

BRB Nos. 09-0610 BLA  
and 09-0611 BLA

STARLET TACKETT )  
(o/b/o and Widow of RONNIE TACKETT) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
H.J. MINING COMPANY, )  
INCORPORATED ) DATE ISSUED: 06/03/2010  
 )  
and )  
 )  
BITUMINOUS CASUALTY )  
CORPORATION, )  
OLD REPUBLIC INSURANCE COMPANY )  
 )  
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky.

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

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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 (04-BLA-5248, 08-BLA-5324) of Administrative Law Judge Janice K. Bullard awarding benefits on claims 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 involves a miner's subsequent claim filed on April 25, 2002, and a survivor's claim filed on August 3, 2006.<sup>1</sup>

The miner's claim is before the Board for the second time. In the initial decision, the administrative law judge credited the miner with approximately 4.3 years of coal mine employment,<sup>2</sup> and found that the new biopsy, autopsy, and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. 20 C.F.R. §725.309(d). Consequently, the administrative law judge considered the miner's claim on the merits. After finding that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), the administrative law judge found that the evidence established that the miner was totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the new biopsy and autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Tackett v. H.J. Mining Co.*, BRB No. 06-0873 BLA (July 31, 2007) (unpub.). The Board also affirmed the administrative law judge's findings that the clinical pneumoconiosis arose out of coal

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<sup>1</sup> The miner died on July 20, 2005, while his claim was pending before the administrative law judge. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

<sup>2</sup> The record reflects that the miner's most recent coal mine employment was in Kentucky. Director's Exhibits 7, 9, 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

mine employment pursuant to 20 C.F.R. §718.203(c), and that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). *Id.* However, the Board vacated the administrative law judge's finding that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration. *Id.*

On remand, the administrative law judge consolidated the miner's claim with claimant's survivor's claim, which was pending before her. In a Decision and Order dated May 5, 2009, the administrative law judge found that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits in the miner's claim. In regard to the survivor's claim, the administrative law judge credited the miner with 4.3 years of coal mine employment, and found that the biopsy, autopsy, and medical opinion evidence established the existence of clinical pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(c). The administrative law judge further found 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 the survivor's claim.

On appeal, employer contends that the administrative law judge erred in finding that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds in support of the award of benefits in both claims. In a reply brief, employer reiterates its contentions of error. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

### **Impact of the Recent Amendments**

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, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director have responded.

Employer and the Director correctly state that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the miner's claim because it was filed before January 1, 2005. Further, employer and the Director correctly state that, although the amendments apply to

the survivor's claim based on its filing date, the amendments do not affect the adjudication of the claim, because there is no evidence, and no allegation that, the miner had at least fifteen years of coal mine employment.<sup>3</sup>

The Director notes further that the amendments revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that an eligible survivor of a miner who was receiving 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). The Director states that, although the miner's claim has been "successful thus far," his award is challenged and has not become final. Director's Brief at 3 n.3. Consequently, the Director indicates that only if an award in the miner's claim becomes final will claimant be derivatively entitled to survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l). Based on the foregoing, we conclude that neither claim in this case is affected by the Section 1556 amendments at this time.

### **The Miner's Claim**

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Employer contends that the administrative law judge erred in finding that the

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<sup>3</sup> The Director, Office of Workers' Compensation Programs, notes that Section 1556 reinstated Section 411(c)(4) of the Act, which 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 and/or that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).<sup>4</sup>

### **The Administrative Law Judge's 2006 Decision and Order**

In her initial decision, the administrative law judge found that Dr. Forehand's opinion,<sup>5</sup> as corroborated by the opinions of two treating physicians, Drs. Mettu and Olano,<sup>6</sup> supported a finding that the miner's total disability was due to pneumoconiosis. The administrative law judge found that Dr. Ammisetty's opinion also supported a finding that the miner's total disability was due to pneumoconiosis.<sup>7</sup> The administrative

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<sup>4</sup> Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

<sup>5</sup> Dr. Forehand diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD). Claimant's Exhibit 7. After noting that the miner suffered from "a severe lung disease of mixed causes," Dr. Forehand opined that the effects of cigarette smoke and coal mine dust exposure "combine[d] to totally and permanently impair [the miner's] lung function and prevent him from returning to his last coal mining job." *Id.*

<sup>6</sup> Dr. Mettu opined that the miner suffered from a severe pulmonary impairment due to "smoking and working in coal mines." Director's Exhibit 1. Dr. Olano opined that the miner's totally disabling pulmonary impairment was due to clinical pneumoconiosis. Claimant's Exhibit 8.

<sup>7</sup> Dr. Ammisetty diagnosed "COPD/emphysema," chronic bronchitis, and anthracosis, each of which he attributed to smoking and coal dust exposure. Director's Exhibit 15. Although Dr. Ammisetty noted that it was difficult to assess the cause of the miner's total disability, he opined that both smoking and coal dust exposure contributed. *Id.*

law judge next considered the opinions of Drs. Repsher and Rosenberg, attributing the miner's total disability to chronic obstructive pulmonary disease (COPD) due solely to smoking. Employer's Exhibits 1, 3-5. The administrative law judge accorded less weight to Dr. Repsher's disability causation opinion because the doctor did not diagnose pneumoconiosis. The administrative law judge further found that Dr. Forehand's opinion, that the miner's total disability was due to pneumoconiosis, was better reasoned than Dr. Rosenberg's contrary opinion. The administrative law judge, therefore, found that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

### **The Board's 2007 Decision and Order**

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), holding that:

[T]he administrative law judge erred in according greater weight to the opinion of Dr. Forehand on the ground that Dr. Forehand concluded that smoking was not the sole cause of disability because the miner did not have evidence of heart disease and diabetes. The autopsy report and the record do show evidence of heart disease and diabetes. Accordingly, the administrative law judge erred in crediting Dr. Forehand's opinion, in part, for the reasons given and we must vacate the administrative law judge's finding that the miner's pneumoconiosis significantly contributed to his total disability and remand the case for further consideration of Dr. Forehand's opinion along with the other opinions. On remand, the administrative law judge must explain how Dr. Forehand's opinion is better documented and reasoned than the opinion of Dr. Rosenberg, who acknowledged the presence of minimal coal workers' pneumoconiosis but, on review of the record, found that the miner's total disability was due solely to smoking. The administrative law judge must also explain how findings of pneumoconiosis on autopsy and biopsy support Dr. Ammisetty's opinion that pneumoconiosis was a cause of disability.

*Tackett*, slip op. at 9. The Board further instructed the administrative law judge that on remand she could not "mechanically rely" on the opinions of Drs. Mettu and Olano because they were treating physicians, but was to explain why she found their opinions "persuasive." *Id.* at 9-10.

### **The Administrative Law Judge's 2009 Decision and Order**

On remand, the administrative law judge again found that Dr. Forehand's opinion, as supported by the opinions of Drs. Ammisetty, Mettu, and Olano, outweighed the

contrary opinions of Drs. Repsher and Rosenberg. The administrative law judge, therefore, found that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

## Discussion

Employer initially contends that the administrative law judge erred in her consideration of Dr. Forehand's opinion. Specifically, employer argues that the administrative law judge erred in determining that evidence of heart disease and diabetes did not undercut Dr. Forehand's opinion that smoking alone would not have caused the severe impairment suffered by the miner. We disagree.

As the Board noted previously, Dr. Forehand based his opinion, that smoking was not the sole cause of the miner's pulmonary disability, in part on the absence of any evidence of heart disease or diabetes. Claimant's Exhibit 7. Dr. Forehand reasoned that, if smoking had been the sole cause of the miner's pulmonary impairment, the miner would have suffered from these other conditions as well.<sup>8</sup> *Id.* Because the autopsy report

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<sup>8</sup> In addressing the cause of the miner's totally disabling respiratory impairment, Dr. Forehand stated:

Cigarette smoking causes a loss of about 80 cc's of lung capacity for each year of cigarette smoking. Cigarette smoking would leave [the miner's] FEV 1 at 1.21 liters. But his FEV1 is less than half that value (0.56 liters). If [the miner] had smoked enough to impair lung function to this degree, I would have seen other effects of cigarettes such as peripheral vascular disease, coronary artery disease and diabetes mellitus, which I did not.

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I have explained why I think [the miner] has a severe lung disease of mixed causes. If [the miner] had not been exposed to coal mine dust he would not be as impaired. If cigarettes were the sole cause of [the miner's] respiratory impairment (FEV1 of 17% of predicted) then [the miner] would be a sicker man with many more health problems. The effects of cigarette smoke (emphysema on lung biopsy) and exposure to coal mine dust (fibrosis and anthracosis on lung biopsy; cor pulmonale on EKG) combine to totally and permanently impair [the miner's] lung function . . . .

Claimant's Exhibit 7.

and the record demonstrated evidence of heart disease and diabetes, the Board remanded the case for further consideration of Dr. Forehand's opinion.

On remand, the administrative law judge reconsidered Dr. Forehand's opinion and concluded that the autopsy evidence of heart disease, and the evidence of diabetes in the record, did not undermine Dr. Forehand's disability causation opinion. Specifically, the administrative law judge noted that, although the autopsy prosector found evidence of atherosclerosis on autopsy, there was no evidence that the miner was diagnosed with coronary artery disease during his lifetime.<sup>9</sup> Similarly, the administrative law judge noted that the record reflects that the miner developed diabetes "very late in his life, after the failure of his lung transplant." Decision and Order at 20.<sup>10</sup> The administrative law judge further found that, while the autopsy prosector diagnosed diabetes, the miner's treatment records "do not reflect the presence of or treatment for diabetes." *Id.* The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We conclude that substantial evidence supports the administrative law judge's permissible credibility determination that the evidence of heart disease and diabetes did not necessarily undermine Dr. Forehand's opinion. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 508, 22 BLR 2-625, 2-638 (6th Cir. 2003).

Employer argues further that the administrative law judge erred in according greater weight to Dr. Forehand's opinion based upon his status as the miner's treating physician. Employer's argument has merit. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Williams*, 338 F.3d at 513, 22 BLR at 2-647 (holding that the "case law and applicable regulatory scheme clearly provide that the [administrative law judge] must evaluate treating physicians just as they consider other experts."). The administrative law judge failed to explain how Dr. Forehand's status as the miner's treating physician provided him with an advantage over the other physicians in assessing the cause of the miner's pulmonary disability. Consequently, before according additional weight to Dr. Forehand's opinion based upon his status as the miner's treating physician, the administrative law judge, on remand, should initially address whether Dr. Forehand's opinion is sufficiently reasoned, and then should weigh Dr. Forehand's opinion consistent with 20 C.F.R. §718.104(d) and

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<sup>9</sup> The administrative law judge noted that the only cardiac condition that the miner was diagnosed with during his life was cor pulmonale, a cardiac condition associated with pulmonary impairments.

<sup>10</sup> Unless otherwise noted, all references to "Decision and Order" refer to the administrative law judge's May 5, 2009 Decision and Order.



*Williams. See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We also agree with employer that the administrative law judge erred in finding that Dr. Forehand's opinion was entitled to additional weight because it is supported by the opinions of the miner's other treating physicians, namely, Drs. Ammisetty, Mettu, and Olano. Because Dr. Mettu did not diagnose clinical pneumoconiosis, his opinion cannot support Dr. Forehand's opinion that the miner's total disability was due to clinical pneumoconiosis. Director's Exhibit 1. The administrative law judge also found that, because Dr. Ammisetty could not assess the extent to which smoking and coal dust exposure affected the miner's disability, the doctor's opinion was not sufficient to establish that the miner's pneumoconiosis was a "substantially contributing cause" of his totally disabling pulmonary impairment. Decision and Order at 19; Director's Exhibit 15. The administrative law judge accorded less weight to Dr. Olano's opinion because the physician "did not address the effect of the [m]iner's significant smoking history on his pulmonary condition." Decision and Order at 21; Director's Exhibit 18; Claimant's Exhibit 8. Given the deficiencies that the administrative law judge found in the opinions of Drs. Ammisetty, Mettu, and Olano, she erred in failing to explain how they supported Dr. Forehand's disability causation opinion. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The administrative law judge also found that Dr. Forehand's opinion was supported by a physician's diagnosis of coal workers' pneumoconiosis rendered during the time that the miner was being evaluated for a lung transplant. Decision and Order at 20. The administrative law judge failed to explain how this diagnosis supported Dr. Forehand's opinion regarding the cause of the miner's pulmonary disability. Decision and Order at 20. The mere existence of clinical pneumoconiosis does not support a finding that a miner's pulmonary disability is due to the disease.<sup>11</sup> See 20 C.F.R. §718.204(c)(1), (2).

Employer also contends that the administrative law judge, in finding that the miner's total disability was due to clinical pneumoconiosis, selectively analyzed the medical opinion evidence, improperly substituted her own opinion for that of Dr. Rosenberg, and failed to subject Dr. Forehand's opinion to the same scrutiny as Dr. Rosenberg. We agree. The administrative law judge failed to follow the Board's directive to explain her basis for finding that Dr. Forehand's disability causation opinion

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<sup>11</sup> The administrative law judge similarly failed to explain why Dr. Rosenberg's opinion, that the miner's minimal coal workers' pneumoconiosis did not cause his total disability, was called into question by pathological evidence of coal workers' pneumoconiosis. Decision and Order at 21.

is better documented and reasoned than that of Dr. Rosenberg, who acknowledged the presence of minimal coal workers' pneumoconiosis but, on review of the record, found that the miner's total disability was due solely to smoking. While Dr. Forehand opined that the miner's FEV1 values would have been greater if the miner had not suffered from clinical pneumoconiosis, Dr. Rosenberg explained that the pattern of the miner's pulmonary impairment was consistent with an impairment caused exclusively by smoking. Dr. Rosenberg explained that:

[The miner] obviously developed severe airflow obstruction, characterized by a markedly reduced FEV1 in relationship to FVC, such that his FEV1% was severely reduced. This characteristic pattern of obstruction is not related to past coal dust exposure . . . . In addition, he had a bronchodilator response with marked air trapping and a low diffusing capacity, all of which are characteristic of smoking-related COPD and not that of obstructive lung disease related to past coal dust exposure. This is totally consistent with the pathological findings of panlobular emphysema. . . . [T]his type of emphysema is not related to past coal dust exposure.

Employer's Exhibit 1. Dr. Rosenberg also opined that the miner's "very minimal degree of [coal workers' pneumoconiosis]" would not have caused "any significant ventilatory impairment." *Id.*

While the administrative law judge accepted, without discussion, Dr. Forehand's assessment of the significance of the miner's FEV1 values, the administrative law judge questioned Dr. Rosenberg's assessment of the significance of the pattern of the miner's pulmonary impairment. See *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999) (*en banc*). The administrative law judge questioned Dr. Rosenberg's opinion, finding that "the fact that [the miner] experienced improvement with bronchodilator [did] not demonstrate that part of the underlying impairment was not due to coal mine induced pneumoconiosis." Decision and Order at 21. By focusing on only one factor relied upon by Dr. Rosenberg to support his disability causation opinion, *i.e.*, the miner's response to bronchodilators, the administrative law judge engaged in an impermissible selective analysis. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). The administrative law judge also improperly substituted her own opinion for that of a medical professional in assessing the significance of the miner's response to bronchodilators. See *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law. *Wojtowicz*,

12 BLR at 1-165. In this case, the administrative law judge did not explain why the reasoning provided by Dr. Forehand for attributing the miner's total disability to his clinical pneumoconiosis was superior to Dr. Rosenberg's reasoning in support of his opinion that the miner's total disability was due to smoking, and not to his minimal degree of coal workers' pneumoconiosis.<sup>12</sup>

In light of the above-referenced errors, we must vacate the administrative law judge's finding that the miner's total disability was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remand the case for further consideration. On remand, when considering whether the medical evidence establishes that the miner's total disability was due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions.<sup>13</sup> *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Finally, in regard to her consideration of the miner's claim, we note that the administrative law judge has not addressed whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>14</sup>

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<sup>12</sup> The administrative law judge also did not address the significance of Dr. Rosenberg's observation that the "statement that Dr. Forehand makes that, [the miner's] COPD could only be smoking-related if he had associated peripheral vascular disease, coronary artery disease and diabetes, has no scientific foundation." Employer's Exhibit 1; *see also* Employer's Exhibit 3 at 27-28.

<sup>13</sup> In remanding this case, however, we reject employer's argument that the administrative law judge is required to discount Dr. Forehand's conclusions because he did not render a "differential diagnosis." *See Stover v. Peabody Coal Co.*, BLR , BRB No. 08-0549 BLA (Jan. 27, 2010) (*en banc*); Employer's Brief at 20; Employer's Reply Brief at 2.

<sup>14</sup> A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses." 20 C.F.R. §718.201(a)(1). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id.* "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Ordinarily, an administrative law judge's finding that the existence of clinical pneumoconiosis was established by biopsy and autopsy evidence at Section 718.202(a)(2) would obviate the need for her to render a separate finding regarding whether the medical opinion evidence establishes the existence of legal pneumoconiosis at Section 718.202(a)(4). *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, there is evidence supportive of a finding of legal pneumoconiosis, in the form of COPD due in part to coal mine dust exposure. Moreover, there is evidence supportive of a finding that the miner's total disability was due to COPD. Consequently, on remand, should the administrative law judge find that the evidence does not establish that the miner's total disability was due to clinical pneumoconiosis, she must address whether the medical opinion evidence establishes the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, if so, whether the evidence establishes that the miner's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).<sup>15</sup>

### **The Survivor's Claim**

Employer argues that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>16</sup>

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<sup>15</sup> Contrary to the administrative law judge's analysis, evidence of clinical pneumoconiosis does not entitle claimant to a presumption that Dr. Mettu's diagnosis of chronic bronchitis constitutes legal pneumoconiosis. Decision and Order at 20-21. The Sixth Circuit's recognition that "an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis as well," *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005), does not support the administrative law judge's assumption that, since the miner's biopsy and autopsy evidence establish clinical pneumoconiosis, all of the miner's other respiratory diseases were necessarily attributable to coal dust exposure, and, therefore, constituted legal pneumoconiosis. Decision and Order at 21. Clinical pneumoconiosis is only a small subset of compensable afflictions that fall within the definition of legal pneumoconiosis. *Martin*, 400 F.3d at 306, 23 BLR at 2-285. To establish that other diseases, such as COPD or bronchitis, constitute legal pneumoconiosis, claimant must affirmatively establish, through medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), that those chronic lung diseases arose out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509, 22 BLR 2-625, 2-640 (6th Cir. 2003); *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

<sup>16</sup> Because employer does not challenge the administrative law judge's findings in this survivor's claim of 4.3 years of coal mine employment, that the biopsy, autopsy, and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), and that the miner's clinical pneumoconiosis arose out

To establish entitlement to survivor's benefits, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).<sup>17</sup> See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Where pneumoconiosis is not the cause of death, a miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

### **Summary of the Relevant Evidence**

Dr. Camp completed the miner's death certificate. Dr. Camp attributed the miner's death to a pulmonary embolism due to a left lung transplant due to COPD. Director's Exhibit (S) 14. Dr. Camp listed "history of coal miner's dust exposure" as a significant condition contributing to death. *Id.*

Dr. Warner performed the miner's autopsy, and diagnosed, *inter alia*, coal

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of coal mine employment pursuant to 20 C.F.R. §718.203(c), those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>17</sup> Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.
- (4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
- (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

workers' pneumoconiosis, bronchopneumonia, and emphysema. Director's Exhibit (S) 16. Dr. Warner addressed the cause of death, stating:

[The miner's] death is attributable to emphysema and the development of end stage lung disease. His lung disease developed with the contributing factors of tobacco use and coal mining exposure. [The miner's] pulmonary condition necessitated a lung transplant; the immunocompromised state required to prevent transplant rejection placed him at a higher risk of infection.

Director's Exhibit (S) 16.

Dr. Forehand completed a questionnaire on November 29, 2005. Dr. Forehand diagnosed clinical pneumoconiosis and legal pneumoconiosis, in the form of COPD caused by coal dust exposure and cigarette smoking. Director's Exhibit (S) 19. Dr. Forehand opined that "[c]oal workers' pneumoconiosis hastened [the miner's] death by leaving him with so little respiratory reserve that he did not have the capacity to fight infection or respond adequately to treatment." *Id.*

Dr. Forehand subsequently prepared an October 30, 2007 report, wherein he also addressed the cause of the miner's death:

[The miner] . . . died on July 20, 2005 from complications of lung transplantation for treatment of chronic obstructive pulmonary disease stemming from a combination of inhaling coal mine dust including toxic silica for more than 4 years and from smoking cigarettes for 26 years before stopping in about 1993.

Claimant's Exhibit (S) 2K. Dr. Forehand opined that coal mine dust and smoking were "significant factors contributing to [the miner's] end stage lung disease and death." *Id.*

By contrast, Drs. Rosenberg and Oesterling opined that the miner's death was due solely to complications from his smoking-related COPD. Employer's Exhibits 4-7. Drs. Rosenberg and Oesterling opined that the miner's death was unrelated to his clinical pneumoconiosis or his coal dust exposure. *Id.*

### **The Administrative Law Judge's Findings**

Although the administrative law judge found that the opinions of Drs. Oesterling and Rosenberg regarding the cause of the miner's death are "generally well-reasoned and well-documented," she accorded greater weight to Dr. Forehand's opinion, noting that it was "well supported by the record." Decision and Order at 27. The administrative law

judge also accorded greater weight to Dr. Forehand's opinion based upon his status as the miner's treating physician. *Id.* The administrative law judge, therefore, found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

## **Discussion**

Employer argues that the administrative law judge's analysis regarding whether the miner's death was due to pneumoconiosis is flawed by her failure to address whether the miner's COPD constituted legal pneumoconiosis. We agree. Although the administrative law judge found that the evidence established clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), she did not specifically address whether and how clinical pneumoconiosis hastened the miner's death. *See Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303, --- BLR --- (6th Cir. 2010); *Williams*, 338 F.3d at 518, 22 BLR at 2-655. Rather, she weighed the reports as if the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), in the form of COPD attributable to coal dust exposure.

Dr. Forehand is the only physician of record to relate the miner's death to his clinical pneumoconiosis, opining that "[c]oal workers' pneumoconiosis hastened [the miner's] death by leaving him with so little respiratory reserve that he did not have the capacity to fight infection or respond adequately to treatment." Director's Exhibit (S) 19. The administrative law judge, however, did not address this part of Dr. Forehand's opinion in making her finding.

Dr. Forehand also opined that the miner died from complications of lung transplantation for treatment of COPD due to coal dust exposure and cigarette smoking. Claimant's Exhibit (S) 2K. The other physicians of record, Drs. Camp, Warner, Rosenberg, and Oesterling, agree with Dr. Forehand that the miner's death was due, in part, to his COPD, but express varying opinions regarding the cause of the miner's COPD. Thus, the issues before the administrative law judge are (1) whether clinical pneumoconiosis hastened the miner's death; (2) whether the miner's COPD constituted legal pneumoconiosis; and (3) whether it hastened the miner's death.

Because the administrative law judge did not make specific, reviewable findings on these issues, we must vacate the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). 5 U.S.C. §557(c)(3)(A). On remand, the administrative law judge must address whether the evidence establishes that the miner's death was hastened by clinical pneumoconiosis. *Conley*, 595 F.3d at 303; *Williams*, 338 F.3d at 518, 22 BLR at 2-655. If the administrative law judge finds that the evidence does not establish that the miner's death was due to clinical pneumoconiosis, she should consider whether the medical

evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Should the administrative law judge find that the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), *see Williams*, 338 F.3d at 509, 22 BLR at 2-640, she should address whether the evidence establishes that the miner's death was due to, or hastened by, legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge