U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 15-0373 BLA,
17-0189 BLA and 19-0214 BLA

HELEN FAYE FORD (o/b/o and Widow of JERRY W. FORD) Claimant-Respondent v. CHEVRON MINING, INCORPORATED/ PITTSBURG & MIDWAY COAL MINING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/30/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order Awarding Benefits on Remand of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

Kathleen H. Kim (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05937) and the Decision and Order Awarding Benefits on Remand (2012-BLA-05404) of Administrative Law Judge Jonathan C. Calianos rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act). This case involves a miner's subsequent claim filed on May 9, 2011[1] and a survivor's claim filed on May 7, 2012. Both claims are before the Benefits Review Board for the second time.[2]

In his initial Decision and Order Awarding Benefits dated December 12, 2016, the administrative law judge credited the miner with 14.25 years of coal mine employment and thus found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] Considering whether Claimant established entitlement to benefits without the benefit of this presumption,[4] the administrative law judge found the new evidence established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). He further found, based on all the evidence,

[1] The miner filed three prior claims for benefits. On March 31, 2010, the district director denied the miner's most recent prior claim, filed on August 10, 2009, because he did not establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3. The miner took no further action until he filed the present claim on May 9, 2011. Director's Exhibit 5.

[2] Claimant is the widow of the miner, who died on March 15, 2012. Claimant's Exhibit 5. She is pursuing the miner's claim on his estate's behalf and her survivor's claim.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] The administrative law judge also determined there is no evidence the miner had complicated pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 20.

Claimant established clinical and legal pneumoconiosis[5] arising out of coal mine employment significantly contributed to his disability. Consequently, he awarded benefits.

Pursuant to Employer's appeal, the Board vacated the administrative law judge's findings that the new medical opinion evidence established total disability and thus a change in an applicable condition of entitlement.[6] In the interest of judicial economy, the Board addressed Employer's contentions on the merits of the claim and affirmed the administrative law judge's finding that Claimant established legal pneumoconiosis. The Board vacated, however, the administrative law judge's finding that the medical opinion evidence established clinical pneumoconiosis and total disability due to pneumoconiosis, and remanded the case for further consideration of the evidence. *Ford v. Chevron Mining, Inc.*, BRB No. 17-0189 BLA (Jan. 29, 2018) (unpub.).

On remand, the administrative law judge issued an Order on October 11, 2018, in which he found Employer "waived and/or forfeited" any Appointments Clause challenge. In a Decision and Order Awarding Benefits on Remand dated December 28, 2018, the subject of the current appeal in the miner's claim, the administrative law judge further concluded the new medical opinion evidence established total disability and a change in an applicable condition of entitlement. He also found the miner was totally disabled due to legal pneumoconiosis and awarded benefits in the miner's claim.

[5] 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 definition encompasses 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). 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." 20 C.F.R. §718.201(a)(1).

[6] The Board noted the administrative law judge correctly observed that because the miner had less than fifteen years of coal mine employment, Claimant could not invoke the Section 411(c)(4) presumption. *Ford v. Chevron Mining, Inc.*, BRB No. 17-0189 BLA (Jan. 29, 2018) (unpub.).

In a separate Decision and Order Awarding Benefits dated May 27, 2015, the administrative law judge determined Section 422(*l*) of the Act, 30 U.S.C. §932(*l*),[7] automatically entitled Claimant to derivative survivor's benefits based on the award in the miner's claim. The Board consolidated the appeals in the miner's claim and the survivor's claim.[8] *Ford v. Chevron Mining, Inc*., BRB Nos. 15-0373 BLA and 19-0214 BLA (Nov. 15, 2019) (Order) (unpub.).

In the present appeal in the miner's claim, Employer argues the administrative law judge lacked the authority to decide the case because he was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[9] Employer also challenges the administrative law judge's findings that the new evidence established total

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

[8] In response to Employer's appeal, the Board affirmed the award of benefits in the survivor's claim. *Ford v. Chevron Mining, Inc*., BRB No. 15-0373 BLA (Apr. 27, 2016) (unpub.). Following Employer's appeal of this award to the United States Court of Appeals for the Sixth Circuit, the Board received Employer's appeal of the award of benefits in the miner's claim, which was assigned BRB No. 19-0214 BLA. While the award of survivor's benefits was pending before the Sixth Circuit, Claimant filed a motion to remand the survivor's claim to the Board. The court granted Claimant's request and instructed the Board to consolidate the survivor's claim with the appeal in the miner's claim. The Board therefore reinstated Claimant's survivor's claim and consolidated it with the miner's claim. *Ford v. Chevron Mining, Inc*., BRB Nos. 15-0373 BLA and 19-0214 BLA (Nov. 15, 2019) (Order) (unpub.).

[9] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2.

disability and a change in an applicable condition of entitlement. Employer further contends the administrative law judge erred in finding the miner was totally disabled due to pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, asserting Employer forfeited its Appointments Clause argument. Employer filed a reply brief reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[10] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

In light of the United States Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018),[11] Employer argues the administrative law judge's appointment violates the Appointments Clause. Employer's Brief at 11-12; Employer's Reply Brief at 4-6. Employer first raised this issue on remand after the issuance of *Lucia*. It contends it timely raised this challenge before the administrative law judge and the Board in the present appeal. *Id*.

We agree with the Director that Employer forfeited its Appointments Clause argument by failing to raise it when the case was previously before the Board.[12] Director's Brief at 3-4. The Appointments Clause issue is "non-jurisdictional" and thus is subject to

[10] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[11] In *Lucia*, the United States Supreme Court held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). The Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id*.

[12] Employer did not raise an Appointments Clause challenge when this case was first before the administrative law judge or in its prior appeal to the Board. *Ford v. Chevron Mining, Inc.*, BRB No. 17-0189 BLA (Jan. 29, 2018) (unpub.).

the doctrines of waiver and forfeiture. *See Lucia*, 138 S.Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020) (upholding forfeiture for failure to raise Appointments Clause challenge pursuant to Board's issue-exhaustion requirements); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (internal citation omitted); *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 750-51 (6th Cir. 2019) (petitioners forfeited Appointments Clause challenge by failing to raise it in initial briefing before the Board);[13] *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Director's Brief at 3-4.

The exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) is inapplicable because the Board, unlike the Federal Mine Safety and Health Review Commission, has the long-recognized authority to address properly raised questions of substantive law. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (because the Board performs the identical appellate function the district courts previously performed, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as the district courts possessed). Furthermore, Employer has not given us any basis for excusing its forfeiture.[14] *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Therefore, we reject Employer's argument that the Board should remand

[13] Employer's suggestion that the Board hold this case in abeyance pending the issuance of a decision in *Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019), is moot. Employer's Brief at 12.

[14] We also reject Employer's assertion that it preserved its Appointments Clause challenge as it listed "Constitutional Challenges to the Act" in the parties' joint prehearing report in July 2015 and made clear it would not waive "the Constitutional issue" during a July 20, 2018 telephone conference the administrative law judge held with the parties. Employer's Brief at 11-12. As previously noted, employer did not specifically raise the Appointments Clause issue when it first appealed the case to the Board. Generally, we do not consider issues that a petitioner raises only after it has filed its brief identifying the issues on appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Miner's Claim

Change in Applicable Condition of Entitlement - Total Disability

When 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 "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The district director denied the miner's prior claim because he did not establish total respiratory disability. Director's Exhibit 3. Consequently, to obtain review of the merits of the miner's claim, Claimant had to establish the miner was totally disabled. 20 C.F.R. §725.309(c)(3), (4).

A miner is totally disabled if a pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987);); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Notwithstanding the non-qualifying pulmonary function and blood gas studies, the administrative law judge found Claimant established total disability based on the new medical opinions and his weighing of the new evidence as a whole.[15] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 5, 7-10.

In its prior Decision and Order, the Board instructed the administrative law judge to determine whether Dr. Houser's opinion is reasoned and documented and, if he were to

[15] The administrative law judge found total disability was not established at 20 C.F.R. §718.204(b)(2)(i)-(ii) because none of the pulmonary function or blood gas studies produced qualifying results. Decision and Order on Remand at 5. He further found the record insufficient to establish cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order on Remand at 5.

find his opinion entitled to probative value, to weigh it against Dr. Chavda's opinion to determine whether Claimant established total disability.[16] Decision and Order on Remand at 6-7, *citing Ford*, BRB No. 17-0189 BLA, slip op. at 6. The administrative law judge reinstated his finding that the miner's usual coal mine work as a shooter and machine operator required "heavy and arduous labor,"[17] and considered the medical opinions of Drs. Chavda,[18] Baker, and Houser. He noted the physicians are qualified medical experts based on their experiences and qualifications. Decision and Order on Remand at 7, 8.

Drs. Chavda and Baker opined the miner was totally disabled from a respiratory impairment while Dr. Houser opined he was not. Director's Exhibit 16; Employer's Exhibit 5. The administrative law judge found Dr. Houser's opinion adequately reasoned and documented and thus entitled to probative weight. Decision and Order on Remand at 7. He further determined, however, that Dr. Chavda's opinion is more persuasive than Dr. Houser's and Dr. Baker's opinions. Decision and Order on Remand at 8, 10. Thus he found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 10.

Employer argues the administrative law judge erred in discounting Dr. Houser's opinion. Employer's Brief at 16-17. We disagree. The administrative law judge noted Dr. Houser reviewed medical records on June 22, 2012. Decision and Order on Remand at 7; Employer's Exhibit 5. Dr. Houser noted symptoms of cough with sputum production,

[16] Employer asserts Dr. Chavda's opinion "is not in compliance or meeting the standard to prove disability" under the regulations. Employer's Brief at 16. The Board previously affirmed the administrative law judge's determination that Dr. Chavda's opinion is credible. *Ford*, BRB No. 17-0189 BLA, slip op. at 5. The Board's previous affirmance on this issue constitutes the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). As Employer has not demonstrated a valid exception to the law of the case doctrine, we decline to disturb the Board's disposition of this issue. *See Brinkley*, 14 BLR at 1-150-151.

[17] Because Employer does not challenge the administrative law judge's finding that the miner's usual coal mine employment required "heavy and arduous labor," we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 6.

[18] Dr. Chavda examined the miner on May 25, 2011 and May 26, 2011 for the Department of Labor and was deposed on September 23, 2011. Director's Exhibit 16 at 40.

wheezing and dyspnea, "short[ness] of breath with mild exercise,"[19] and diagnoses of pneumoconiosis, lung cancer, and pneumonia. Employer's Exhibit 5. He compared the miner's 2009 Department of Labor (DOL) examination from the miner's prior claim with his 2011 DOL examination. *Id*. Noting the 2011 non-qualifying FEV1 results were only 0.01 L lower than those obtained in 2009, Dr. Houser stated he did "not believe it has been established that there was a substantial change in [the miner's] condition between these two exams." *Id*. He also noted the miner's 2011 blood gas study results were normal. *Id*. Consequently, he concluded the data and evidence submitted for review did not establish the miner had a disabling respiratory impairment. *Id*. As previously noted, the administrative law judge found Dr. Houser's opinion adequately reasoned and documented. Decision and Order on Remand at 7. But he further found that Dr. Houser did not "clearly" explain his disability opinion. *Id*. at 8.

Contrary to Employer's argument, the administrative law judge did not discount Dr. Houser "for relying on objective evidence." Employer's Brief at 16-17. Rather, he permissibly found Dr. Chavda's opinion that the miner was totally disabled more persuasive and entitled to greater weight because he better explained his "understanding of the objective testing" and clinical evaluation of the miner's respiratory impairment "beyond the objective testing." Decision and Order on Remand at 8, 10; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012) (administrative law judge's function is to weigh the evidence, draw appropriate inferences, and determine credibility); *Gray v. SLC Coal Co*., 176 F.3d 382, 387 (6th Cir. 1999); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989).

Dr. Chavda opined that because the miner's MVV result met the "criteria for disability" and his FEV1 result "barely misses" the criteria, he did not have "enough lung capacity" from a clinical perspective to perform a coal mine job. Director's Exhibit 16 at 40. Dr. Chavda explained being one percent over the disability criteria does not indicate a lack of respiratory disability given the miner's significant reduction in lung capacity and his significant symptoms of dyspnea, coughing, and wheezing. Director's Exhibit 16 at

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[19] Dr. Houser reviewed Dr. Chavda's report in which he recorded the miner's "other complaints" as:

> Walking- "I can walk 75 feet before I notice a change in my breathing."
> Climbing- "I can climb 2-3 steps before I notice a change in my breathing."
> Lifting- "I can lift up to 20 pounds before I notice a change in my breathing."

Director's Exhibit 16 at 37.

80; Decision and Order on Remand at 7-8. As substantial evidence supports the administrative law judge's credibility determination, we affirm his finding that Dr. Chavda's opinion is more persuasive than Dr. Houser's.[20] *See Banks*, 690 F.3d at 489.

Employer also asserts the administrative law judge did not provide a valid reason to credit Dr. Chavda's opinion over Dr. Baker's. Employer's Brief at 16-18. Employer therefore argues Dr. Baker's 2009 report "must be given great weight and, at least, render Dr. Chavda's opinion in equipoise on the issue of total disability." *Id*. at 16-17. In a report dated August 28, 2009, Dr. Baker opined the miner had a mild impairment and would have the respiratory capacity to perform coal mine work. Director's Exhibit 3. In a subsequent report dated May 4, 2015, Dr. Baker noted the miner's pulmonary function and arterial blood gas studies produced reduced results but did not meet the disability standards. Claimant's Exhibit 4. He opined coal dust exposure was a substantially contributing cause of the miner's disability but did not address the extent of his disability. *Id.*

The administrative law judge noted Dr. Baker "acknowledged that [the miner] was disabled prior to his death." Decision and Order on Remand at 10. Considering the disability opinions of Drs. Chavda and Baker, the administrative law judge accorded greater weight to Dr. Chavda's opinion because it is two years more recent than Dr. Baker's 2009 opinion.[21] *Id*. Further, he permissibly found Dr. Chavda's opinion more persuasive than Dr. Baker's opinion because he better explained his "understanding of the objective testing" and clinical evaluation of the miner's respiratory impairment "beyond the objective testing." Decision and Order on Remand at 10; *see Banks*, 690 F.3d at 489; *Gray*, 176 F.3d at 387; *Crisp*, 866 F.2d at 185.

Thus we reject employer's assertion that the administrative law judge did not provide a valid reason for according greater weight to Dr. Chavda's opinion. Further, as the administrative law judge discounted Dr. Baker's 2009 opinion in determining whether

[20] Employer also contends the administrative law judge improperly discounted Dr. Houser's opinion because he did "not see[] the miner in person." Employer's Brief at 17. Because the administrative law judge provided a valid basis for discounting Dr. Houser's opinion, we hold any error in according it less weight for other reasons is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[21] The administrative law judge accorded greater weight to evidence "generated" for the subsequent claim because it provided a more accurate depiction of the miner's physical condition at that time. Decision and Order on Remand at 4.

the new medical opinion evidence established total disability, any error in his considering evidence from the prior claim is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We therefore affirm the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).[22] Decision and Order on Remand at 10. We also affirm his finding that all of the relevant evidence, when weighed together, established total disability. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 198; Decision and Order on Remand at 13.

Further, we affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement.[23]

Total Disability Causation

To establish the miner's total disability was due to pneumoconiosis, Claimant must prove pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1); *see Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599-601 (6th Cir. 2014). Because Claimant established legal pneumoconiosis but not clinical pneumoconiosis,[24] the relevant inquiry

[22] Employer reiterates its contention that "the administrative law judge failed to consider that the lay testimony did not support a finding of total disability." Employer's Brief at 18. The Board rejected this argument in its previous Decision and Order. *Ford*, BRB No. 17-0189 BLA, slip op. at 5-6 n.12. As Employer cites no valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition of this issue. *See Brinkley*, 14 BLR at 1-150-51.

[23] We reject employer's contention that the administrative law judge erred in analyzing the evidence at 20 C.F.R. §725.309 by "not even considering if the miner's physical condition had changed" since the denial of his prior claim. Employer's Brief at 12-13. A comparative analysis is not required under 20 C.F.R. §725.309(c). *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486 (6th Cir. 2012) (administrative law judge need not compare the old and new evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present).

[24] The administrative law judge found the evidence did not establish clinical pneumoconiosis. Decision and Order on Remand at 10-12.

before the administrative law judge is whether the miner's legal pneumoconiosis was a substantially contributing cause of his total disability. 20 C.F.R. §718.204(c).

The administrative law judge considered the opinions of Drs. Chavda, Baker, and Houser. Both Dr. Chavda[25] and Dr. Baker[26] diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease due to coal mine dust exposure and opined it contributed to the miner's impairment. Director's Exhibit 16; Claimant's Exhibit 4. In contrast, Dr. Houser opined pneumoconiosis was not a substantial contributing factor to the miner's respiratory impairment prior to his death. Employer's Exhibit 5. Finding Dr. Chavda's and Dr. Baker's opinions better reasoned and more comprehensive than Dr. Houser's opinion, the administrative law judge determined Claimant established total disability due to pneumoconiosis. Decision and Order on Remand at 13.

We reject Employer's assertion that the administrative law judge erred in discounting Dr. Houser's opinion. Contrary to Employer's contention, the administrative law judge rationally determined the same reasons he provided for discounting Dr. Houser's opinion on the issue of total disability also undercut his opinion on the issue of disability causation.[27] *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order on Remand at 13.

We also reject Employer's contention that Dr. Chavda's and Dr. Baker's disability causation opinions "must be discounted for being contrary to the x-ray evidence that each relied upon." Employer's Brief at 21, *citing Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109,

[25] Dr. Chavda opined the miner's smoking related chronic obstructive pulmonary disease (COPD) is the main contributing factor for his pulmonary disability and legal pneumoconiosis is a contributing factor to his "second minor disability impairment." Director's Exhibit 16.

[26] Dr. Baker opined the miner's coal dust exposure was a substantially contributing cause to his COPD and disability. Claimant's Exhibit 4.

[27] Employer argues the administrative law judge mischaracterized Dr. Houser's opinion because he determined the doctor diagnosed legal pneumoconiosis. Employer's Brief at 20. The administrative law judge's error in characterizing this aspect of Dr. Houser's opinion is harmless, however, as he relied on reasons related to the issue of total disability to discount the doctor's disability causation opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); *Larioni*, 6 BLR at 1-1278; Decision and Order on Remand at 13.

116 (4th Cir. 1995) (a doctor's opinion as to causation may not be credited unless there are "specific and persuasive reasons" for concluding the doctor's view on causation is independent of his mistaken belief the miner did not have pneumoconiosis). Employer has not explained how Dr. Chavda's opinion that the miner did not have clinical pneumoconiosis and Dr. Baker's opinion that the miner had clinical pneumoconiosis undermined the probative value of their opinions that legal pneumoconiosis contributed to his disability. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); Director's Exhibit 16 at 73; Claimant's Exhibit 4. Employer raises no other allegations of error with respect to the opinions of Drs. Chavda and Baker. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that Claimant established the miner was totally disabled due to legal pneumoconiosis and the award of benefits in the miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we reinstate the award of survivor's benefits. 30 U.S.C. §932(*l*); 20 C.F.R. §802.211(b); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Ford v. Chevron Mining, Inc.*, BRB No. 15-0373 BLA (Apr. 27, 2016) (unpub.).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Awarding Benefits on Remand are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge