

BRB Nos. 11-0734 BLA
and 12-0107 BLA

CECILIA R. SMITH)
(Widow of and on behalf of HARLAN O.)
SMITH))
)
Claimant-Respondent)
)
v.)
)
PEABODY COAL COMPANY) DATE ISSUED: 11/30/2012
)
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 Denying the Employer's Request for Modification on Remand and the Decision and Order Awarding Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Denying the Employer's Request for Modification on Remand (2005-BLA-84) and the Decision and Order Awarding Benefits

on Remand (2005-BLA-6240) of Administrative Law Judge Alice M. Craft, rendered on a consolidated miner's claim and survivor's claim, filed pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for a second time. The relevant procedural history is as follows.¹ The miner filed a claim on May 2, 1991. Director's Exhibit 1. On August 7, 1998, Administrative Law Judge Clement J. Kichuck awarded benefits, and the award was affirmed by the Board on appeal. *Smith v. Peabody Coal Co.*, BRB No. 98-1593 BLA (Dec. 14, 1999) (unpub.).

Following the death of the miner, claimant filed a survivor's claim on August 16, 2002.² Director's Exhibit 139. Employer also filed a timely request for modification of the award of benefits issued to the miner. Director's Exhibit 116. The district director awarded survivor's benefits on October 8, 2003, and denied employer's request for modification in the miner's claim on July 25, 2005. Director's Exhibits 137, 167. Employer requested a hearing, and the claims were consolidated for adjudication by Judge Craft (the administrative law judge). Director's Exhibits 174-178.

In a Decision and Order Denying Modification dated July 25, 2008, the administrative law judge found that there was a mistake in a determination of fact as to whether the miner had clinical pneumoconiosis.³ However, the administrative law judge denied employer's modification request, pursuant to 20 C.F.R. §725.310, because she found that the evidence was sufficient to establish the existence of legal pneumoconiosis⁴

¹ A complete procedural history of the case is set forth in *C.S. [Smith] v. Peabody Coal Co.*, BRB Nos. 08-0765 BLA & 08-0795 BLA, slip op. at 2-4 (Aug. 21, 2009) (unpub.).

² Claimant is the widow of the miner, Harlan O. Smith, who died on July 25, 2002. Director's Exhibit 150.

³ "Clinical pneumoconiosis" consists of 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. §718.201(a)(1).

⁴ "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). This

at 20 C.F.R. §718.202(a)(4), and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge also issued a separate Decision and Order Awarding Benefits in the survivor's claim on July 25, 2008. The administrative law judge determined therein that claimant established that the miner suffered from legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that the miner's death was due to legal pneumoconiosis at 20 C.F.R. §718.205(c).

Employer appealed both decisions to the Board and the appeals were consolidated. With respect to the miner's claim, the Board rejected employer's argument that the administrative law judge erred in giving Dr. Fino's opinion little weight on the issue of the existence of legal pneumoconiosis, as Dr. Fino expressed views that were inconsistent with the discussion of the prevailing medical science in the preamble to the revised regulations adopted by the Department of Labor (DOL). *C.S. [Smith] v. Peabody Coal Co.*, BRB Nos. 08-0765 BLA & 08-0795 BLA, slip op. at 9 (Aug. 21, 2009) (unpub.). The Board also rejected employer's argument that the administrative law judge erred in finding Dr. Baker's opinion to be supportive of a finding that the miner suffered from legal pneumoconiosis. *Id.* at 8-9. The Board, however, agreed with employer that the administrative law judge did not properly weigh the opinions of Drs. Traughber, Taylor and Rosenberg, and vacated her finding at 20 C.F.R. §718.202(a)(4). *Id.* at 6-11. Based on the administrative law judge's errors at 20 C.F.R. §718.202(a)(4), the Board also vacated the administrative law judge's finding that the miner was totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 11.

With respect to the survivor's claim, the Board rejected employer's argument that the administrative law judge abused her discretion in excluding the medical report of Dr. Weiss pursuant to 20 C.F.R. §725.414. *Smith*, BRB Nos. 08-0765 BLA & 08-0795 BLA, slip op. at 13. However, because the administrative law judge committed the same errors in weighing the medical opinions of Drs. Traughber, Taylor and Rosenberg, as she did in the miner's claim, the Board vacated the administrative law judge's finding that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.205(c), and vacated the award of survivor's benefits. *Id.* at 12. Accordingly, the claims were remanded for further consideration.

In a Decision and Order Denying the Employer's Request for Modification on Remand, dated July 13, 2011, the administrative law judge determined that the opinions of Drs. Taylor, Baker and Traughber were sufficient to establish that the miner was totally disabled due to legal pneumoconiosis. Therefore, the administrative law judge

definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

concluded that there was no mistake in a determination of fact as to whether the miner was entitled to benefits and denied employer's request for modification pursuant to 20 C.F.R. §725.310.

In a separate Decision and Order Awarding Benefits on Remand, also dated July 13, 2011, the administrative law judge addressed the survivor's claim and found that claimant satisfied the eligibility criteria for automatic entitlement to survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).⁵ Additionally, the administrative law judge found that claimant established the existence of legal pneumoconiosis and that the miner's death was death was due to legal pneumoconiosis. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge improperly shifted the burden to employer to prove that the miner did not have legal pneumoconiosis. Employer challenges the weight that the administrative law judge accorded to the medical opinion evidence, relevant to the existence of legal pneumoconiosis, in both the miner's claim and the survivor's claim. In addition, employer asserts that the administrative law judge erred in finding that claimant was entitled to survivor's benefits under amended Section 932(l), as claimant filed her survivor's claim before January 1, 2005. Employer further contends that the administrative law judge erred in finding that the miner's death was due to legal pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response addressing the timeliness of employer's appeal in the miner's claim.⁶

⁵ On March 23, 2010, amendments to the Act, included in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, were enacted that changed the entitlement criteria for certain claims filed after January 1, 2005 that were pending on or after March 23, 2010. In pertinent part, the amendments revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing 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.

⁶ Employer filed two appeals with regard to the denial of its modification request on remand. The Board dismissed, as premature, employer's first appeal, filed on September 28, 2001 and docketed as BRB No. 11-0734 BLA, because it preceded the date upon which the administrative law judge's remand decision was electronically filed with the district director on November 4, 2011. *Smith v. Peabody Coal Co.*, BRB No. 11-0734 BLA (Feb. 6, 2012) (unpub. Order). The Board acknowledged employer's second appeal, dated November 10, 2011, as timely filed and it was assigned BRB No. 12-0101 BLA. *Id.* The Director, Office of Workers' Compensation Programs (the Director), argues that employer's first appeal, BRB No. 11-0734 BLA, was not premature and that the second appeal was redundant. However, because the Director does not allege that

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.⁷ 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

Employer may request modification, based on a change in conditions since the issuance of an award of benefits, or based on a mistake in a determination of fact underlying the award. 20 C.F.R. §725.310(a); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The burden of proof rests with employer and a miner does not have the burden to reestablish his entitlement to benefits. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). Moreover, employer, as the proponent of an order terminating an award of benefits, bears the specific burden of disproving at least one element of entitlement. *Id.*; *see also Branham v. BethEnergy Mines*, 20 BLR 1-27 (1996).

In this case, although the administrative law judge found a mistake in a determination of fact with regard to whether the miner had clinical pneumoconiosis, she also considered whether the evidence was sufficient to establish that the miner had legal pneumoconiosis. Employer challenges the administrative law judge's weighing of the evidence on the issue of the existence of legal pneumoconiosis and asserts that she erred in referencing the preamble to the regulations, mischaracterized the opinions of Drs. Rosenberg and Fino, and abused her discretion in relying on the opinions of Drs. Taylor, Baker, and Traugher, to find that the miner had legal pneumoconiosis and was totally disabled by that disease.

Contrary to employer's arguments, the administrative law judge had discretion to consult the preamble to the regulations as an authoritative statement of medical principles accepted by the DOL when it revised the definition of pneumoconiosis to include

employer failed to timely appeal the administrative law judge's Decision and Order Denying the Employer's Request for Modification on Remand, it is not necessary to specifically address the Director's argument that employer's first appeal was not premature. Thus, we will consider the merits of employer's appeal of the award of benefits in the miner's claim under BRB No. 12-0107 BLA.

⁷ Because the miner's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

obstructive respiratory or pulmonary impairments arising out of coal mine employment. *See A & E Coal Co. v. Adams*, F.3d , No. 11-3926, 2012 WL 3932113 at *3-4 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, F.3d , No. 11-3500, 2012 WL 3194224 at *7-8 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, BLR (4th Cir. May 15, 2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). In addition, there is no merit to employer's assertion that it did not receive proper notice of the administrative law judge's intent to rely on the preamble, as the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams*, 2012 WL 3932113 at *3-4; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990).

Regarding the administrative law judge's consideration of Dr. Rosenberg's opinion, we reject employer's argument that the administrative law judge mischaracterized the physician's rationale for excluding coal dust exposure as a causative factor for the miner's disabling chronic obstructive pulmonary disease (COPD). The administrative law judge noted correctly that Dr. Rosenberg opined that the miner did not have legal pneumoconiosis based, in part, on his belief that coal mine dust exposure does not cause a clinically significant obstructive respiratory condition, "absent progressive massive fibrosis." Decision and Order Denying the Employer's Request for Modification on Remand at 22; Director's Exhibit 134; Employer's Exhibit 1. The administrative law judge rationally found that Dr. Rosenberg's opinion is at odds with the position of the DOL "that coal [mine] dust causes clinically significant obstructive disease in the absence of clinical pneumoconiosis[.]" Decision and Order Denying the Employer's Request for Modification on Remand at 22; *see* 65 Fed. Reg. 79,938, 79,940, 79,943 (Dec. 20, 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Furthermore, the administrative law judge noted correctly that Dr. Rosenberg also based his opinion on his belief that COPD/emphysema due to coal dust exposure could be distinguished from emphysema due to smoking. Decision and Order Denying Employer's Request for Modification on Remand at 22; Director's Exhibit 134. The administrative law judge permissibly rejected Dr. Rosenberg's rationale because she considered it to be contrary to the position of the DOL that "coal [mine] dust and cigarette smoke[-]induced emphysema occur through similar mechanisms." Decision and Order Denying the Employer's Request for Modification on Remand at 22; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Crisp*, 866 F.2d at 185; 12 BLR at 2-129; *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002),

cert. denied, 537 U.S. 1147 (2003); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because the administrative law judge reasonably found that Dr. Rosenberg did not provide a valid explanation for why the miner's respiratory condition could not be due to coal dust exposure, we affirm her decision to accord Dr. Rosenberg's opinion little weight at 20 C.F.R. §718.202(a)(4).

With respect to Dr. Fino's opinion, employer resurrects its challenge to the administrative law judge's finding that Dr. Fino rejected the premises behind the regulations when he excluded the miner's thirty-three years of coal mine employment as a contributing factor to his COPD. Because employer has not established that the Board's rejection of employer's argument was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination that the administrative law judge acted within her discretion in according little weight to Dr. Fino's opinion that the miner did not have legal pneumoconiosis.⁸ *Smith*, BRB Nos. 08-0765 BLA & 08-0795 BLA, slip op. at 9; see *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

Regarding claimant's evidence, we affirm the administrative law judge's reliance on Dr. Baker's opinion to find that the miner had legal pneumoconiosis. Contrary to employer's argument, the administrative law judge permissibly determined that Dr. Baker offered a reasoned and documented opinion, as he "took relevant histories, conducted a physical examination, and performed objective tests. . . . [Dr. Baker] also said that coal dust and cigarette smoking contributed to the [m]iner's obstructive disease. . . . [Dr. Baker's] opinion is otherwise supported by the evidence available to him, and it is consistent with the premises underlying the regulations." 2008 Decision and Order Denying Employer's Request for Modification at 43; Decision and Order Denying the Employer's Request for Modification on Remand at 23; see *Adams*, 2012 WL 3932113 at *3-4; *Banks*, 2012 WL 3194224 at *7-8; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. With respect to Dr. Taylor's diagnosis of legal pneumoconiosis, the Board instructed the administrative law judge on remand to "address whether Dr. Taylor's opinion is sufficiently reasoned" before according it additional weight based on his status as the

⁸ The record also includes Dr. Anderson's opinion that the miner's disabling respiratory condition was due solely to smoking. Director's Exhibit 29. The administrative law judge assigned diminished weight to Dr. Anderson's opinion because she found that it was inadequately explained. Decision and Order Denying the Employer's Request for Modification on Remand at 22. We affirm the administrative law judge's finding with regard to Dr. Anderson, as it is unchallenged by employer on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

miner's treating physician.⁹ *Smith*, BRB Nos. 08-0765 BLA & 08-0795 BLA, slip op. at 7-8. Contrary to employer's argument, the administrative law judge followed the Board's instruction and permissibly found that Dr. Taylor's opinion is well-reasoned and documented because the physician is "experienced in pulmonary medicine," is "extensively familiar with the [m]iner's condition" and because his opinion "is consistent with the [m]iner's occupational, smoking, and medical histories, objective testing and the premises underlying the current regulations."¹⁰ Decision and Order Denying the Employer's Request for Modification on Remand at 23; *see Adams*, 2012 WL 3932113 at *3-4; *Banks*, 2012 WL 3194224 at *7-8; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

We also reject employer's argument that the administrative law judge erred in finding that Dr. Traughber's opinion was supportive of a finding of legal pneumoconiosis. The Board previously held that the administrative law judge erred in finding that Dr. Traughber attributed the miner's emphysema to coal dust exposure, when the doctor explicitly stated that the miner's emphysema was not caused by his occupational exposure to coal dust. *Smith*, BRB Nos. 08-0765 BLA & 08-0795 BLA, slip op. at 6-7. On remand, the administrative law judge observed that, while Dr. Traughber indicated that coal dust exposure did not directly cause the miner's emphysema, he testified that coal dust exposure aggravated the miner's symptoms from emphysema and that it was an "additive" factor in the miner's respiratory condition, based on scarring of the lungs, which interferes with oxygen transfer. Director's Exhibit 33 at 30-32; *see* Decision and Order Denying the Employer's Request for Modification on Remand at 24-27. The administrative law judge reasonably concluded that, because Dr. Traughber opined that coal dust exposure made the miner's emphysema and chronic bronchitis worse, his opinion is supportive of a finding of legal pneumoconiosis. *See*

⁹ Dr. Taylor was the miner's treating physician from 1995 until the miner's death in 2002. Director's Exhibits 26, 152-154, 157. He diagnosed lung cancer and chronic obstructive pulmonary disease (COPD), with components of emphysema, asthma and bronchitis. *Id.* Dr. Taylor stated, "exposure to coal mine dust for twenty-five years contributed to [the miner's COPD], but I do not believe the exposure to coal mine dust contributed significantly to his lung cancer." Director's Exhibit 157.

¹⁰ Contrary to employer's argument, the administrative law judge did not credit Dr. Taylor's opinion based only on his status as the miner's treating physician, but rather cited Dr. Taylor's history of treating the miner as one factor, along with other factors, in finding Dr. Taylor's opinion to be reasoned and documented. Decision and Order Denying the Employer's Request for Modification on Remand at 23.

Cornett, 227 F.3d at 576-77, 22 BLR at 2-121-122. Furthermore, based upon the administrative law judge's rational finding that Dr. Traugher's opinion was "supported by the evidence available to him" and "consistent with the regulations," we affirm the administrative law judge's decision to credit Dr. Traugher's opinion. Decision and Order Denying the Employer's Request for Modification at 27; *see Adams*, 2012 WL 3932113 at *3-4; *Banks*, 2012 WL 3194224 at *7-8; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

We consider employer's arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge has properly explained, in accordance with the Administrative Procedure Act¹¹ (APA), the weight she accorded the conflicting medical opinions, we affirm her finding that the claimant established the existence of legal pneumoconiosis.

Regarding the issue of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that the opinions of Drs. Rosenberg and Fino are entitled to little weight, relevant to the cause of the miner's total disability, as neither physician diagnosed pneumoconiosis, contrary to the administrative law judge's findings. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order Denying the Employer's Request for Modification on Remand at 27. We also affirm the administrative law judge's findings that the opinions of Drs. Baker and Traugher, on the issue of the cause of the miner's disabling COPD, are well-reasoned and documented, for the reasons set forth *supra*, and that the weight of the evidence is sufficient to establish total disability due to pneumoconiosis. Decision and Order Denying the Employer's Request for Modification on Remand at 27. Thus, we affirm the administrative law judge's finding that the miner was entitled to benefits and that employer failed to establish a basis for modifying the award of benefits pursuant to 20 C.F.R. §725.310.¹²

¹¹ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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).

¹² Because claimant's evidence was found to be more credible as to whether the miner had legal pneumoconiosis and was totally disabled due to legal pneumoconiosis, it is not necessary that we specifically address employer's argument that the administrative law judge improperly shifted the burden of proof. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The Survivor's Claim

Initially, we agree with employer that the administrative law judge erred in finding that claimant is entitled to benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l). See Decision and Order Awarding Benefits on Remand at 4. Under the terms of Section 1556 of Public Law No. 111-148, amended Section 932(l) applies to claims filed after January 1, 2005 that were pending on or after March 23, 2010. In addition, the Board has held that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the survivor's claim was filed. See *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Based on the August 16, 2002 filing date of this survivor's claim, amended Section 932(l) is not applicable. Director's Exhibit 139. We, therefore, vacate the administrative law judge's finding that claimant is entitled to automatic survivor's benefits pursuant to amended Section 932(l).¹³ Based on employer's allegations of error on appeal, we will review the administrative law judge's alternative determination that claimant established entitlement to benefits by a preponderance of the evidence.

In order to establish entitlement to survivor's benefits under the regulations at 20 C.F.R. Part 718, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In this survivor's claim, filed after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. See 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's

¹³ Although amended Section 932(l) is not applicable to this specific claim, our decision does not preclude claimant from filing a subsequent survivor's claim, in accordance with 20 C.F.R. §725.309, in order to assert her right to automatic survivor's benefits, based on a final award of benefits in the miner's claim. See *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A, slip op. at 4-6 (Jan. 9, 2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), appeal docketed, No. 12-1294 (4th Cir. Mar. 8, 2012).

death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

The administrative law judge found that claimant established the existence of legal pneumoconiosis based on the opinions of Drs. Baker and Taylor. Decision and Order Awarding Benefits on Remand at 23. As discussed, *supra*, we affirm the administrative law judge's credibility findings with regard to the opinions of Drs. Baker, Taylor, Fino and Rosenberg. We, therefore, affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(4) in the survivor's claim.

In considering whether the miner's death was hastened by legal pneumoconiosis, the administrative law judge stated:

In this case, Drs. Taylor and Fino agreed that the obstructive lung disease hastened the [m]iner's death (Dr. Taylor), or was a significant contributing factor to his death (Dr. Fino). Dr. Rosenberg was somewhat more equivocal, as he first said that the [m]iner's death was due to lung cancer, advanced COPD, and their complications. But he also said that[,] given the state of the [m]iner's cancer, there was no treatment even if he had not had COPD. When asked whether the [m]iner would have lived any longer notwithstanding COPD, Dr. Rosenberg said "nothing significant." But the [m]iner's treatment records indicate that the decision to forego all treatment other than palliative radiotherapy was based on the [m]iner's poor pulmonary function. I find Dr. Rosenberg's testimony on this point to be outweighed by the more definitive opinions of Dr. Taylor and Dr. Fino.

Decision and Order Awarding Benefits on Remand at 24. Accordingly, the administrative law judge found that claimant satisfied her burden of proving that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Employer argues that the administrative law judge drew her own medical conclusions from the record, erred in rejecting Dr. Rosenberg's opinion and did not address relevant portions of Dr. Fino's opinion. Employer further asserts that the administrative law judge erred in failing to determine whether Dr. Taylor's opinion satisfies the standard set forth in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), which requires that a doctor's opinion demonstrate that pneumoconiosis hastened death "through a specifically defined process that reduces a miner's life by an estimable time." Employer's Brief at 37, *quoting Williams*, 338 F.3d at 518, 22 BLR at 2-655. Employer's contentions have merit, in part.

Contrary to employer's argument, the administrative law judge permissibly determined that Dr. Rosenberg's opinion was "equivocal" as to whether COPD hastened the miner's death.¹⁴ Decision and Order Awarding Benefits on Remand at 19; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. With respect to the administrative law judge's consideration of the miner's treatment records under 20 C.F.R. §718.205(c), we also reject employer's argument that the administrative law judge concluded, based upon her own interpretation of the medical evidence, that treatment of the miner's lung cancer was curtailed due to his poor respiratory condition. Rather, the administrative law judge supported her determination with specific references to medical opinions in the miner's treatment records, stating:

The [m]iner was hospitalized for his work-up at the Regional Medical Center, beginning April 29, 2002, under the care of Dr. Taylor. In the history, Dr. Taylor noted the [m]iner's multiple past admissions for his COPD and abnormal CAT scan[,] which had not been pursued because he was a poor surgical candidate. On initial examination at admission, the [m]iner was in a wheelchair. Flexible bronchoscopy conducted on May 2 and CT-guided needle biopsy on May 6 resulted in findings of poorly differentiated carcinoma of the lung, and with invasion of the cancer into his ribs and chest wall. *Because of his debilitated condition and severe dyspnea, a course of limited radiotherapy was undertaken for palliation of pain, but the [m]iner experienced exacerbation of congestive heart failure and COPD.* His general condition deteriorated through most of the hospital stay, and he became essentially bedfast. A consultation report from Dr. Satish Shah, who conducted the [m]iner's radiotherapy, reported that the [m]iner had quit smoking about a year before and started chewing tobacco. *Because of the [m]iner's poor pulmonary function and other medical problems, Dr. Shah did not think that any further intervention or chemotherapy beyond the palliative radiotherapy would be of any benefit.* The radiotherapy was stopped on June 6, 2002, after the [m]iner had been admitted to the Intensive Care Unit because he had developed pneumonia. By the time he had recovered from the pneumonia, his pain had improved, so the decision was made to discontinue radiation. Thereafter, however, his

¹⁴ As noted by the administrative law judge, Dr. Rosenberg specifically testified that the miner's death was related to lung cancer and COPD. *See* Decision and Order Awarding Benefits on Remand at 19; Employer's Exhibit 1 at 47. However, when Dr. Rosenberg was asked, in his opinion, "if not for [the miner's] COPD, would [the miner] have lived any [longer] beyond August 2002," Dr. Rosenberg replied, "nothing significant." Employer's Exhibit 1 at 49.

condition again deteriorated, and he remained in the hospital until July 17, 2002, when arrangements were made for home care. He was readmitted on July 22, 2002, and died on July 25, 2002. In his discharge summary, Dr. Taylor said the cause of death was carcinoma of the lung with COPD. There was no postmortem examination.

Decision and Order Awarding Benefits on Remand at 13 (emphasis added); *see* Employer's Exhibit 5.

We agree with employer, however, that the administrative law judge did not fully resolve the conflict in the evidence regarding whether claimant satisfied her burden under 20 C.F.R. §718.205(c). Although the administrative law judge indicated that COPD hastened the miner's death because it prevented treatment of his lung cancer, she did not address Dr. Fino's statement that:

Mention was made in the record that this patient could not undergo any treatment for his lung cancer because of his severe respiratory impairment. I would point out that treatment for lung cancer in this man, even if it could have been administered, would not have made any difference. Unfortunately, by the time the diagnosis was made, there was really nothing that could be done.

Employer's Exhibit 2. Additionally, the administrative law judge did not consider whether Dr. Taylor's opinion details the specific process by which legal pneumoconiosis, in the form of COPD, reduced the miner's life by an estimable period of time, as required by *Williams*.¹⁵ Because the administrative law judge did not consider Dr. Fino's comment¹⁶ and did not render a finding as to the legal sufficiency of Dr. Taylor's opinion under 20 C.F.R. §718.205(c), her Decision and Order Awarding Benefits on Remand does not satisfy the APA. *See Wojtowicz v. Duquesne Lighting Co.*, 12 BLR 1-162

¹⁵ Dr. Taylor stated in a letter to claimant's counsel that the miner died "from lung cancer with complications of COPD." Director's Exhibit 157. Dr. Taylor further indicated that the miner's death, "was hastened by obstructive lung disease, which . . . was probably aggravated by his coal mine exposure." *Id.*

¹⁶ When crediting Dr. Fino's opinion as evidence supportive of claimant's burden at 20 C.F.R. §718.205(c), the administrative law judge did not acknowledge that Dr. Fino attributed the miner's COPD solely to cigarette smoking. *See* Decision and Order Awarding Benefits on Remand at 24. We have affirmed the administrative law judge's discrediting of Dr. Fino's opinion regarding the cause of the miner's COPD. *Smith*, BRB Nos. 08-0765 BLA & 08-0795 BLA, slip op. at 9.

(1989). We, therefore, vacate the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and the award of survivor's benefits.

On remand, the administrative law judge must reconsider whether claimant satisfied her burden of proving that legal pneumoconiosis hastened the miner's death. The administrative law judge is instructed to render her findings in accordance with the APA and the standard set forth in *Williams*.

Accordingly, the administrative law judge's Decision and Order Denying the Employer's Request for Modification on Remand is affirmed, and her Decision and Order Awarding Benefits on Remand 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge