

BRB Nos. 09-0580 BLA  
and 09-0581 BLA

EDNA ADKINS	)	
(o/b/o and Widow of HIRAM ADKINS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA IRON COAL & COKE	)	DATE ISSUED: 06/30/2010
COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel F. Solomon,  
Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for  
employer.

Emily Goldberg-Kraft (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: DOLDER, Chief Administrative Appeals Judge, SMITH and  
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2006-BLA-5740 and 2006-  
BLA-5741) of Administrative Law Judge Daniel F. Solomon awarding benefits on a

miner's subsequent claim<sup>1</sup> and a survivor's claim<sup>2</sup> filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the second time. In his original Decision and Order, the administrative law judge accepted employer's stipulations that the miner worked in qualifying coal mine employment in excess of ten years, and that he suffered from pneumoconiosis arising out of coal mine employment. The administrative law judge found that the miner's subsequent claim was timely filed, and that employer's stipulation to the existence of pneumoconiosis arising out of coal mine employment established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Turning to the merits of the miner's claim, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby entitling claimant<sup>3</sup> to the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis. Alternatively, the administrative law judge found that the evidence was sufficient to establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). With respect to the survivor's claim, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim.

On appeal, the Board vacated the administrative law judge's award of benefits in both claims, and remanded the case for further consideration of the relevant evidence of record in each claim. *E.A. [Adkins] v. Virginia Iron Coal & Coke Co.*, BRB No. 08-0168 BLA (Oct. 30, 2008)(unpub.). With respect to the miner's claim, the Board affirmed, as unchallenged, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309 based on employer's

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<sup>1</sup> The miner's first application for benefits, filed on September 22, 1987, was denied by the district director in 1988, on the grounds that the evidence was insufficient to establish that the miner's pneumoconiosis arose out of coal mine employment and that he was totally disabled due to pneumoconiosis. Director's Exhibit 1.

<sup>2</sup> In the miner's claim, the exhibits of the Director, Office of Workers' Compensation Programs (the Director), are referred to as "Director's Exhibits," and in the survivor's claim, the Director's exhibits are referred to as "Government's Exhibits."

<sup>3</sup> Claimant is the surviving spouse of the miner, who died on May 6, 2005. Director's Exhibit 9. In addition to her claim for survivor's benefits, filed on May 26, 2005, Government's Exhibit 2, claimant is pursuing the subsequent miner's claim, filed on March 23, 2005. Director's Exhibit 3.

stipulation to the existence of simple pneumoconiosis arising out of coal mine employment. However, the Board vacated the administrative law judge's finding that the statute of limitations did not apply to the miner's subsequent claim, and instructed him to consider the issue of timeliness pursuant to 20 C.F.R. §725.308 on remand. The Board also vacated the administrative law judge's finding that the evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, as the administrative law judge had mischaracterized the opinions of Drs. Sides, Naeye and Fino, and had not resolved the dispute over the size of the lesions on autopsy. The Board instructed the administrative law judge on remand to reevaluate the conflicting medical opinions of record in determining whether the totality of the evidence established complicated pneumoconiosis arising out of coal mine employment, and cautioned him against substituting his own opinion for that of a physician. Further, the Board vacated the administrative law judge's finding that the evidence was sufficient to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c), as he did not consider the exertional requirements of the miner's usual coal mine employment in evaluating the physicians' assessments of disability, and he considered treatment records that were not in evidence in the miner's claim. The Board directed that, absent a finding of good cause pursuant to 20 C.F.R. §725.456(b)(1), the administrative law judge's findings on remand must be based solely on evidence previously admitted into the miner's claim record pursuant to 20 C.F.R. §725.414. *Id.* at 3-12. With respect to the survivor's claim, the Board vacated the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), holding that the administrative law judge provided invalid and/or insufficient explanations for his credibility determinations. *Id.* at 12-14. Accordingly, the Board remanded the miner's claim and the survivor's claim to the administrative law judge for further consideration of the appropriate relevant evidence.

On remand, the administrative law judge determined that the miner's subsequent claim was timely filed, and found that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, but was sufficient to establish that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(b), (c). With respect to the survivor's claim, the administrative law judge found that the weight of the evidence established that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death pursuant to Section 718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim.

In the present appeal, employer challenges the administrative law judge's finding that the miner's claim was timely filed. Employer further maintains that the administrative law judge provided invalid reasons for his credibility determinations in finding total disability due to pneumoconiosis established pursuant to Section 718.204(b), (c) in the miner's claim, and in finding death due to pneumoconiosis established pursuant

to Section 718.205(c) in the survivor's claim. Arguing that the administrative law judge failed to comply with the Board's previous remand instructions, employer urges the Board to vacate the award of benefits in both claims and direct that this case be reassigned to a different administrative law judge on remand. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the miner's claim was timely filed, to which employer replies in support of its position.<sup>4</sup>

By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. *Adkins v. Virginia Iron Coal & Coke Co.*, BRB Nos. 09-0580 BLA and 09-0581 BLA (Mar. 30, 2010)(unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. The Director has responded, noting that, if the Board affirms the administrative law judge's factual findings and the award of benefits in both claims, the recent amendment to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), will have no impact on this case.<sup>5</sup> However, the Director maintains that, if the Board does not affirm the award of benefits, the case must be remanded for the administrative law judge to determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis in the miner's claim and death due to pneumoconiosis in the survivor's claim under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) and, if so, to allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause. Employer has filed a Motion for Remand so that it may be provided with the opportunity to submit new evidence in response to the changes in law that may affect both claims.

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,

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<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>5</sup> Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

and in accordance with applicable law.<sup>6</sup> 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).

Turning first to the issue of timeliness, the Act requires that a living miner’s claim for benefits be filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner or a party responsible for the care of the miner. 30 U.S.C. §932(f);<sup>7</sup> 20 C.F.R. §725.308(a);<sup>8</sup> see *Sewell Coal Co. v. Director, OWCP [Dempsey]*, 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001). In order to trigger the running of the three-year statute of limitations, the medical determination must be a reasoned opinion of a medical professional, and must not have been discredited or found to be outweighed by contrary evidence in a prior adjudication. See *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 616, 23 BLR 2-345, 2-365 (4th Cir. 2006); *J.O. v. Helen Mining Co.*, 24 BLR 1-117, 1-122 (2009); *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006)(*en banc*); *Sturgill v. Bell County Coal Co.*, 23 BLR 1-159, 1-166

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<sup>6</sup> The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director’s Exhibits 1, 4.

<sup>7</sup> 30 U.S.C. §932(f) provides:

Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later-

- (1) a medical determination of total disability due to pneumoconiosis; or
- (2) March 1, 1978.

<sup>8</sup> 20 C.F.R. §725.308 was promulgated to implement 30 U.S.C. §932(f). It provides in relevant part:

- (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(2006)(*en banc*). Additionally, the regulation provides a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). The question of whether the evidence is sufficient to establish rebuttal of the presumption of timely filing of a claim pursuant to 20 C.F.R. §725.308(a), (c) involves factual findings that are appropriately made by the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Employer contends that the administrative law judge erred in determining that the miner's subsequent claim was timely filed. In this regard, employer alleges that the administrative law judge ignored relevant evidence in finding that a medical determination of total disability due to pneumoconiosis was not communicated to the miner. Employer asserts that, in 1988, the Department of Labor (DOL) mailed to the miner a copy of Form CM-988, Dr. Kanwal's Medical History and Examination Form dated November 24, 1987, and agreed that the opinion established the miner's entitlement to benefits, but denied the claim because the miner was still working. Employer's Brief at 17-18; Reply Brief at 3-4. Thus, employer maintains that the record establishes that a reasoned opinion of a medical professional was communicated to the miner, and that the miner's subsequent claim must be denied as a matter of law because the prior denial was based on the mistaken finding that the miner was still working.<sup>9</sup> We disagree.

The record reflects that on February 18, 1988, the district director notified the miner that he did not qualify for benefits because the evidence in his claim did not show that he had pneumoconiosis caused at least in part by coal mine work and that he was totally disabled by the disease. Director's Exhibit 1. The denial letter indicated that various attachments were enclosed therewith, specifically: Form CM-1000g, the Guide for Submitting Additional Evidence; Form CM-1078, an Authorization of Representation; and Form CM-998, a one-page summary of the results obtained on the miner's ventilatory study and arterial blood gas study performed on November 24, 1987, with the appropriate standards for disability.<sup>10</sup> Form CM-998 also contained the notation that "although the standards for disability have been met [by the miner's ventilatory study], the evidence in file indicates you are doing your usual coal mine employment."

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<sup>9</sup> Employer maintains that, because the record reflects that the miner had ceased working in October 1987, Director's Exhibit 4, the denial of the miner's original claim was based on a mistake in fact. As the miner did not request modification within one year of the district director's denial of benefits, employer asserts that the miner's subsequent claim is barred as a matter of law. Reply Brief at 4.

<sup>10</sup> Employer mistakenly asserts that the district director's denial letter listed Form CM-988, Medical History and Examination for Coal Workers' Pneumoconiosis, as an enclosure, rather than Form CM-998, the actual enclosure. Employer's Brief at 17.

*Id.* As the district director denied benefits on multiple grounds, and claimant demonstrated a change in one of the applicable conditions of entitlement, we reject employer's argument that the incorrect determination that the miner was still working bars his subsequent claim as a matter of law. *See* 20 C.F.R. §725.309(d).

In finding that the miner's subsequent claim was timely filed, the administrative law judge determined that "employer has not proved that the report [of Dr. Kanwal] was actually communicated to Miner," Decision and Order on Remand at 2, and substantial evidence supports this finding. Contrary to employer's contention, the record does not reflect that DOL provided the miner with Dr. Kanwal's report.<sup>11</sup> Further, the Director correctly notes that, even if the miner received and understood Dr. Kanwal's report, the 1988 final finding by the district director that the miner was not totally disabled due to pneumoconiosis repudiated Dr. Kanwal's 1987 opinion to the contrary, rendering it ineffective to trigger the running of the statute of limitations. *See Williams*, 453 F.3d at 616, 23 BLR at 2-365. Consequently we affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness. *See* 20 C.F.R. §725.308; *Dempsey*, 523 F.3d at 257, 24 BLR at 2-128; *Williams*, 453 F.3d at 616, 23 BLR at 2-365; *Kirk*, 264 F.3d at 602, 22 BLR at 2-228.

Turning to the merits of entitlement in this case, employer contends that the administrative law judge erred in weighing the conflicting medical evidence of record and in failing to follow the mandate of the Board on remand. Employer's Brief at 18-30. Employer asserts that the administrative law judge's analysis of the medical opinion evidence on the issues of total disability and disability causation relied on evidence not properly admitted into the record in the miner's claim, and ignored actual evidence concerning the exertional requirements of the miner's job. Employer also contends that the administrative law judge did not apply consistent treatment to the medical opinions of record in crediting the opinion of Dr. Perper,<sup>12</sup> that the miner's severe coal workers' pneumoconiosis was a major cause of his pulmonary disability, over the opinion of Dr. Fino,<sup>13</sup> that the miner's ventilatory impairment was due to diffuse interstitial pulmonary

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<sup>11</sup> We find no merit to employer's alternative argument, that the Department of Labor deprived employer of a valid defense, in violation of employer's due process rights, if it did not mail Dr. Kanwal's report to the miner. Reply Brief at 2-5.

<sup>12</sup> Dr. Perper diagnosed the miner with severe complicated coal workers' pneumoconiosis and severe interstitial type coal workers' pneumoconiosis, and opined that pneumoconiosis was a major cause of the miner's pulmonary disability and death. Claimant's Exhibit 4.

<sup>13</sup> Dr. Fino found no x-ray evidence of pneumoconiosis, but diagnosed coal workers' pneumoconiosis based on the autopsy report and the reports of Drs. Naeye and

fibrosis, and the opinion of Dr. Naeye,<sup>14</sup> who stated that pneumoconiosis had no effect on the miner's health. Employer's arguments have merit.

In finding that the miner was totally disabled by pneumoconiosis at Section 718.204(b), (c), the administrative law judge noted the Board's directive to consider only evidence admitted into the miner's claim, absent a finding of good cause, but again relied on the treatment records from Dr. Solomon, Government's Exhibit 8; the Wellmont Holston Valley Medical Center, Government's Exhibit 9; and the Indian Path Medical Center, Government's Exhibit 11, stating that they were designated as treatment records by claimant at the hearing. Decision and Order on Remand at 8. Noting that "when a person is in a hospital, it is reasonable that no work related activities can be performed," and that "when similar symptoms are noted and the patient has to be re-admitted for the same impairment, it is reasonable that work activities were precluded," the administrative law judge determined that "the records completely impeach any notion that the miner was not significantly impaired from a respiratory standpoint." *Id.* Accordingly, the administrative law judge credited Dr. Perper's opinion to support a finding of total disability, as the administrative law judge "accept[ed] from a reading of the entire report that Dr. Perper [found] that the miner could not perform any significant work activities." *Id.* The administrative law judge conflated the issues of total respiratory disability and disability causation, and discounted the opinions of Drs. Fino and Naeye, stating that he did not "accept" their description of the severity of the miner's pneumoconiosis as "mild," and that neither doctor considered the nature of the miner's past relevant work, which the administrative law judge determined was "not sedentary," based on the Department of Labor's Dictionary of Occupational Titles. *Id.* at 8-9.

As employer contends, the administrative law judge did not follow the Board's instructions, and referred to hospital and treatment reports that were admitted only into the record of the survivor's claim, and not the miner's claim. Hearing Transcript at 32;

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Perper. Employer's Exhibit 5 at 10-11, 28. Dr. Fino stated that the miner did not have any evidence of a ventilatory impairment in 1998, but was experiencing a significant ventilatory impairment in 2004 due to diffuse interstitial pulmonary fibrosis unrelated to the inhalation of coal dust. Employer's Exhibit 5 at 15, 28-29. Dr. Fino opined that, while the miner died as a consequence of a respiratory problem, it was not due to coal dust exposure or coal workers' pneumoconiosis. Employer's Exhibit 29-30.

<sup>14</sup> Dr. Naeye reviewed the autopsy slides and other physicians' reports, and diagnosed very mild simple coal workers' pneumoconiosis, mild centrilobular emphysema, acute lobular pneumonia, and "the near absence of chronic bronchitis." He further opined that pneumoconiosis had no effect on the miner's health and had no role in causing his death. Employer's Exhibit 1.



Telephone Conference at 4-5; 2007 Decision and Order at 2. Furthermore, while the administrative law judge correctly noted that neither Dr. Fino nor Dr. Naeye considered the physical demands of the miner's past work,<sup>15</sup> the administrative law judge failed to discuss the miner's own description of his job as requiring him to sit for eight hours per day, with no lifting or carrying. Director's Exhibits 1, 13. The administrative law judge erred in looking outside the record to find that the miner's work was not sedentary, without considering the miner's description of his work as a heavy equipment operator that was contained in the record. *See generally Ondeco v. Director, OWCP*, 14 BLR 1-2 (1989). Additionally, in crediting the opinion of Dr. Perper, the administrative law judge failed to discuss whether Dr. Perper's misdiagnosis of complicated pneumoconiosis affected his opinion that the miner's severe coal workers' pneumoconiosis was a substantial and primary cause of the miner's impairment and disability. Accordingly, in light of the administrative law judge's failure to follow the Board's instructions on remand, and his failure to provide a complete and adequate discussion of the relevant evidence, we vacate his findings pursuant to Section 718.204(b), (c), and remand the case for further consideration of the evidence thereunder.

With respect to the survivor's claim, the administrative law judge again found that the evidence established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c), after crediting Dr. Perper's opinion,<sup>16</sup> that pneumoconiosis was a major cause and hastening factor in the miner's death, over the contrary opinions of Drs. Fino<sup>17</sup> and Naeye,<sup>18</sup> that the miner's death was unrelated to pneumoconiosis. Decision

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<sup>15</sup> Dr. Fino stated that the miner worked twenty-four years in the mining industry hauling coal or driving a coal truck, but he did not discuss the exertional requirements of the miner's job. Employer's Exhibit 5 at 8, 16. Dr. Naeye noted that the miner worked in the coal mines, but indicated that the length of time, the location, and the miner's specific underground work assignments were not recorded in the records available to him. Employer's Exhibit 1.

<sup>16</sup> Dr. Perper opined that the miner's severe coal workers' pneumoconiosis was a major cause and hastening factor in his death, based on "occupational, smoking and clinical, radiological and laboratory documentation of severe pulmonary dysfunction, and clear and irrefutable pathological findings at autopsy of severe complicated pneumoconiosis." Dr. Perper also determined that the miner's coal workers' pneumoconiosis was causally associated with centrilobular emphysema. Claimant's Exhibit 4.

<sup>17</sup> Dr. Fino opined that, while the miner died as a consequence of a respiratory problem, his coal dust exposure played no role in his death. Employer's Exhibit 3 at 29-30.

and Order on Remand at 10-12. The administrative law judge credited Dr. Perper's opinion as being more consistent with the treatment records of Dr. Solomon, which showed that "the miner had a history of treatment for symptoms consistent with pneumoconiosis that [was] more than 'mild.'" *Id.* at 11. However, while Dr. Solomon's treatment records document the miner's shortness of breath, COPD, persistent hypoxia and pulmonary fibrosis, the physician did not attribute these conditions to coal dust exposure or diagnose pneumoconiosis. Moreover, the administrative law judge did not address whether Dr. Perper's reliance on the mistaken premise that the miner had complicated pneumoconiosis undermined his opinion regarding the severity of the miner's pneumoconiosis and the cause of his death. By contrast, the administrative law judge accorded less weight to the opinion of Dr. Naeye on the ground that he did not address whether the miner's emphysema was related to coal dust exposure and/or was a contributing cause of death, when Dr. Naeye diagnosed mild centrilobular emphysema, but attributed the miner's death to lobular pneumonia. *Id.*; Employer's Exhibit 1. The administrative law judge concluded that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death "because I accept that there was an interrelationship between the emphysema and the pneumoconiosis, and I further accept that Dr. Perper's explanation is the most rational of all those in the record." Decision and Order on Remand at 12. However, Dr. Perper did not indicate that the miner's emphysema was a contributing cause of death. In light of the administrative law judge's faulty analysis of the medical opinions of record, we vacate the administrative law judge's findings pursuant to Section 718.205(c), and remand the case for further consideration of the survivor's claim.

Reluctantly, and in view of the administrative law judge's response to the Board's prior remand instructions, we grant employer's request to remand this case for assignment to a different administrative law judge, who will take "a fresh look at the evidence" to determine whether claimant has met her burden of proof pursuant to the issues of total respiratory disability at Section 718.204(b), disability causation at Section 718.204(c), and the cause of the miner's death at Section 718.205(c). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998).

On remand, the administrative law judge must first render a specific finding as to the length of the miner's coal mine employment, as such a finding is relevant to the

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<sup>18</sup> Dr. Naeye opined that the miner did not experience very much chronic bronchitis in the months and years before he died, and overall, the centrilobular emphysema in his lungs was mild for a 79-year-old ex-miner who smoked cigarettes. He further determined that "a developing acute lobular pneumonia [was] visible in two pieces of lung tissue removed at autopsy" and that "this pneumonia was the likely direct cause of his death." Employer's Exhibit 1.

availability of the Section 411(c)(4) presumption.<sup>19</sup> If, on remand, the administrative law judge finds that the miner has established at least fifteen years of qualifying coal mine employment and total respiratory disability, the administrative law judge must then determine whether the medical evidence rebuts the Section 411(c)(4) presumption by showing that his total disability did not arise in whole, or in part, out of coal mine employment. 30 U.S.C. §921(c)(4). With respect to the survivor's claim, the Section 411(c)(4) presumption requires a determination of whether the miner was totally disabled due to a pulmonary or respiratory impairment, an issue that, prior to the recent amendments, was not relevant in a survivor's claim.<sup>20</sup> Furthermore, as noted by the Director and by employer in its Motion for Remand, because the parties' respective burdens of proof potentially change, the administrative law judge must determine whether due process requires the admission into the record of additional evidence by both parties. Any new evidence submitted, however, must comply with the evidentiary limitations, absent a showing of good cause. 20 C.F.R. §§725.414, 725.456(b)(1). Additionally, in view of the confusion regarding the hospitalization and treatment records that were not admitted into the existing record in the miner's claim, and the fact that all of the physicians reviewed these records in formulating their opinions, the administrative law judge has the discretion to admit these records into evidence and/or render further evidentiary rulings. See *Brasher v. Pleasant View Mining Co., Inc.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*).

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<sup>19</sup> In the current case, the miner alleged thirty years of coal mine employment, Hearing Transcript at 26; the district director found 15.66 years of coal mine employment, Director's Exhibit 25; and the administrative law judge found at least ten years of coal mine employment. Decision and Order on Remand at 1.

<sup>20</sup> The Director correctly notes that under Section 422(l) of the Act, 30 U.S.C. §932(l), as amended, a qualified survivor of a miner who filed a successful claim for benefits is automatically entitled to survivor's benefits without the burden of reestablishing entitlement, but only when the award of benefits in the miner's claim is final.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits on both claims is affirmed in part and vacated in part, and this case is remanded to the Office of Administrative Law Judges for reassignment and 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