U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0262 BLA
and 16-0263 BLA

CATHLEEN BROCK (o/b/o and Widow of EARL BROCK) Claimant-Petitioner v. IKERD BANDY COMPANY, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/04/2017 DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Request for Modification in Miner's Claim and Denying Award in Survivor's Claim of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Granting Employer's Request for Modification in Miner's Claim and Denying Award in Survivor's Claim (2012-BLA-5538 and 2012-BLA-5718) of Administrative Law Judge John P. Sellers, III on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim[2] filed on September 3, 2008, and a survivor's claim dated September 22, 2011.[3] Director's Exhibits 4, 65.

In a Decision and Order dated April 28, 2010, Administrative Law Judge Christine L. Kirby credited the miner with twenty-one years of coal mine employment, based on the parties' stipulation. Judge Kirby also accepted employer's concession that the miner was totally disabled and, therefore, found that an applicable condition of entitlement had changed since the date upon which the denial of the miner's prior claim became final.[4] *See* 20 C.F.R. §725.309. On the merits, Judge Kirby applied Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[5] and found that the miner was entitled to invocation of the

[1] Claimant is the widow of the miner, who died on September 2, 2011. Director's Exhibit 66. In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate. Director's Exhibit 65.

[2] The miner's initial claim for benefits, filed on September 4, 1997, was finally denied by the district director on December 19, 1997, because the miner failed to establish any of the elements of entitlement. Director's Exhibit 1. The miner's second claim, filed on February 12, 2001, was denied by Administrative Law Judge Thomas F. Phalen, Jr. because the miner failed to establish pneumoconiosis and total respiratory disability. The Board affirmed the denial of benefits. *Brock v. Ikerd Bandy Co.*, BRB No. 05-0312 BLA (Aug. 4, 2005)(unpub.); Director's Exhibit 2.

[3] The survivor's claim contains no filing date, but was signed on September 22, 2011. Director's Exhibit 65.

[4] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

[5] Pursuant to Section 411(c)(4) of the Act, a miner's total disability and/or death is presumed to be due to pneumoconiosis if the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions

rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption and, accordingly, awarded benefits in the miner's claim. Director's Exhibit 47.

Employer initially appealed the decision, but upon employer's request for modification, filed on August 17, 2011, the Board dismissed the appeal and remanded the case to the district director for modification proceedings. *Brock v. Ikerd Bandy Coal Co.*, BRB No. 11-0552 BLA (Sep. 22, 2011) (Order)(unpub.). Director's Exhibits 48, 51, 53, 54, 56, 57, 60. In support of its modification request on the ground of a mistake in Judge Kirby's determination of fact that the miner was totally disabled due to pneumoconiosis, employer submitted the medical report of Dr. Rosenberg, the miner's death certificate, and medical treatment records. Employer's Exhibits 1-5.

Following the miner's death on September 2, 2011, claimant filed her survivor's claim. Director's Exhibit 65. On October 5, 2011, the district director issued a Proposed Decision and Order, wherein he found that claimant was automatically entitled to survivor's benefits, based on the award to her deceased husband. Director's Exhibit 67. Employer requested a formal hearing in the survivor's claim. Director's Exhibit 68.

On February 3, 2012, employer's request for modification of the miner's claim was transferred to the Office of Administrative Law Judges (OALJ), and on February 28, 2012, the survivor's claim was transferred to the OALJ. Director's Exhibits 60, 70. The cases were subsequently assigned to Administrative Law Judge John P. Sellers, III (the administrative law judge).

Following a hearing, the administrative law judge found that all of the miner's twenty-one years of coal mine employment were performed either underground or in conditions substantially similar to those in an underground mine.[6] Applying Section 411(c)(4) in the miner's subsequent claim, the administrative law judge accepted employer's concession that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and found, therefore, that the miner was entitled to

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substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), *see* 20 C.F.R. §718.305.

[6] Employer conceded that the miner had twenty-one years of coal mine employment, but contested the issue of whether this employment was performed underground or on the surface in conditions substantially similar to those in an underground mine. Hearing Transcript at 18-21.

invocation of the rebuttable presumption that the miner's disability was due to pneumoconiosis. The administrative law judge further determined, however, that employer successfully rebutted the presumption by proving that the miner did not have pneumoconiosis and that his totally disabling respiratory or pulmonary impairment was not due to pneumoconiosis. The administrative law judge concluded that employer was entitled to modification, based on a mistake in fact pursuant to 20 C.F.R. §725.310, and that granting modification would render justice under the Act. Accordingly, the administrative law judge denied benefits in the miner's claim.

Because the administrative law judge found that the miner was not entitled to benefits at the time of his death, he determined that claimant was not automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[7] The administrative law judge then considered whether claimant was entitled to survivor's benefits pursuant to Section 411(c)(4), and found that claimant established invocation of the rebuttable presumption of death due to pneumoconiosis. The administrative law judge further determined, however, that employer successfully rebutted the presumption by proving that the miner did not have pneumoconiosis and that his death was not due to pneumoconiosis. Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant challenges the administrative law judge's determination that employer disproved the existence of clinical pneumoconiosis in the miner's claim.[8] In the survivor's claim, claimant contends that the administrative law judge erred in finding that the miner "was not totally disabled at the time of his death." Claimant's Brief at 3. Employer responds in support of the granting of modification in the miner's claim, and the denial of benefits in both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, challenging the administrative law judge's finding that employer disproved the existence

[7] Section 422(*l*) provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[8] In light of the administrative law judge's acceptance of employer's concession that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), we decline to address claimant's arguments with respect to the issue of total disability. Decision and Order at 27; 2011 Decision and Order at 5; Hearing Transcript at 19; Employer's Brief at 9-11.

of legal pneumoconiosis in the miner's claim. The Director urges the Board to vacate the denial of benefits in both claims.[9]

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.[10] 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

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis in the miner's claim, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[11] or by establishing that "no part of the miner's respiratory or

[9] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment; the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b); and invocation of the rebuttable presumptions of total disability and death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[10] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1-266.

[11] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R.

pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer successfully established rebuttal under both methods and, thus, denied benefits.

A. Clinical Pneumoconiosis

Claimant asserts that the administrative law judge erred in his evaluation of the x-ray and medical opinion evidence and, thus, erred in finding the evidence "insufficient to establish the existence of clinical pneumoconiosis." Claimant's Brief at 3-9. In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge considered interpretations of x-rays dated March 24, 2001, April 27, 2001, May 31, 2001, November 17, 2008, and October 12, 2009, which had been considered by Judge Kirby in connection with her April 28, 2011 award of benefits. The administrative law judge adopted and reiterated Judge Kirby's previous findings in his decision. Decision and Order at 12-13. The administrative law judge noted that Dr. Baker, a physician with no particular radiological qualifications, interpreted the March 24, 2001 x-ray as positive for pneumoconiosis, while Dr. Barrett, who is dually qualified as a B reader and Board-certified radiologist,[12] interpreted the same x-ray as negative. Director's Exhibits 2-248, 2-261. Giving more weight to Dr. Barrett's interpretation, based on his superior qualifications, the administrative law judge determined that this x-ray was negative for pneumoconiosis. Decision and Order at 12; 2011 Decision and Order at 7.

Dr. Hussain, a physician with no particular radiological qualifications, interpreted the April 27, 2001 x-ray as positive for pneumoconiosis in two separate readings, noting "p/s, 6 zones, 2/1" and "p/s, 4 zones, 1/0." Director's Exhibits 2-260, 2-265. The administrative law judge determined that the April 27, 2001 x-ray was entitled to little

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§718.201(a)(1). Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[12] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A "Board-certified radiologist" is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

weight, based on Dr. Hussain's lack of particular radiological qualifications and his inconsistency in interpretation. Decision and Order at 12; 2011 Decision and Order at 7.

The administrative law judge found that the May 31, 2001 x-ray was negative for pneumoconiosis, as the sole interpretation was read as negative by Dr. Broudy, a B reader. *Id.*; Director's Exhibit 2-224.

Dr. Rasmussen, a B reader, interpreted the November 17, 2008 x-ray as positive for pneumoconiosis, while Dr. Wiot, who is dually qualified as a B reader and Board-certified radiologist, interpreted the same x-ray as negative. Director's Exhibits 12, 39. Giving more weight to Dr. Wiot's interpretation, based on his superior qualifications, the administrative law judge determined that this x-ray was negative for pneumoconiosis. Decision and Order at 12; 2011 Decision and Order at 7.

The administrative law judge found that the x-ray dated October 12, 2009 was negative, as the sole interpretation of the film was read as negative by Dr. Dahhan, a B reader. *Id.*; Director's Exhibit 44. The administrative law judge concluded that the weight of the x-ray evidence was negative for pneumoconiosis.

Claimant argues that "the administrative law judge relied almost solely on the qualifications of the physicians;" that he "placed substantial weight on the numerical superiority of interpretations;" and that he "may have selectively analyzed the x-ray evidence." Claimant's Brief at 3-5. Claimant's arguments lack merit.

Considering the quality and quantity of the x-ray evidence as a whole, the administrative law judge agreed with Judge Kirby's findings and permissibly concluded that the weight of the x-ray evidence was negative for pneumoconiosis, based on a numerical preponderance of negative interpretations by physicians with superior qualifications. Decision and Order at 12-13; 2011 Decision and Order at 7-8; *see* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 58-60, 19 BLR 2-271, 2-278-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003).

The administrative law judge next considered the medical opinions of Drs. Baker, Hussain, Rasmussen, Dahhan, and Rosenberg, as well as the miner's treatment records, on the issue of clinical pneumoconiosis. Drs. Baker, Hussain, and Rasmussen diagnosed clinical pneumoconiosis, based on radiographic changes consistent with pneumoconiosis. Dr. Rasmussen also diagnosed interstitial fibrosis that "can be related to [the miner's] coal dust exposure." Director's Exhibits 2-244, 2-278, 12, 15. In contrast, Drs. Dahhan and Rosenberg opined that the miner did not have clinical pneumoconiosis. Director's Exhibit 46; Employer's Exhibit 1. In treatment notes dated June 16, 2009, Dr.

Mandviwala listed a "history of questionable pneumoconiosis," and diagnosed chronic congestive heart failure and "chronic hypoxemia secondary to congestive heart failure and possible chronic obstructive pulmonary disease/pneumoconiosis." Employer's Exhibit 3. In addition, in treatment notes dated August 3, 2009, Dr. Talib listed a "questionable history of pneumoconiosis," and diagnosed hypoxemia, coronary artery disease, chronic kidney disease, "possible pneumoconiosis," and diabetes. Employer's Exhibit 3.

The administrative law judge agreed with Judge Kirby's determination to accord little weight to the opinions of Drs. Baker and Hussain because they were not well-reasoned. Decision and Order at 12; 2011 Decision and Order at 8. The administrative law judge further determined that Dr. Rasmussen's opinion that the miner's interstitial pulmonary fibrosis can be related to his coal dust exposure was "equivocal" and was outweighed by the well-reasoned medical opinions of Dr. Dahhan and Dr. Rosenberg, whom the administrative law judge accorded "substantial weight." Decision and Order at 13-17. Therefore, the administrative law judge found that employer successfully established that the miner did not have clinical pneumoconiosis. *Id*. at 17.

Claimant asserts that the opinions of Drs. Mandviwala, Talib, Baker, Hussain, and Rasmussen should have been credited as reasoned and documented because each was based on a physical examination of the miner, a review of the miner's medical and work histories and his symptoms. Thus, claimant contends that the administrative law judge erred in discounting these opinions for the reasons he provided. Claimant also maintains that because Dr. Rosenberg never physically examined the miner, the administrative law judge improperly credited his opinion.[13] Claimant's Brief at 5-9. Claimant's arguments are without merit.

We reject claimant's assertion that the opinions of Drs. Talib and Mandviwala in the miner's treatment notes are well reasoned on the issue of clinical pneumoconiosis. While the administrative law judge did not assign weight to their opinions, any error is harmless, as neither doctor made a definite diagnosis of clinical pneumoconiosis. Employer's Exhibits 2, 3; *see Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge permissibly agreed with Judge Kirby's determination to accord little weight to the opinions of Drs. Baker and Hussain because their findings of clinical pneumoconiosis

[13] Claimant also asserts that the administrative law judge "appears to have. . . "substitute[d] his own conclusion for [that] of a physician," noting that it is error for an administrative law judge to interpret medical tests. Claimant's Brief at 7. As claimant has not identified any specific example of such a substitution, however, we decline to address claimant's allegation of error. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

were based solely on their positive interpretations of x-rays dated March 24, 2001 and April 27, 2001, which were outweighed by the negative interpretations by better qualified readers, and because the preponderance of the x-ray evidence was negative for pneumoconiosis. Decision and Order at 12; Director's Exhibits 2-244, 2-278; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-648-49 (6th Cir. 2003), *citing Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge reasonably accorded little weight to Dr. Rasmussen's opinion that the interstitial pulmonary fibrosis shown on the miner's x-ray "can be related to his coal dust exposure," as it was "equivocal." Further, the administrative law judge permissibly found that Dr. Rasmussen's opinion was outweighed by the well-reasoned medical opinions of Drs. Dahhan and Rosenberg, who found no clinical pneumoconiosis, and by Dr. Wiot's x-ray interpretation finding no evidence of interstitial fibrosis. Decision and Order at 17; Director's Exhibits 12, 15; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Lastly, we reject claimant's contention that the opinion of Dr. Rosenberg was not entitled to significant weight because he was a non-examining physician. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); *Collins v. J&L Steel* (*LTV Steel*), 21 BLR 1-181, 1-189 (1999). As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that employer met its burden of affirmatively proving that the miner did not have clinical pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

B. Legal Pneumoconiosis

The Director challenges the administrative law judge's reliance on Dr. Rosenberg's opinion to find that employer rebutted the presumed fact of legal pneumoconiosis. Director's Brief at 3-4.

The administrative law judge considered the medical opinions of Drs. Rasmussen, Baker, Hussain, Broudy, Dahhan, and Rosenberg in determining whether employer disproved the existence of legal pneumoconiosis. Decision and Order at 6-7; 17-23; Director's Exhibits 12, 15, 46, 2-244, 2-278, 1-59, 1-83; Employer's Exhibit 1. Dr. Rasmussen diagnosed legal pneumoconiosis in the form of coal mine dust-induced chronic lung disease due to interstitial fibrosis. Director's Exhibits 12, 15. Dr. Baker diagnosed chronic bronchitis due to coal dust exposure and cigarette smoking. Director's Exhibit 2-244. Dr. Hussain diagnosed "pneumoconiosis," but did not clearly explain whether he was diagnosing clinical pneumoconiosis or legal pneumoconiosis. Director's Exhibit 2-278. Drs. Broudy and Dahhan opined that the miner did not have any respiratory or pulmonary impairment related to coal dust exposure. Director's Exhibits 1-59, 1-83, 1-104, 46. Dr. Rosenberg opined that the miner did not have legal

pneumoconiosis, but suffered from a disabling restrictive impairment due to his previous bypass surgery, obesity, pleural-related changes and congestive heart failure. Employer's Exhibit 1.

The administrative law judge accorded substantial weight to Dr. Rosenberg's opinion, but determined that the opinions of Drs. Rasmussen, Baker, Hussain, Broudy, and Dahhan were entitled to little probative weight. Therefore, based on Dr. Rosenberg's opinion, the administrative law judge found that employer successfully established that the miner did not have legal pneumoconiosis. Decision and Order at 17-23; Employer's Exhibit 1; Director's Exhibits 1-59, 1-83, 1-104, 2-244, 2-278, 12, 15, 46.

The Director argues that Dr. Rosenberg's opinion is not credible because it is based on the invalid assumption that a purely restrictive lung disease cannot be legal pneumoconiosis, a premise that is contrary to the regulations. The Director further asserts that "apart from his invalid reliance on the absence of positive x-rays, Dr. Rosenberg offered no explanation of why he categorically excluded the miner's long history of coal dust exposure as even a partial or contributing cause of the miner's lung disease."[14] Director's Brief at 4. The Director's arguments have merit, in part. [15]

In determining that employer successfully rebutted the presumption of legal pneumoconiosis, the administrative law judge gave weight to Dr. Rosenberg's qualifications as a Board-certified internist and pulmonologist, and credited his opinion that the miner's restrictive impairment and hypertension were unrelated to his coal dust exposure.[16] Decision and Order at 19-20; Employer's Exhibit 1. The administrative law judge stated:

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[14] As no party challenges the administrative law judge's findings that the opinions of Drs. Dahhan, Broudy, Rasmussen, Baker and Hussain are entitled to reduced probative weight on the issue of legal pneumoconiosis, they are affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 17-23; Director's Exhibits 1-59, 1-83, 1-104, 2-244, 2-278, 12, 15, 46.

[15] We note that the mere fact that the regulatory definition makes it legally possible for a restrictive impairment arising out of coal dust exposure to be considered pneumoconiosis does not, in and of itself, invalidate a physician's opinion that a miner's particular restrictive impairment is not legal pneumoconiosis.

[16] Dr. Rosenberg opined that the miner did not have legal pneumoconiosis. He diagnosed a disabling restriction with severe hypoxemia related to "various non-coal mine related factors including his sternotomy for previous bypass surgery, obesity, pleural-related changes and congestive heart failure." Employer's Exhibit 1 at 7. Dr. Rosenberg stated that "while it is true that clinical pneumoconiosis can cause restriction,

> Dr. Rosenberg reasoned that the miner's restrictive impairment and hypertension, including hypoxemia, were not due to clinical pneumoconiosis, for which he felt there was insufficient evidence, but to other conditions capable of causing such impairments and for which he concluded there was sufficient evidence—his history of coronary heart disease and surgery, his obesity, and his sleep apnea. Although he acknowledged that hypertension such as the miner demonstrated could be the result of advanced chronic obstructive lung disease, he emphasized that the miner did not have obstructive lung disease.
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> Because the employer successfully rebutted the presence of clinical pneumoconiosis, and because the miner demonstrated a restrictive rather than an obstructive impairment, and because the miner's cardiac problems, sleep apnea, and obesity are well documented in the materials summarized by Dr. Rosenberg, and given his credentials, I find Dr. Rosenberg's opinion entitled to substantial weight.

Decision and Order at 19-20.

As the Director correctly points out, "legal pneumoconiosis includes any chronic lung disease . . . arising out of coal mine employment . . . . includ[ing], but . . . not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Legal pneumoconiosis is present when coal dust significantly contributes to or substantially aggravates a respiratory condition, even if it is not the main or sole etiology. *See* 20 C.F.R. §718.201(b); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-263 (4th Cir. 2013)(recognizing that the Act does not require coal mine dust exposure to be the sole cause of a miner's respiratory impairment); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

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this is only when advance[d] micronodularity is present (Morgan, Cochrane)." *Id*. He opined that the miner's severe left ventricular dysfunction, compounded with his obesity and sleep apnea, caused his pulmonary hypertension and hypoxemia. *Id*. at 8. Dr. Rosenberg further indicated that "while it is true that coal mine dust exposure can cause pulmonary hypertension (Fernie), this is only in the setting of advanced clinical pneumoconiosis." Lastly, Dr. Rosenberg reasoned that "pulmonary hypertension can occur in the setting of advanced COPD, whatever the cause, but [the miner] did not have COPD" and, therefore, taking all the above information together, the miner did not have legal pneumoconiosis. *Id*.

It is unclear from the administrative law judge's discussion whether he considered the adequacy of Dr. Rosenberg's explanation for his conclusion that the miner's restrictive lung disease is not due to coal dust exposure in light of the regulatory definition of legal pneumoconiosis. On remand, the administrative law judge is instructed to reconsider Dr. Rosenberg's reasoning in finding that legal pneumoconiosis was not present. The administrative law judge is reminded that the Act does not require that coal mine dust exposure be the sole cause of a miner's respiratory or pulmonary impairment, but rather, may be a contributing or aggravating factor. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121. Consequently, we vacate the denial of benefits in the miner's claim, and remand for further consideration.

The Survivor's Claim

The administrative law judge determined that because the miner was not entitled to benefits in the miner's claim, based on employer's rebuttal of the 411(c)(4) presumption, claimant was not automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). Decision and Order at 26. The administrative law judge further determined that employer successfully rebutted the Section 411(c)(4) presumption in the survivor's claim based on Dr. Rosenberg's opinion. *Id*. at 27-28. Because we have vacated the denial of benefits in the miner's claim and the administrative law judge's credibility findings with respect to Dr. Rosenberg's opinion, we must also vacate his determination that this opinion is sufficient to prove that no part of the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2). On remand, if the administrative law judge awards benefits in the miner's claim, claimant is automatically entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

Accordingly, the administrative law judge's Decision and Order Granting Employer's Request for Modification in Miner's Claim and Denying Award in Survivor's Claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge