

BRB No. 09-0792 BLA

ARNOLD PRATER (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED: 09/10/2010
	)	
and	)	
	)	
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 Awarding Living Miner's Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

Rita Roppolo (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: SMITH, McGANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits (2008-BLA-5807) of Administrative Law Judge Richard K. Malamphy with respect to a subsequent claim filed on September 11, 2007,<sup>1</sup> 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). Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge credited claimant with "at least" fourteen years of coal mine employment, based on a stipulation by the parties. Noting the denial of the prior claim, the administrative law judge weighed the evidence submitted since the prior denial and found that it was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),<sup>2</sup> the element of entitlement previously adjudicated against claimant.<sup>3</sup> In addition, the administrative law judge found, based on the new evidence, that the presumption that claimant's pneumoconiosis arose out of his coal mine employment, based on his years of coal mine employment, was not rebutted under 20 C.F.R. §718.203(b), and that the medical evidence was sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits.<sup>4</sup>

On appeal, employer contends that the administrative law judge failed to conduct the required analysis at 20 C.F.R. §725.309 to determine whether claimant had

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<sup>1</sup> Claimant filed his initial claim on January 7, 1982, which was denied by Administrative Law Judge Jeffrey Tureck in a Decision and Order issued on December 4, 1986, based on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 1.

<sup>2</sup> Legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

<sup>3</sup> The administrative law judge did not make a finding as to whether the medical opinion evidence established clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4).

<sup>4</sup> Claimant died on April 2, 2010, subsequent to the issuance of the administrative law judge's July 28, 2009 decision awarding benefits and employer's August 29, 2009 appeal of the decision. Claimant's counsel has notified the Board that claimant's widow wishes to pursue his claim.

established a change in an applicable condition of entitlement necessary to the adjudication of the claim on the merits. Employer further contends that, even without such analysis, the claim is barred by the common law principles of *res judicata* and finality. In addition, employer contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4), and that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c). In response, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, concurring with employer's contention that the case should be remanded for the administrative law judge to provide specific findings under Section 725.309, as to whether a change in an applicable condition of entitlement was established and, also, to provide specific findings regarding the weight that he accorded the relevant evidence pursuant to Section 718.202(a)(4). However, the Director urges the Board to reject employer's argument that this claim is barred by the principles of *res judicata* and finality. Employer reiterates its position in its reply brief.<sup>5</sup>

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),<sup>6</sup> which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated May 12, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of the 2010 amendments with respect to the entitlement criteria for certain claims. *Prater v. National Mines Corp.*, BRB No. 09-0792 BLA (May 12, 2010)(unpub. Order). The Director, claimant, and employer have responded to the Board's Order.

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<sup>5</sup> The administrative law judge's findings that pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3), by new evidence, are affirmed, as they are unchallenged by any party on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>6</sup> The 2010 amendments to the Act also provided that a qualified survivor of a miner, who had filed a successful claim for benefits, is automatically entitled to survivor's benefits, without the burden of establishing entitlement. *See* 30 U.S.C. §932(l).

The Director states that the recent amendment to Section 411(c)(4) of the Act, is applicable in this case. He suggests that, initially, the Board should review the administrative law judge's Decision and Order in light of employer's arguments, and if the Board affirms the award of benefits, the case need not be remanded for consideration under Section 411(c)(4). Director's Supplemental Letter at 2. If the Board vacates the award of benefits, however, the Director states that the case should be remanded to the administrative law judge with instructions to consider the case under Section 411(c)(4), and to provide a more specific finding regarding the length of claimant's coal mine employment. *Id.* at 2-3. Specifically, the Director notes that stipulations, such as the length of coal mine employment stipulation in this case, are normally binding on the parties, unless relief from their operation is necessary to prevent "manifest injustice" to a party. The Director contends that, in light of amended Section 411(c)(4), if claimant has "at least" fifteen years of qualifying coal mine employment, a "manifest injustice" will occur if claimant is held to his length of coal mine employment stipulation. *Id.* Therefore, the Director argues that the Board should "relieve [claimant] of the consequences otherwise flowing from the stipulation." *Id.* at 3. The Director further states that, if, on remand, the administrative law judge finds that claimant establishes at least fifteen years of qualifying coal mine employment, the administrative law judge should consider claimant's entitlement under Section 411(c)(4). Moreover, the Director argues that because amended Section 411(c)(4) changes the parties' respective burdens of proof, the administrative law judge must allow the parties the opportunity 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 under 20 C.F.R. §725.456. *Id.*

Claimant responds, urging affirmance of the administrative law judge's award of benefits, but argues alternatively, that if the case is remanded, claimant's testimony regarding his coal mine employment history should be reconsidered under Section 411(c)(4). Claimant's Supplemental Brief at 3. In response, employer contends that the parties' stipulation to fourteen years of coal mine employment renders amended Section 411(c)(4) inapplicable to this case. Employer's Supplemental Letter at 1. Alternatively, employer contends that if amended Section 411(c)(4) is applied, employer cannot be held liable for any benefits that may be due because, as a result of claimant's death, employer would be deprived of the opportunity to question him regarding his coal mine employment history or to have him examined and, therefore, liability should transfer to the Trust Fund. *Id.* at 2.

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.<sup>7</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).

To establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, it must be established that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

### **Subsequent Claim**

Initially, we address the procedural issues raised by employer's argument that this subsequent claim is barred by the common law principles of *res judicata* and finality. Employer contends that, because claimant was found to be totally disabled in his first claim, he cannot now establish that he is "more disabled." Employer's Brief at 10. Employer further contends that, because claimant's respiratory impairment was previously found to be due to smoking, the common law principles of *res judicata* and finality preclude entitlement in this claim, as claimant cannot show that his condition has changed based upon medical opinions that his respiratory impairment is due to both smoking and coal mine employment. Employer's Brief at 11. *Id.* In addition, employer argues that the administrative law judge erred in failing to conduct any analysis of the evidence pursuant to Section 725.309. *Id.* at 10.

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<sup>7</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

In response, the Director urges the Board to reject employer's contention that a change in an applicable condition of entitlement cannot be established because claimant was already disabled at the time of the first claim. The Director argues that, contrary to employer's contention, the issue of total respiratory disability was contested in the first claim, but not decided because Judge Tureck concluded that claimant failed to establish the existence of pneumoconiosis and, thus, found that entitlement was precluded on that basis. Director's Response Letter at 4. However, the Director agrees with employer that the administrative law judge did not specifically address whether a change in an applicable condition of entitlement was established pursuant to Section 725.309, based on new evidence and, therefore, concurs that the case must be remanded for the administrative law judge to render a specific finding on the issue under Section 725.309. *Id.* at 5.

Contrary to employer's contention, that this claim is barred by the principles of *res judicata* and finality, these principles have no application in the context of subsequent claims, "as the purpose of Section 725.309 is to provide relief from the principles of *res judicata* to a miner whose physical condition worsens over time." *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993). Specifically, Section 725.309 states that if claimant establishes a change in one of the applicable conditions of entitlement, "no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see [20 C.F.R.] §725.463), shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4). Moreover, courts have held that the principles of *res judicata* and finality do not apply in a subsequent claim where the issue is claimant's physical condition at a period of time entirely different from that previously adjudicated. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(*en banc*); *Loilia Coal Co. v. Harvey*, 109 F.3d 445, 450, 21 BLR 2-50, 2-60 (8th Cir. 1997); *Labelle Processing Co. v. Swarow*, 72 F.3d 308, 314, 20 BLR 2-76, 2-87 (3d Cir. 1995); *White*, 23 BLR at 1-3.

Further, contrary to employer's contention, total respiratory disability was not established in the prior claim. While total respiratory disability was a contested issue before Judge Tureck, he did not render a finding on the issue, but found, instead, that because claimant failed to establish either clinical or legal pneumoconiosis, entitlement to benefits was precluded. Director's Exhibit 1. We, therefore, agree with the Director that employer's assertion of error on the grounds of *res judicata* and finality is without merit. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004).

However, as employer and the Director correctly contend, the administrative law judge did not consider, specifically, whether a change in an applicable condition of entitlement was established pursuant to Section 725.309(d). Instead, the administrative law judge considered the medical evidence submitted since the prior denial and found

that, because it was sufficient to establish the existence of legal pneumoconiosis, it was *apparently* sufficient to establish a change in an applicable condition of entitlement under Section 725.309(d). The administrative law judge then found that all of the elements of entitlement were established at Sections 718.202, 718.203 and 718.204(b) and (c), based on the new evidence.

In light of our holding, *infra*, however, that the administrative law judge did not adequately explain his finding that legal pneumoconiosis was established pursuant to Section 718.202(a)(4), we must vacate the administrative law judge's award of benefits and remand the case to the administrative law judge for further consideration. On remand, the administrative law judge must render a specific finding as to whether the newly submitted evidence established a change in an applicable condition of entitlement pursuant to Section 725.309. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3. If the administrative law judge finds that claimant has established a change in an applicable condition of entitlement, then the administrative law judge must consider all of the evidence of record, both old and new, to determine whether claimant has established entitlement to benefits. *Id.*

### **Legal Pneumoconiosis**

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Baker, Ammisetty, Dahhan and Broudy. The administrative law judge found that Drs. Ammisetty and Baker opined that claimant suffered from legal pneumoconiosis, *i.e.*, that his coal dust exposure significantly contributed to, and substantially aggravated, his chronic obstructive pulmonary disease (COPD), whereas Drs. Dahhan and Broudy opined that claimant did not have legal pneumoconiosis because his COPD was due to his smoking history. Decision and Order at 10-19.<sup>8</sup> Weighing the

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<sup>8</sup> Within his report, Dr. Ammisetty diagnosed chronic bronchitis, chronic obstructive pulmonary disease (COPD) and legal pneumoconiosis, finding that these conditions were most likely secondary to claimant's cigarette smoking history, but that claimant's coal dust exposure "significantly exacerbated" his respiratory condition. Director's Exhibit 15. In addition, Dr. Ammisetty opined that claimant was totally disabled from his last coal mine employment as a result of his cardiopulmonary condition. *Id.* Dr. Baker diagnosed clinical pneumoconiosis and legal pneumoconiosis, in the form of bronchitis and COPD, with smoking and coal dust exposure equally to blame for claimant's condition. Claimant's Exhibits 1, 3. Dr. Baker also opined that claimant was totally disabled from performing his usual coal mine employment. *Id.* Dr. Dahhan, while diagnosing COPD, opined that it was due to claimant's right lung lobectomy and smoking history, stating that claimant did not have legal pneumoconiosis. Director's Exhibit 33; Employer's Exhibits 4, 7. Dr. Dahhan also opined that claimant was totally disabled from performing his usual coal mine employment, but stated that it

medical opinion evidence, the administrative law judge found that all of the doctors were “well credentialed” and rendered their opinions, taking into account an “essentially accurate” occupational history, given the unclear estimation of claimant’s employment history. Decision and Order at 21. However, the administrative law judge credited the opinions of Drs. Ammisetty and Baker, diagnosing legal pneumoconiosis, based on their opinions that coal dust exposure had significantly and substantially aggravated claimant’s COPD and chronic bronchitis. *Id.* The administrative law judge also found that while Dr. Dahhan did not diagnose legal pneumoconiosis, he agreed with Drs. Ammisetty and Baker that “[c]laimant’s history of coal mine exposure [was] consistent with legal pneumoconiosis” and “it [was] possible that a portion of his drop in FEV<sub>1</sub> is related to coal dust exposure.” *Id.* The administrative law judge concluded that “[c]laimant’s respiratory condition [was] significantly related to or substantially aggravated by his coal dust exposure.” *Id.* The administrative law judge, therefore, found that legal pneumoconiosis was established at Section 718.202(a)(4). *Id.*

In challenging the administrative law judge’s finding of legal pneumoconiosis, employer contends that the administrative law judge failed to resolve the conflicts in the medical reports of claimant’s smoking history, or to render any finding regarding the extent of claimant’s smoking history. Employer’s Brief at 15. Employer further argues that the administrative law judge failed to resolve other conflicts in the medical opinions. Additionally, employer contends that the administrative law judge failed to explain *why* he accorded determinative weight to the opinions of Drs. Ammisetty and Baker, over the contrary opinions of Drs. Broudy and Dahhan. *Id.* at 16. Specifically, employer contends that the administrative law judge mischaracterized the opinion of Dr. Dahhan, arguing that the administrative law judge found it to be supportive of a finding of legal pneumoconiosis when, in fact, Dr. Dahhan specifically diagnosed claimant’s smoking history and lobectomy as the causes of his COPD. *Id.* at 16. The Director responds, agreeing with employer that the administrative law judge failed to provide an adequate explanation of his weighing of all of the medical opinion evidence. Specifically, the Director contends that the administrative law judge did not adequately explain his weighing of Dr. Broudy’s opinion. Director’s Letter Brief at 4. The Director, therefore, contends that, because the administrative law judge did not adequately discuss his rationale for crediting the opinions of Drs. Ammisetty and Baker over the opinion of Dr. Broudy, the case must be remanded to the administrative law judge for appropriate

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was not due to claimant’s coal dust exposure. *Id.* Dr. Broudy opined that claimant had severe COPD and cor pulmonale resulting from claimant’s smoking history. Employer’s Exhibits 3, 10. In addition, Dr. Broudy opined that claimant did not retain the respiratory capacity to perform his usual coal mine employment as a result of the COPD due to cigarette smoking. *Id.*

consideration of the medical opinions at Section 718.202(a)(4).<sup>9</sup> *Id.* at 4.

There is merit to employer's contentions regarding the administrative law judge's weighing of the medical opinion evidence pursuant to Section 718.202(a)(4).<sup>10</sup> As employer and the Director contend, in finding that the evidence was sufficient to establish that claimant's respiratory impairment was significantly related to, or substantially aggravated by, his coal dust exposure, the administrative law judge did not discuss his specific weighing of all of the medical opinion evidence. The administrative law judge failed to provide an adequate explanation for the weight he accorded the individual medical opinions, and, in particular, he did not discuss what, if any, weight he accorded the medical opinion of Dr. Broudy. *Id.* While the administrative law judge provided a detailed discussion of each of the medical opinions, including the objective testing administered, and the social and occupational histories upon which each of the opinions was based, Decision and Order at 10-19, he did not explain why he *apparently* accorded less weight to Dr. Broudy's opinion than to the opinions of Drs. Ammisetty and Baker. See *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); Decision and Order at 21. However, we reject employer's contention that the administrative law judge substituted his opinion for that of the medical experts in according little weight to the opinion of Dr. Dahhan. Contrary to employer's contention, the administrative law judge reasonably accorded little weight to Dr. Dahhan's opinion because his opinion was inconsistent with the Attfield and Hodous journal article,<sup>11</sup> cited specifically by the doctor as support for his conclusion that claimant's respiratory impairment was due to his smoking history and not coal dust exposure. Director's Exhibit 33; Employer's Exhibits 4; 7. The

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<sup>9</sup> The Director, Office of Workers' Compensation Programs (the Director), disagrees with employer that the administrative law judge's findings regarding the opinions of Drs. Ammisetty, Baker and Dahhan were in error. Director's Letter Brief at 3-4.

<sup>10</sup> We reject employer's contention that the administrative law judge mischaracterized the medical opinion of Dr. Dahhan. While the administrative law judge noted that Dr. Dahhan agreed with Drs. Ammisetty and Baker, that claimant's coal mine employment history was consistent with a finding of legal pneumoconiosis, the administrative law judge did not find that Dr. Dahhan, himself, made a diagnosis of legal pneumoconiosis. Decision and Order at 21.

<sup>11</sup> Michael Attfield & Thomas K. Hodous, "Pulmonary Function of U.S. Coal Miners Related to Dust Exposure Estimates", 145 Am. Rev. Respir. Diseases. 605 (1992).

administrative law judge, therefore, rationally determined that Dr. Dahhan's opinion was not adequately supported by its underlying documentation. *See Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Moreover, we reject employer's contention that the administrative law judge should have reviewed Dr. Baker's opinion with respect to the Attfield and Hodous article and found it, too, entitled to no weight. Contrary to employer's contention, Dr. Baker did not rely on that article to support his conclusion that claimant's respiratory disability was due to the synergistic effects of smoking and coal dust exposure. As the Director points out, Dr. Baker's opinion is consistent with the conclusions contained in medical literature and scientific studies relied upon by the Department of Labor (DOL) in drafting the definition of legal pneumoconiosis. Director's Letter Brief at 3, citing 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); Claimant's Exhibits 1, 3. Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4), and we remand the case for the administrative law judge to explain the weight he accords each of the medical opinions.<sup>12</sup> *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591. In considering the medical opinion evidence on remand, the administrative law judge should first render a specific finding regarding claimant's cigarette smoking history, as the physicians relied on differing smoking histories in rendering their opinions. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Moreover, in light of our decision to vacate the administrative law judge's weighing of the medical opinions pursuant to Section 718.202(a)(4), *see* discussion, *supra*, we also vacate the administrative law judge's Section 718.204(c) finding because it is based, at least in part, on his credibility determinations under Section 718.202(a)(4). Consequently, we vacate the administrative law judge's Decision and Order Awarding Living Miner's Benefits, and we remand the case for reconsideration pursuant to Sections 725.309 and 718.202(a)(4) and, if reached, for consideration of the case on the merits.

### **Section 411(c)(4) Amendments**

Because we cannot affirm the administrative law judge's award of benefits in this case, we consider the applicability of the 2010 amendments. Based upon the parties

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<sup>12</sup> The administrative law judge did not make a determination as to whether the medical opinion evidence established clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). However, that is a determination that should be made on remand, as a finding of either clinical or legal pneumoconiosis is sufficient to establish pneumoconiosis under the Act, 20 C.F.R. §718.201, and the finding is relevant to determining whether disability causation is established at 20 C.F.R. §718.204(c).

responses to our May 12, 2010 Order and our review of the case, we conclude that this case is potentially affected by the amendments. As previously noted, if a claimant establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). Herein, the administrative law judge credited claimant with “at least” fourteen years of coal mine employment, based on the parties’ stipulation; however, claimant alleged that he had at least seventeen years of coal mine employment. Decision and Order at 3, 4; Hearing Transcript at 11-17; Director’s Exhibits 4, 5. Because claimant filed his current claim after January 1, 2005 and it was pending on March 23, 2010, whether claimant had fifteen or more years of qualifying coal mine employment is relevant to the availability of the Section 411(c)(4) presumption. Consequently, we vacate the administrative law judge’s finding of fourteen years of coal mine employment based on the parties’ stipulation, and we remand the case to the administrative law judge to render a specific finding as to the length of claimant’s qualifying coal mine employment, as such a finding is necessary to determine whether the claim is entitled to consideration at Section 411(c)(4). 30 U.S.C. §921(c)(4).

On remand, the administrative law judge must determine initially whether claimant has established at least fifteen years of qualifying coal mine employment, *i.e.*, that claimant was employed for at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509 (7th Cir. 1988). If the requisite coal mine employment has been established, the administrative law judge must then determine whether claimant has established a totally disabling pulmonary or respiratory impairment and, thus, has established invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b).

If the administrative law judge finds that claimant is entitled to the presumption that he was totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether employer has rebutted the presumption. 30 U.S.C. §921(c)(4). On remand, the administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, as the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.456(b)(1). However, the administrative law judge should first determine whether, as employer contends, due process requires that liability for any benefits transfer to the Trust Fund because, as a result of claimant’s death, employer would be deprived of the opportunity to question him regarding his coal mine employment history or to have him examined, citing *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 807, 21 BLR 2-302, 2-

319 (4th Cir. 1998).<sup>13</sup>

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's 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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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>13</sup> The Director has not yet addressed this argument which was advanced in employer's supplemental briefing, filed a week after the Director's supplemental briefing.