U.S. Department of Labor

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

BRB Nos. 20-0528 BLA
and 20-0529 BLA

SUSAN C. FOLDEN (o/b/o and Widow of DAVID A. FOLDEN, SR.)	)	
Claimant-Respondent	)	
v.	)	
SLAB FORK COAL COMPANY	)	
and	)	
	)	DATE ISSUED: 03/07/2023
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
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 Granting Claimant's Request for Modification and Awarding Benefits on Remand and the Decision and Order Awarding Survivor's Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Jeffrey S Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Dana Rosen's Decision and Order Granting Claimant's Request for Modification and Awarding Benefits on Remand and Decision and Order Awarding Survivor's Benefits (2014-BLA-05129, 2018-BLA-06258) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a miner's subsequent claim[1] filed on July 21, 2010, and a survivor's claim[2] filed on June 29, 2018. The miner's claim is before the Benefits Review Board for the second time.

[1] ALJ Larry W. Price denied the Miner's initial claim on June 26, 2007, because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. The Benefits Review Board and the United States Court of Appeals for the Fourth Circuit affirmed the denial. *D.F.* [*Folden*] *v. Slab Fork Coal Co.*, BRB No. 07-0836 BLA (June 24, 2008) (unpub.); *Folden v. Slab Fork Coal Co.*, No. 08-1927 (4th Cir. May 1, 2009) (unpub.).

The Miner filed this subsequent claim on July 21, 2010, which the district director denied in a Proposed Decision and Order dated April 11, 2012. The Miner requested modification, which the district director denied. 20 C.F.R. §725.310. At the Miner's request, the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. The Miner died on September 26, 2015, while his claim was pending before the OALJ. Director's Exhibit 8.

[2] The appeal in the miner's claim was assigned BRB No. 20-0528 BLA and the appeal in the survivor's claim was assigned BRB No. 20-0529 BLA. We consolidated these appeals for purposes of decision only. *Folden v. W. Va. CWP Fund*, BRB Nos. 20-0528 BLA, 20-0529 BLA (Nov. 5, 2020) (Order) (unpub.).

In her initial decision, the ALJ credited the Miner with eleven years of coal mine employment[3] and found the new evidence established clinical and legal pneumoconiosis.[4] 20 C.F.R. §718.202(a). She therefore found the Miner established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). Considering the claim on the merits, the ALJ found the Miner totally disabled due to pneumoconiosis, 20 C.F.R. §718.204(b), (c), and awarded benefits.

Upon review of Employer's appeal, the Board affirmed, as unchallenged, the ALJ's finding that the Miner was totally disabled. 20 C.F.R. §718.204(b)(2). However, the Board vacated the ALJ's determinations that the Miner had clinical and legal pneumoconiosis and was totally disabled due to pneumoconiosis, and remanded the case for her to reconsider the medical evidence on those issues.[5] *Folden v. W. Va. CWP Fund*, BRB No. 18-0438 BLA (July 17, 2019) (unpub.).

---

[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) (2018); *see* 20 C.F.R. §718.305. Because the ALJ credited the Miner with less than fifteen years of coal mine employment, he was not entitled to the Section 411(c)(4) presumption.

[4] "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). "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). A disease "arising out of coal mine employment" includes "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).

[5] The Board held that the ALJ failed to consider all the relevant x-ray evidence and erred in discrediting a negative x-ray reading based on the x-ray's film quality. *Folden v. W. Va. CWP Fund*, BRB No. 18-0438 BLA, slip op. at 4-6 (July 17, 2019) (unpub.); 20 C.F.R. §718.202(a)(1). Additionally, the Board held that she erred in her analysis of the medical opinions and computed tomography scans when she presumed that chronic obstructive pulmonary disease (COPD) and emphysema are coal mine dust-related diseases. *Folden*, BRB No. 18-0438 BLA, slip op. at 7 & n.14; 20 C.F.R. §§718.202(a)(4), 718.107. It further held that she failed to consider all the relevant medical opinions, or address the documentation and reasoning of the opinions attributing the Miner's respiratory impairments to coal mine dust exposure. *Folden*, BRB No. 18-0438 BLA, slip op. at 6-7

While the miner's claim was pending before the Board, Claimant filed her survivor's claim. The district director awarded benefits and Employer requested a hearing. The claim was forwarded to the OALJ for a hearing. After the Board remanded the miner's claim to the ALJ, the survivor's claim was consolidated with the miner's claim.

In her Decision and Order on Remand dated August 7, 2020, the ALJ found Claimant established the Miner had clinical and legal pneumoconiosis and was totally disabled due to pneumoconiosis. Thus she awarded benefits.

The ALJ then issued an Order in the survivor's claim requiring Claimant to "Supplement Record with Evidence of Dependency" by August 21, 2020. In response to the Order, Claimant submitted four exhibits regarding her eligibility as a dependent and survivor of the Miner. Without holding the hearing Employer requested, the ALJ issued a Decision and Order Awarding Survivor's Benefits on August 14, 2020. Based on the award in the miner's claim, she found Claimant automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[6] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ erred in finding the Miner had clinical and legal pneumoconiosis and was totally disabled due to pneumoconiosis. It argues further the ALJ erred in failing to hold a hearing in the survivor's claim and in not affording it an opportunity to submit rebuttal evidence on the issue of Claimant's dependency.

Claimant has not filed a response brief. In a limited response, the Director, Office of Workers' Compensation Programs (the Director), agrees with Employer that the ALJ erred in failing to hold a hearing in the survivor's claim. He urges the Board to vacate the award of survivor's benefits and remand the case for the ALJ to hold the requested hearing.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence and in

& n.11. Finally, the Board held that she improperly shifted the burden to Employer to prove the Miner's total disability was not due to pneumoconiosis. *Id.* at 8; 20 C.F.R. §718.204(c).

[6] Section 422(*l*) provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the Miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

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 Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Evidentiary Issue

Employer contends the ALJ erred by considering two pulmonary function studies by Dr. Craven that Claimant withdrew at the hearing in the miner's claim. Employer's Brief at 7-8. It argues that by considering Dr. Craven's studies plus the two from Dr. Ajjarapu that Claimant substituted for them, the ALJ considered pulmonary function study evidence in excess of the evidentiary limitations at 20 C.F.R. §725.414. We need not resolve this issue.

The Board previously affirmed, as unchallenged, the ALJ's finding that the Miner was totally disabled. The ALJ's unnecessary analysis of total disability for a second time, including Dr. Craven's studies, thus had no effect on this case.[8] Other than stating generally that pulmonary function study evidence is relevant to determining the existence of legal pneumoconiosis and disability causation, Employer does not explain how the ALJ's consideration of Dr. Craven's pulmonary function studies affected the case. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Miner's Claim--Entitlement under 20 C.F.R. Part 718

To be entitled to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist claimants in establishing these elements when certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 30.

[8] The ALJ also considered Dr. Craven's pulmonary function studies in her initial decision. 2018 Decision and Order at 19-20, 67, 75. To the extent Employer now contends that was error, it forfeited the argument by failing to raise it before the Board in its prior appeal. *See Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 208-10 (4th Cir. 2022).

1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Pneumoconiosis

X-ray readings

The ALJ considered thirteen readings of four new x-rays dated November 9, 2011, February 8, 2012, January 21, 2013, and June 26, 2014. 20 C.F.R. §718.202(a)(1). Dr. Miller, a dually-qualified Board-certified radiologist and B reader, and Dr. Forehand, a B reader, interpreted the November 9, 2011 x-ray as positive for pneumoconiosis. Director's Exhibit 14; Claimant's Exhibit 5. Dr Wolfe, a dually-qualified reader, read this x-ray as negative for parenchymal abnormalities consistent with pneumoconiosis, but identified pleural changes consistent with pneumoconiosis.[9] Director's Exhibit 26. Dr. DePonte, a dually-qualified reader, and Dr. Miller both read the February 8, 2012 x-ray as positive for pneumoconiosis; Drs. Meyer and Tarver, both dually qualified, and Dr. Zaldivar, a B reader, read this x-ray as negative. Director's Exhibit 26; Claimant's Exhibits 3, 4; Employer's Exhibits 1, 8. Dr. Alexander, a dually-qualified reader, read the January 21, 2013 x-ray as positive for pneumoconiosis; Dr. Meyer, an equally qualified physician, interpreted it as negative. Claimant's Exhibit 1; Employer's Exhibit 11. Finally, Dr. Miller read the June 26, 2014 x-ray as positive for pneumoconiosis; Dr. Wolfe read it as negative. Claimant's Exhibit 2; Employer's Exhibit 13.

Addressing the November 9, 2011 x-ray, the ALJ found the preponderance of the readings positive for pneumoconiosis. Additionally, she noted that although Dr. Wolfe classified the November 9, 2011 x-ray as negative for pneumoconiosis, he also observed a pleural change consistent with pneumoconiosis that he commented "could result from [a] cause other than pneumoconiosis." Director's Exhibit 26. Finding Dr. Wolfe's "language was equivocal and did not exclude pneumoconiosis as contributing to" the pleural change, the ALJ accorded his negative x-ray reading little weight. Decision and Order on Remand at 58. She therefore found the November 9, 2011 x-ray positive for pneumoconiosis.

The ALJ found the readings of the February 8, 2012, January 21, 2013, and June 26, 2014 x-rays to be in equipoise for pneumoconiosis based on the equal number of

[9] On the International Labour Organization (ILO) x-ray classification form, Dr. Wolfe indicated there were no parenchymal abnormalities consistent with pneumoconiosis, but he checked "Yes" to indicate that there were pleural abnormalities consistent with pneumoconiosis. He then completed sections of the form used to classify pleural thickening and calcification, commenting that "[t]he right pleural change is nonspecific and could result from [a] cause other than pneumoconiosis." Director's Exhibit 26 at 63 (unpaginated).

positive and negative readings by dually-qualified radiologists with similar experience and radiological teaching qualifications. Decision and Order on Remand at 58-60. Because the ALJ found the November 9, 2011 x-ray positive for pneumoconiosis and the readings of the other three x-rays in equipoise, she concluded "Claimant has established clinical and legal pneumoconiosis by means of x-ray evidence." *Id.* at 60.

Employer contends the ALJ shifted the burden of proof to Employer when she discredited Dr. Wolfe's negative reading of the November 9, 2011 x-ray as equivocal. Employer's Brief at 12-13. We disagree.

Dr. Wolfe classified the x-ray as negative for parenchymal abnormalities consistent with pneumoconiosis, but he indicated that pleural abnormalities consistent with pneumoconiosis were present, and he classified them in accordance with the ILO form's instructions. Director's Exhibit 26 at 64 (unpaginated). Although Dr. Wolfe remarked that the pleural changes "could result" from something other than pneumoconiosis, the ALJ permissibly found his comment equivocal. *Id.* at 63 (unpaginated); *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). The ALJ, as the trier-of-fact, was within her discretion to take Dr. Wolfe's comment about the pleural abnormalities into account when she weighed his reading. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Justice*, 11 BLR at 1-94. We therefore reject Employer's allegation of error.[10]

Thus, to the extent the ALJ found the November 9, 2011 x-ray positive for clinical pneumoconiosis, we affirm her finding as permissible and supported by substantial evidence. However, Employer correctly asserts that the ALJ also erred in failing to consider several of the Miner's treatment record x-ray readings that Employer submitted. Employer's Brief at 14-15; Employer's Exhibits 3, 4, 16, 17. Although the ALJ set forth many of these x-rays in her list of the medical evidence, she did not evaluate them in her analysis of the x-ray evidence. Decision and Order on Remand at 55-61. None of these treatment x-rays diagnosed pneumoconiosis. The ALJ erred by not considering and weighing these readings as part of her analysis regarding clinical pneumoconiosis, as all relevant evidence must be weighed together to determine if Claimant established the Miner had clinical pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 211 (4th Cir. 2000).

Additionally, we agree with Employer that the ALJ erred in finding the positive x-ray evidence established both clinical and legal pneumoconiosis. Clinical and legal

[10] Because we hold the ALJ permissibly accorded less weight to Dr. Wolfe's negative reading of the November 9, 2011 x-ray, we need not address Employer's argument that the ALJ did not adequately explain why she credited the positive reading of a B reader, Dr. Forehand, over Dr. Wolfe's negative reading.

pneumoconiosis are distinct diseases. Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses," 20 C.F.R. §718.201(a)(1), and is "generally characterized by certain opacities appearing on a chest x-ray." *Compton*, 211 F.3d at 210. "Legal pneumoconiosis" is a broader category of diseases arising out of coal mine employment, including "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). Unless aided by the benefit of a presumption, a claimant must establish that a chronic respiratory or pulmonary impairment constitutes legal pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 308-09 (4th Cir. 2012). Where, as here, the record includes diagnoses of respiratory or pulmonary impairments such as emphysema and chronic obstructive pulmonary disease (COPD), a diagnosis of clinical pneumoconiosis on an x-ray, standing alone, does not establish that those other impairments arose out of coal mine employment. *See* 20 C.F.R. §718.201(a)(1),(2).

Therefore, we vacate the ALJ's finding that the new x-ray evidence established both clinical and as well as legal pneumoconiosis at 20 C.F.R. §718.202(a)(1), and remand the case for further consideration of all the relevant x-ray evidence.

Computed tomography (CT) scan readings

The ALJ next considered multiple CT scan readings. Decision and Order on Remand at 20-22, 61-64; *see* 20 C.F.R. §718.107 (presence of pneumoconiosis may be demonstrated through use of any other "medically acceptable test or procedure"). Employer submitted Dr. Meyer's interpretations of three CT scans dated December 29, 2010, March 3, 2015, and March 6, 2015. Dr. Meyer read each as negative for pneumoconiosis, while noting findings of emphysema, granuloma, pleural thickening, atelectasis, and airspace opacity due to aspiration pneumonia. Employer's Exhibits 7, 19, 20. The Miner's treatment records contained multiple additional CT scan readings, none of which diagnosed pneumoconiosis; they included findings of atelectasis, pneumonia, and emphysema. Employer's Exhibits 3 at 3; 4 at 19; 20, 21, 22, 46; 16 at 3, 14; 17 at 31, 47.

The ALJ weighed Dr. Meyer's CT scan interpretations along with those from the treatment records and found they supported a finding of pneumoconiosis because Dr. Meyer, and Drs. Valiveti and Vaughn in the treatment records, found pleural thickening. She also found Dr. Antoun diagnosed COPD on a treatment record CT scan on which he also observed bibasilar consolidations or fibrosis, and he opined the distribution and extent of these findings had increased compared to a prior CT scan. Decision and Order on Remand at 61-64. The ALJ noted that progression was consistent with the Department of Labor's findings in the preamble to the 2001 regulations that pneumoconiosis can be a latent and progressive disease. Thus, she found the CT scans corroborated the x-ray evidence of "clinical and legal pneumoconiosis" and supported "a finding that the COPD

and emphysema in this case were a manifestation of coal workers' pneumoconiosis attributable to [the] Miner' s occupational exposure to coal mine dust for over a decade." Decision and Order on Remand at 64.

There is merit to Employer's contention that the ALJ erred in evaluating the CT scan evidence. Employer's Brief at 16-22. Initially, the ALJ did not explain the weight she accorded Dr. Meyer's opinion that the three CT scans he read were negative for pneumoconiosis. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016). The ALJ's decision thus does not comply with the explanatory requirements of the Administrative Procedure Act (APA).[11]

Additionally, the Board previously held the ALJ erred in presuming that emphysema and COPD are coal mine dust related diseases and thus necessarily fall within the definition of legal pneumoconiosis. *Folden*, BRB No. 18-0438 BLA, slip op. at 7. On remand, contrary to the Board's instructions, the ALJ again presumed that emphysema and COPD constitute legal pneumoconiosis. Decision and Order on Remand at 64. Because the evidence did not establish the Miner had at least fifteen years of qualifying coal mine employment, Claimant did not invoke the Section 411(c)(4) presumption and, thus, was not entitled to a presumption that the Miner had pneumoconiosis. Consequently, the ALJ was required to address whether Claimant established the Miner's emphysema and COPD were "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); *Trent*, 11 BLR at 1-27. Therefore, we vacate the ALJ's finding that the CT scans establish pneumoconiosis. *See* 20 C.F.R. §718.107.

Medical Opinions

Again, to establish legal pneumoconiosis, Claimant must demonstrate that the Miner had a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Initially, we agree with Employer that the ALJ erred in her consideration of the medical opinions that the Miner's treating physicians, Drs. Smith and Remines, provided. Each physician submitted a letter dated January 6, 2017, containing the following identical statement regarding the cause of the Miner's emphysema and COPD:

> I am writing this letter to verify the medical condition of my former patient, [the Miner]. [He] was diagnosed with bullous emphysema and chronic

[11] The Administrative Procedure Act requires that every adjudicatory decision include "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).

> airway obstruction. Although I do not have definitive documentation, I feel his lung disorders were a result of exposure to coal and tobacco.

Claimant's Exhibits 9, 10.

The ALJ found the opinions of Drs. Smith and Remines well-reasoned and entitled to "controlling weight." Decision and Order on Remand at 66. She noted Dr. Smith treated the miner for over a decade and Dr. Remines treated him for six years, and that Dr. Smith conducted objective tests, including CT scans and x-rays. The ALJ concluded that Drs. Smith and Remines based their opinions on their years of treatment and observation of the Miner. But she erred by failing to address the specific reasons the doctors attributed the Miner's respiratory conditions to coal mine dust exposure, contrary to the Board's previous instruction.[12] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 20 C.F.R. §718.104(d)(5) (weight accorded to a treating physician's opinion "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation"); *Folden*, BRB No. 18-0438 BLA, slip op. at 6-7. As such, the ALJ's finding that Drs. Smith's and Remines's diagnoses "fall within the definition of pneumoconiosis" is not supported by substantial evidence. Decision and Order on Remand at 66.

Next, Dr. Forehand diagnosed clinical pneumoconiosis, and legal pneumoconiosis in the form of obstructive lung disease due to coal mine dust exposure and smoking. Director's Exhibit 14; Employer's Exhibit 10. In the Board's previous decision, it noted the ALJ gave Dr. Forehand's diagnosis of coal workers' pneumoconiosis "significant weight," but she did not address its underlying documentation or address the doctor's basis for attributing the Miner's obstructive lung disease to his coal mine dust exposure. *Folden*, BRB No. 18-0438 BLA, slip op. at 6 n.13. Although the ALJ identified relevant aspects of Dr. Forehand's opinion on remand, because of her errors regarding the x-rays and CT scans and her misapplication of the definition of pneumoconiosis, we are unable to ascertain whether she correctly evaluated his opinion. Decision and Order and Order on Remand at 67-68. As we must remand this case for further consideration of the x-ray and CT scan evidence, which could affect the ALJ's weighing of Dr. Forehand's diagnoses of clinical and legal pneumoconiosis, we also vacate the ALJ's weighing of Dr. Forehand's opinion.

[12] The ALJ cited Drs. Smith's and Remines's diagnoses of COPD, chronic bronchitis, emphysema, and asthma in the Miner's treatment records, and she noted the Miner's progressive decline from those impairments. Decision and Order on Remand at 64-66. The treatment records, however, do not link any of these diagnoses to coal mine dust exposure. Employer's Exhibits 4, 17, 18; Claimant's Exhibits 12, 13.

Drs. Castle and Zaldivar opined the Miner had neither clinical nor legal pneumoconiosis and that his COPD was due to smoking. Decision and Order on Remand at 32-40; Director's Exhibit 26; Employer's Exhibits 5, 21, 22. The ALJ discredited their opinions because they did not adequately explain how they determined the Miner's coal mine dust exposure did not also contribute to his disabling obstructive pulmonary impairment. Decision and Order on Remand at 70-72. She specifically found "Dr. Zaldivar did not explain how he was able to foreclose coal mine dust's additive or contributory effect," or explain his view that smoking would have been more harmful than the Miner's coal mine dust exposure, which the ALJ found especially problematic given that she had found the x-ray evidence positive for pneumoconiosis. *Id*. Similarly, the ALJ found Dr. Castle's opinion on the etiology of the Miner's COPD and emphysema not well-reasoned because "both the [p]reamble [to the revised 2001 regulations] and medical literature support that coal dust exposure and cigarette smoking cannot be separated." Decision and Order on Remand at 71.

Employer contends the ALJ erred in discrediting Drs. Zaldivar's and Castle's opinions for these reasons. Employer's Brief at 33-38. We agree.

While an ALJ may refer to the medical science discussed in the preamble when weighing a medical opinion, *see Looney*, 678 F.3d at 314-16, the preamble does not state that all COPD and emphysema in coal miners constitutes legal pneumoconiosis.[13] We therefore vacate the ALJ's credibility determination regarding Dr. Castle's opinion. Further, because the ALJ's analysis of Dr. Zaldivar's opinion was based in part on her finding as to the x-ray evidence, which we have vacated, we also vacate her discrediting of Dr. Zaldivar's opinion.

Disability Causation

Because the ALJ's weighing of the medical opinions on the issue of disability causation was based on her findings of clinical and legal pneumoconiosis, which we have vacated, we also vacate the ALJ's finding that the Miner was totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c).

Reassignment

In light of the Board's previous remand of this case and the ALJ's failure to follow the Board's instructions and repetition of errors, we conclude that "review of this claim requires a fresh look at the evidence . . . ." *Hicks*, 138 F.3d at 537 (instructing that review

[13] The portion of the preamble the ALJ cited discusses medical literature showing that coal mine dust exposure can cause clinically significant obstruction. 65 Fed. Reg. 79920, 79939 (Dec. 20, 2000).

of the claim required a fresh look at the evidence, unprejudiced by the various outcomes of the ALJ, where he made errors of law including failing to consider all of the relevant evidence and to adequately explain his rationale for crediting certain evidence); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Thus, we direct the case be reassigned to a different ALJ on remand.

Remand Instructions—Miner's Claim

On remand, the new ALJ must reconsider whether the x-ray, CT scan, and medical opinion evidence establishes the existence of pneumoconiosis. 20 C.F.R. §718.202(a). When reconsidering whether the medical opinion evidence establishes the existence of clinical or legal pneumoconiosis, or both, the new ALJ should address the comparative credentials[14] of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. Moreover, on remand, the new ALJ must weigh all the relevant evidence together under 20 C.F.R. §718.202(a) to determine whether the Miner suffered from clinical or legal pneumoconiosis, and thus whether Claimant has established a change in an applicable condition of entitlement. *Compton*, 211 F.3d at 211; 20 C.F.R. §725.309(c). In setting forth his or her analysis and conclusions, the new ALJ should address clinical pneumoconiosis and legal pneumoconiosis separately.

If on remand Claimant establishes the Miner had pneumoconiosis arising out of coal mine employment, the new ALJ must then consider whether Claimant has established that the Miner's pneumoconiosis was a substantially contributing cause of his total disability.

---

[14] Employer contends the current ALJ erred in going outside of the record to find the qualifications of Drs. Smith, Remines, and Antoun online. Employer's Brief at 26 & n.8. We disagree. Under 29 C.F.R. §18.84:

> On motion of any party, or the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary of the matter noticed.

29 C.F.R. §18.84; *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 138-39 (1990). Consistent with 29 C.F.R. §18.84, the ALJ referenced the doctors' qualifications in her Decision and Order and the parties had thirty days to object and show the contrary. Decision and Order on Remand at 9, 11; *see* 20 C.F.R. §725.479(b). We therefore reject Employer's allegation of error. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989).

See 20 C.F.R. §718.204(c). Employer does not bear a burden to establish that no part of the Miner's disability was caused by pneumoconiosis.[15]

Survivor's Claim

Because we have vacated the award of benefits in the miner's claim, we also vacate the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*). We also address Employer's argument that the ALJ failed to hold the hearing Employer requested.

After the district director awarded benefits, Employer timely requested a hearing and the survivor's claim was forwarded to the OALJ for a hearing. SC Director's Exhibits 13, 14. The case was assigned to ALJ Paul Almanza, who scheduled a hearing for April 1, 2020. On February 12, 2020, however, he canceled the hearing because the miner's claim was pending on remand before ALJ Rosen. ALJ Almanza returned the case to docketing for reassignment to ALJ Rosen for consolidation with the miner's claim, which the parties did not oppose.

The ALJ issued her decision awarding benefits on remand in the miner's claim on August 7, 2020. On the same day, without scheduling a hearing in the survivor's claim, the ALJ ordered Claimant to submit evidence that she was a dependent of the Miner for purposes of her survivor's claim. On August 13, 2020, Claimant submitted evidence of her dependency. On August 14, 2020, the ALJ awarded benefits in the survivor's claim under Section 932(*l*) of the Act. The ALJ noted "[t]he parties stipulated and the record showed that [Claimant] was the Miner's widow dependent for the purposes of augmentation."[16] August 14, 2020 Decision and Order Awarding Survivor's Benefits at 3.

Employer argues it requested a hearing in the survivor's claim and never withdrew its request. Employer's Brief at 49. It contends the ALJ's failure to hold a hearing while allowing Claimant to submit evidence without providing it the opportunity to respond violated its due process rights. *Id.*

[15] The current ALJ appeared to apply both a "substantially contributing cause" standard to Claimant and a "no part" standard to Employer. Decision and Order on Remand at 83-84 (when discrediting Dr. Castle's disability causation opinion); Employer's Brief at 40-41.

[16] The stipulation the ALJ referred to occurred at the 2017 hearing in the miner's claim. Decision and Order Granting Claimant's Modification Request and Awarding Benefits on Remand at 3; Hearing Tr. at 7.

The Director agrees the ALJ erred in not holding the requested hearing. Director's Brief at 2. He urges the Board to vacate the award of benefits in the survivor's claim and remand the case to the ALJ to hold a hearing and give Employer an opportunity to submit dependency rebuttal evidence.

The Act and regulations mandate that an ALJ hold a hearing on any claim whenever a party requests such a hearing, *see* 20 C.F.R. §§725.421(a), 725.450, 725.451, unless one of the following exceptions applies: (1) the right to a hearing is waived, in writing, by the parties, 20 C.F.R. §725.461(a); (2) a party requests summary judgment and the ALJ determines there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, 20 C.F.R. §725.452(c); or (3) the ALJ notifies the parties by written order of his or her belief that a hearing is not necessary, allowing at least thirty days for the parties to respond, and no party requests that a hearing be held. 20 C.F.R. §725.452(d). We agree that none of these exceptions was applicable before the ALJ. Thus, we instruct the new ALJ to hold the hearing Employer requested unless he or she finds one of the regulatory exceptions applicable, and to provide it with an opportunity to submit dependency rebuttal evidence.

Remand Instructions—Survivor's Claim

On remand, after properly addressing Employer's hearing request, should the new ALJ award benefits in the miner's claim and find Claimant establishes dependency, Claimant is derivatively entitled to benefits in the survivor's claim. 30 U.S.C. §932(*l*). If the new ALJ denies benefits in the miner's claim, he or she must consider whether Claimant can establish dependency and that the Miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.205. In making his or her determinations, the new ALJ must consider all relevant evidence, set forth his or her findings in detail, and explain his or her underlying rationale as the APA requires. 5 U.S.C. §557(c)(3)(A); 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Granting Claimant's Request for Modification and Awarding Benefits on Remand and vacate the Decision and Order Awarding Survivor's Benefits, and remand the cases to the OALJ for reassignment to a different ALJ for further consideration and proceedings consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge