**U.S. Department of Labor**

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

BRB No. 17-0363 BLA

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| EVETTE E. HAGY<br>(Widow of JERRY R. HAGY) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| WELLMORE COAL COMPANY<br>c/o WELLMORE ENERGY | ) | |
| and | ) | |
| | ) | DATE ISSUED: 04/26/2018 |
| SECURITY INSURANCE COMPANY OF HARTFORD | ) | |
| 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 Benefits of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Matthew Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05898) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a survivor's claim filed on December 1, 2013.[2]

Based on his determination that the miner had thirteen years of coal mine employment, the administrative law judge found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge also found that there is no evidence of complicated pneumoconiosis, and therefore claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Considering whether claimant could establish entitlement to benefits without the aid of a presumption, the administrative law judge found that claimant established the existence of legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's calculation of the miner's years of coal mine employment. Employer asserts that this, and other errors, tainted the administrative law judge's weighing of the medical opinion evidence relevant to the existence of legal pneumoconiosis and death causation pursuant to 20 C.F.R.

[1] Employer requested a decision on the record, to which claimant, through counsel, agreed. Decision and Order at 2.

[2] Claimant is the widow of the miner, who died on August 11, 2013. Director's Exhibit 12. The miner's third and final claim, filed on July 24, 2006, was denied by the district director on April 30, 2007, because the evidence was insufficient to establish pneumoconiosis. Director's Exhibit

[3] Relevant to this claim, Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

§§718.202(a), 718.205.[5] Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.

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.[6] 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).

**Length of Coal Mine Employment**

Claimant bears the burden of proof to establish the number of years the miner actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold the administrative law judge's determination if it is based on a reasonable method

[5] Eight months after filing its brief in support of the Petition for Review, and six months after the briefing schedule closed, employer moved to hold this case in abeyance pending a decision from the United States Supreme Court in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), cert. granted, U.S. , 2018 WL 386565 (Jan. 12, 2018). In its motion, employer argues for the first time that the manner in which Department of Labor (DOL) administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 2. Because the Supreme Court will address in *Lucia* whether Securities and Exchange Commission administrative law judges are "inferior officers" within the meaning of the Appointments Clause, employer requests that this case be held in abeyance until the Court resolves the issue. *Id*. The Director, Office of Workers' Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. We agree with the Director. We generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered 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). While we retain the discretion in exceptional cases to consider nonjurisdictional constitutional claims that were not timely raised, *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991), employer has not attempted to show why this case so qualifies. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. Therefore, employer's motion to hold this case in abeyance is denied.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

of computation and is supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

The administrative law judge determined that the miner's Social Security Administration (SSA) records "establish[] seventy-three quarters of potential coal mine employment between 1966 and 1989." Decision and Order at 4; Director's Exhibit 7. The administrative law judge also noted that the record includes employment letters from two of the miner's employers, Jewell Coal and Coke Company (Jewell Coal and Coke) and Rapoca Energy Company (Rapoca Energy). Decision and Order at 4. The employment letters indicate that the miner worked at the coke plant for Jewell Coal and Coke from May 19, 1974 through June 25, 1979, and for Rapoca Energy from December 9, 1987 through September 9, 1989. Director's Exhibits 8, 9.

Observing that the regulations specifically provide that coke oven workers are not considered "miners" under the Act, the administrative law judge determined that "the twenty-one quarters of employment for Jewell Coal and Coke" from May 19, 1974 through June 25, 1979 would not be credited as coal mine employment. Decision and Order at 4, *citing* 20 C.F.R. §725.101(a)(19). The administrative law judge, therefore, deducted twenty-one quarters of employment from the seventy-three quarters of potential coal mine employment he found established by the SSA records and concluded that the miner worked fifty-two quarters, or thirteen years, in coal mine employment. Decision and Order at 4-5.

Employer initially asserts that claimant is bound by the miner's stipulation in his second claim that he worked 9.94 years in coal mine employment, and that the administrative law judge erred in not acknowledging the stipulation. Employer's Brief at 5-6, *citing* 20 C.F.R. §725.309(c)(5); Director's Exhibit 25. We disagree. Contrary to employer's assertion, the regulation at 20 C.F.R. §725.309(c)(5) is not applicable in this survivor's claim, as that section applies to subsequent claims. *Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61, 1-64-65 (2012). Moreover, as claimant was not a party to the miner's claim she is not bound by the length of coal mine employment determination made therein. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217-18, 23 BLR 2-393, 2-401 (4th Cir. 2006).

We agree with employer, however, that the administrative law judge did not adequately explain how he computed the length of the miner's coal mine employment and, thus, failed to comply with the Administrative Procedure Act (APA).[7] *See Wojtowicz v.*

[7] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis

*Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While the administrative law judge generally referenced the miner's SSA records, he did not identify any of the coal mine employers or otherwise specify what evidence he credited to determine that the miner had "seventy-three quarters of potential coal mine employment between 1966 and 1989." Decision and Order at 4; Director's Exhibit 7. Further, we are unable to discern the basis for this finding in light of the fact that the SSA records indicate quarters in which the miner received less than fifty dollars in earnings, and do not reflect quarterly earnings after 1978. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984) (for pre-1978 employment, it is reasonable to credit the miner with each quarter in which at least $50 in earnings from coal mine employment is reflected in the Social Security records). Additionally, the SSA records reflect that the miner had concurrent periods of coal mine employment with more than one employer as well as intervening periods of employment with non-coal mine employers. Thus, as employer asserts, the administrative law judge's findings lack sufficient specificity to allow us to determine whether they are based on a reasonable method of computation and supported by substantial evidence. Employer's Brief at 7.

Because the administrative law judge's evaluation of the coal mine employment evidence does not comply with the APA, we must vacate the administrative law judge's finding that the miner had thirteen years of coal mine employment, and remand the case for further consideration. *Wojtowicz*, 12 BLR at 1-165. On remand, the administrative law judge must consider all relevant evidence, including the miner's Department of Labor (DOL) work history forms[8] and SSA records,[9] and fully explain his findings as to the length of the miner's coal mine employment.

Because we have vacated the administrative law judge's finding that claimant did not establish fifteen years of qualifying coal mine employment, we must vacate his finding that claimant did not invoke the Section 411(c)(4) presumption of death due to pneumoconiosis.

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therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[8] A handwritten entry on the miner's 1995 CM-911a Employment History Form reflects that he also worked for Eastern Energy Corporation from August 17, 1981 to October 1985. Director's Exhibit 2.

[9] We note that the miner's Social Security Administration records "version 1984.002" include earnings from Rapoca Energy Company that are missing from "version 2009.001." Director's Exhibits 2, 7.

Because the administrative law judge already analyzed this claim under 20 C.F.R. Part 718 with the burden of proof on claimant, we will address employer's contentions that the administrative law judge erred in finding that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

**Death Due to Pneumoconiosis**

In a survivor's claim where the Section 411(c)(3) and 411(c)(4) presumptions are not invoked, claimant must affirmatively establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). Failure to establish any one of the requisite elements precludes an award of benefits. *See Trumbo*, 17 BLR at 1-87-88.

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a) and, therefore, erred in finding that the miner's death was due to legal pneumoconiosis at 20 C.F.R. §718.205. The administrative law judge considered the opinions of Drs. Forehand, Rosenberg, and Castle. Decision and Order at 10-14, 16-18; Director's Exhibits 13, 14; Employer's Exhibit 1. Dr. Forehand[10] concluded that the miner had legal pneumoconiosis in the form of chronic bronchitis due to cigarette smoking and coal dust exposure, while Drs. Rosenberg and Castle attributed the miner's chronic obstructive pulmonary disease (COPD) solely to cigarette smoking. The administrative law judge noted that Dr. Forehand relied on a history of nineteen to twenty years of coal mine employment, and credited Dr. Forehand's opinion as sufficient to support a finding of legal pneumoconiosis. Decision and Order at 18. Conversely, the administrative law judge discredited the opinions of Drs. Rosenberg and Castle as inconsistent with the scientific evidence credited by the DOL in the preamble to the 2001 revised regulations. The administrative law judge further found

[10] Dr. Forehand examined the miner on behalf of the DOL on March 13, 1995, and diagnosed the miner with legal pneumoconiosis in the form of chronic bronchitis and cor pulmonale that he attributed to the miner's cigarette smoking and twenty years of coal dust exposure. Director's Exhibit 14. On July 26, 1995, Dr. Forehand provided a letter opinion to the district director acknowledging that if the miner had only five years of coal dust exposure rather than twenty, he would amend his report to diagnose chronic bronchitis and cor pulmonale due to cigarette smoking. Dr. Forehand stated that he would eliminate the diagnosis of pneumoconiosis because of an insignificant amount of coal dust exposure. *Id.* Dr. Forehand performed another DOL examination on November 12, 1998 and, based on nineteen years of coal dust exposure, diagnosed legal pneumoconiosis in the form of chronic bronchitis due to cigarette smoking and coal dust exposure. Director's Exhibit 13.

that neither physician adequately explained how he eliminated the miner's coal mine dust exposure as a cause of his COPD. Decision and Order at 17-18. Based on these findings, the administrative law judge concluded that Dr. Forehand's opinion established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id*. at 18.

Employer argues that the administrative law judge did not adequately address Dr. Forehand's reliance on a coal mine employment history that was 46-53% higher than the administrative law judge's determination when he credited Dr. Forehand's opinion that the miner had legal pneumoconiosis. Employer's Brief at 9-13. We agree.

We have vacated the administrative law judge's finding of thirteen years of coal mine employment and his findings on remand may be different. Even assuming that the administrative law judge again finds thirteen years of coal mine employment established, Dr. Forehand relied on a history of nineteen to twenty years. The administrative law judge did not explain whether Dr. Forehand's assumption undermined the credibility of his opinion. Decision and Order at 10-11; *see Wojtowicz*, 12 BLR at 1-165. Moreover, the administrative law judge did not explain his determination to credit Dr. Forehand's opinion beyond stating that it is "sufficient to establish the presence of legal pneumoconiosis." Decision and Order at 18. Because we are unable to discern the basis for the administrative law judge's finding, we vacate the administrative law judge's determination to credit Dr. Forehand's opinion. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000)*; Wojtowicz*, 12 BLR at 1-165.

We therefore vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge should consider all of the relevant evidence and determine the length of the miner's coal mine employment, then reassess Dr. Forehand's opinion in light of that determination.[11] Further, when considering whether Dr. Forehand's opinion establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address Dr. Forehand's explanations for his conclusions, the documentation underlying his medical judgment, and the bases for his

[11] We reject, however, employer's contention that the administrative law judge must also reevaluate the length of the miner's smoking history. Employer's Brief at 8-9. Employer asserts that in finding that the miner had a smoking history of at least thirteen to fifteen years, the administrative law judge failed to consider the smoking history recorded by Dr. McSharry in 1999 in the miner's claim. *Id*., *referencing* Decision and Order at 3-4. Contrary to employer's argument, Dr. McSharry's report was not designated as medical evidence in the survivor's claim. *See* 20 C.F.R. §725.414; *Keener v. Peerless Eagle* Coal Co., 23 BLR 1-229, 1-240-242 (2007) (en banc).

diagnosis.[12] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997). If, on remand, the administrative law judge finds that Dr. Forehand's opinion establishes the existence of legal pneumoconiosis, he should then weigh together all the relevant evidence to determine whether the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a).[13] *See Compton*, 211 F.3d at 211, 22 BLR at 2-174.

[12] We reject employer's argument that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Castle that the miner suffered from disabling chronic obstructive pulmonary disease (COPD) due entirely to smoking. Director's Exhibit 14; Employer's Exhibit 1. While the administrative law judge properly considered the qualifications of all of the physicians, *see* Decision and Order at 10-13, he was not required to accord weight to the opinions authored by the physicians with superior qualifications. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Further, the administrative law judge correctly observed that Drs. Rosenberg and Castle relied, in part, on the view that the miner's testing reflecting a reduced $FEV_1$/FVC ratio is a pattern of impairment that is generally consistent with smoking-induced obstruction and not impairment related to coal dust exposure. The administrative law judge permissibly discredited the physicians' rationale on the basis that they did not adequately explain why they concluded that coal dust did not contribute to, or aggravate, claimant's COPD. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); Decision and Order at 16-18.

[13] We find no merit to employer's argument that the administrative law judge erred in considering the miner's treatment notes from Dr. Sutherland, Dr. Patel, and Buchanan General Hospital that were admitted into the record at Director's Exhibit 13. Decision and Order at 2; Employer's Brief at 12. Because treatment records fall outside the scope of the evidentiary limitations under 20 C.F.R. §725.414, the administrative law judge permissibly considered them. 20 C.F.R. §725.414(a)(4); *Keener*, 23 BLR at 1-239; Decision and Order at 14-16. Moreover, the administrative law judge did not rely on these treatment records to find legal pneumoconiosis established. Director's Exhibit 16. We note further that these treatment notes were included in the evidence submitted to the Office of Administrative Law Judges by the district director under 20 C.F.R. §725.421, and were admitted without objection pursuant to 20 C.F.R. §725.455(b). As they were not subject to the evidentiary limitations, they thus properly were in evidence and could be considered by the administrative law judge.

Employer next argues that the administrative law judge erred in finding that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Employer's Brief at 13-16. Because the administrative law judge relied on his legal pneumoconiosis finding to conclude that claimant established death due to pneumoconiosis at 20 C.F.R. §718.205(b), we vacate that finding and further vacate the award of benefits.

**Remand Instructions**

If, on remand, the administrative law judge finds that claimant has established at least fifteen years of coal mine employment, he must further determine whether the miner's employment constituted *qualifying* coal mine employment for purposes of invoking the Section 411(c)(4) presumption, i.e., was "in one or more underground mines" or at a surface mine "in conditions substantially similar to those in underground mines." 20 C.F.R. §718.305(b)(1)(i). If so, the administrative law judge must also determine whether claimant has established that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, can invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b). In that event, claimant is entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis, and the administrative law judge must then assess whether employer has rebutted the applicable presumption. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

If the administrative law judge finds that claimant cannot invoke the Section 411(c)(4) presumption, the administrative law judge must reconsider whether claimant has established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a) and that the miner's death was due to legal pneumoconiosis at 20 C.F.R. §718.205(b), as discussed above.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge