's determination that benefits in the miner's claim commence as of March 2006. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Finally, employer contends that the administrative law judge erred in finding that claimant was entitled to survivor's benefits. Employer asserts that the automatic entitlement provisions of amended Section 422(*l*) are not applicable in this claim because the award of benefits in the miner's claim should be vacated. We disagree. Because the administrative law judge properly found that claimant established entitlement to benefits in the miner's claim under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), we affirm the administrative law judge's finding that claimant was derivatively entitled to survivor's benefits under amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012). Furthermore, we affirm the administrative law judge's determination that survivor's benefits commence as of March 2011, the month in which the miner died.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge