BRB Nos. 09-0408 BLA
and 09-0416 BLA

WILMA WILLIAMSON (Widow of EARL WILLIAMSON)	)	
Claimant-Respondent	)	DATE ISSUED: 02/26/2010
v.	)	
ROBERT COAL COMPANY	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Administrative Law Judge Daniel F. Solomon, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order (2005-BLA-06056 and 2006-BLA-05944) of Administrative Law Judge Daniel F. Solomon awarding benefits in a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The miner filed a claim for benefits on September 19, 1988, which was denied by the district director on September 5, 1989, based upon the miner's failure to establish any of the elements of entitlement. The miner filed a second application for benefits on August 6, 2004. The district director determined that, although the miner established that he had

pneumoconiosis, he did not prove that he was totally disabled. The miner requested a hearing, but died on June 25, 2005, before the district director acted on his request.

Claimant, the miner's surviving spouse, filed an application for survivor's benefits on September 12, 2005. The district director issued an initial finding of entitlement and employer requested a hearing, which was convened before the administrative law judge on March 13, 2007. The administrative law judge granted the parties' request that the survivor's claim be remanded to the district director for consolidation with the miner's claim. A hearing with respect to the consolidated claims was held on August 8, 2008.

In the Decision and Order, the administrative law judge credited the miner with nine years and nine months of coal mine employment and determined that employer is the properly designated responsible operator. The administrative law judge noted that the miner's August 6, 2004 claim was a subsequent claim pursuant to 20 C.F.R. §725.309(d). The administrative law judge determined that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(2), (4) and 718.203(c), and total disability due to pneumoconiosis under 20 C.F.R. §718.204(b)(2)(iii), (iv) and (c). Based upon these findings, the administrative law judge awarded benefits in the miner's claim.

With respect to the survivor's claim, the administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(2), (4) and 718.203(c) and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in the survivor's claim.

Employer argues on appeal that the administrative law judge did not properly weigh the relevant medical evidence and did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in rendering his findings. Claimant has responded and urges affirmance of the awards of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[1]

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had nine years and nine months of coal mine employment, that employer is the responsible operator, and his findings that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), (3) or legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), in either claim, and did not establish total disability under 20 C.F.R. §718.204(b)(2)(i), (ii), in the miner's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[2] 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).

I. The Miner's Claim

A. Claimant's Burden of Proof

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in the miner's claim, claimant is required to establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

B. Subsequent Claim and Consideration of Entitlement on the Merits

We note initially that although the administrative law judge acknowledged that the miner's 2004 claim was a subsequent claim and determined that the newly submitted evidence was sufficient to prove the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis, he did not render an explicit finding as to whether claimant established a change in an applicable condition of entitlement under Section 725.309. In addition, the administrative law judge did not consider whether the evidence of record, including the evidence from the miner's prior claim, was sufficient to establish entitlement on the merits.

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 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.*, 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). The miner's prior claim was denied because he failed to establish the existence of pneumoconiosis and that he was totally disabled by a respiratory or

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 1 at 415. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing either that the miner had pneumoconiosis or that he was totally disabled. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) (holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

In the present case, the administrative law judge first stated that the miner's initial claim was denied because he failed to establish any of the elements of entitlement, but then stated that the miner's first claim was denied on the grounds that he did not establish total disability or total disability due to pneumoconiosis. Decision and Order at 2, 4. A review of the record supports the administrative law judge's initial characterization of the bases for the denial of the miner's first claim. Director's Exhibit 1 at 15. In light of our decision to vacate the administrative law judge's findings under Sections 718.202(a)(2), (4), 718.203(c), 718.204(b)(2)(iii), (iv), and 718.204(c), *see discussion infra*, we instruct the administrative law judge to render an explicit finding on remand as to whether the newly submitted evidence is sufficient to establish the existence of pneumoconiosis or total disability. If this threshold requirement is satisfied, the administrative law judge must consider entitlement on the merits, based upon a consideration of all of the evidence of record. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3.

C. The Existence of Pneumoconiosis

Pursuant to Section 718.202(a)(2), the administrative law judge considered reports submitted by Drs. Gruetter, Oesterling, and Dennis. Dr. Gruetter examined tissue removed during a wedge resection of the left upper lobe of the miner's lung on June 17, 2004. Director's Exhibit 17. Dr. Gruetter observed the presence of "poorly differentiated adenocarcinoma," "seven intrapulmonary lymph nodes with sinus histiocytosis and anthracosis," and anthracosis in "the left AP window nodes, hilar nodes and interlobar node." Director's Exhibit 17. Dr. Oesterling reviewed twenty tissue slides from the resection and, in a report dated June 8, 2005, concluded that the miner had "a very mild form of macular coal workers' pneumoconiosis, a level of disease which should impose no limitation on [his] breathing ability[.]" Employer's Exhibit 10.

Dr. Dennis performed an autopsy on the miner on June 28, 2005. Director's Exhibit 60. Upon gross examination of the "bi-lobed lung," Dr. Dennis observed black pigment deposition and/or macule development on the pleural surfaces, hilar lymph nodes, and the lower lobe with "very little fibrosis." *Id*. Dr. Dennis's summary of his microscopic examination of the miner's lung tissue includes numerous references to adenocarcinoma, emphysematous changes, macular development and black pigment deposition. *Id*. Dr. Dennis concluded that the miner had anthracosilicosis and cor pulmonale. *Id.*

Dr. Oesterling reviewed seventeen tissue slides prepared from tissue removed during the autopsy and presumed, based upon Dr. Dennis's reference to the "bi-lobed lung," that they were from the miner's left lung and the surrounding lymph nodes. Employer's Exhibit 11. Dr. Oesterling determined that the level of dust deposition that he observed "is insufficient to warrant a diagnosis of coal workers' pneumoconiosis." *Id*. Dr. Oesterling also stated, "[t]he limited dust present produce[d] no structural alteration, thus there would have been no functional alteration due to this dust." *Id*.

With respect to the biopsy evidence, the administrative law judge determined that Dr. Gruetter's references to anthracosis constituted a diagnosis of clinical pneumoconiosis, as that term is included in the regulatory definition of the disease. Decision and Order at 35, *citing* C.F.R. §718.201(a)(1). The administrative law judge further found that Dr. Oesterling's reference to anthracotic pigment and fibrosis in the miner's lymph nodes and his diagnosis of mild macular coal workers' pneumoconiosis (CWP) were sufficient to establish the existence of pneumoconiosis. Decision and Order at 35.

Regarding the autopsy evidence, the administrative law judge stated that Dr. Dennis's diagnosis of anthracosilicosis was entitled to greater weight, "as I find it to be well[-]reasoned and most supported by the biopsy evidence." *Id*. The administrative law judge explained that Dr. Dennis's references to black pigmentation, fibrosis, silica deposition and macular development were "substantiated by Drs. Gruetter's and Oesterling's biopsy findings." *Id*. The administrative law judge also indicated that Dr. Dennis's description of greater amounts of pigmentation, fibrosis and silica than were found in the biopsy slides was consistent with the progressive nature of pneumoconiosis. *Id*. The administrative law judge gave less weight to Dr. Oesterling's autopsy report on the grounds that he was the only pathologist who did not diagnose pneumoconiosis and that his conclusion, that the autopsy slides did not demonstrate the presence of fibrosis in the miner's lymph nodes, conflicted with his assessment of the biopsy evidence. Decision and Order at 35.

In resolving the conflict between the opinions of Dr. Oesterling and Dr. Dennis regarding the amount of pigmentation and fibrosis in the miner's lungs and lymph nodes, the administrative law judge found that Dr. Dennis's findings were "more consistent with the record and better documented." *Id*. at 36. The administrative law judge also determined that Dr. Dennis's ability to view the entire lung while performing the autopsy gave him an advantage in assessing the amount of pigmentation present. *Id*. The administrative law judge further found that the medical reports of Drs. King, Rosenberg and Vuskovich substantiated the diagnoses of pneumoconiosis made by Drs. Gruetter and Dennis. The administrative law judge concluded, therefore, that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(2).

Employer contends that the administrative law judge erred in determining that Dr. Gruetter's diagnosis of anthracosis was a diagnosis of pneumoconiosis, rather than a reference to the appearance of black pigment. Employer further argues that the administrative law judge did not properly resolve the issue of whether the presence of anthracosis in lymph nodes is a finding of a disease of the lung. With respect to the administrative law judge's discrediting of Dr. Oesterling's autopsy report, employer maintains that the administrative law judge failed to consider Dr. Oesterling's explanation of why he reached a different conclusion than that expressed in his biopsy report. In addition, employer contends that because Drs. Oesterling and Dennis are the only pathologists of record, the administrative law judge's statement that Dr. Oesterling "stood alone" in determining that the miner did not have pneumoconiosis was not rational. Decision and Order at 35. Employer also challenges the administrative law judge's decision to accord greater weight to Dr. Dennis's autopsy report, based upon his status as the autopsy prosector and the recency of this evidence.

Regarding the administrative law judge's consideration of the biopsy evidence, we affirm his finding that Dr. Oesterling's diagnosis of mild macular CWP supported a finding of pneumoconiosis pursuant to Section 718.202(a)(2). 20 C.F.R. §§718.201(a)(1), 718.202(a)(2). With respect to Dr. Gruetter's use of the term "anthracosis," the administrative law judge acted within his discretion as fact-finder in determining that "anthracosis" can constitute a diagnosis of pneumoconiosis, without claimant having to establish that the term was not merely a reference to black pigment. 20 C.F.R. §718.201(a)(1); *see Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989); *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203 (11th Cir. 1993); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001) (*en banc*) (Dolder and Smith, JJ, dissenting in part and concurring in part).

However, regarding the issue of whether a diagnosis of anthracosis in a miner's lymph nodes can be considered a diagnosis of pneumoconiosis, the Board has held that this a question of fact that must be resolved by the administrative law judge based upon the evidence before him. *See Bueno v. Director,* OWCP, 7 BLR 1-337 (1984); *see also Daugherty v. Director, OWCP*, 897 F.2d 740, 13 BLR 2-393 (4th Cir. 1990); *Hapney*, 22 BLR at 1-114. In the present case, the administrative law judge cited an unpublished Board decision in support of the proposition that "anthracosis found in lymph nodes may be sufficient to establish the existence of pneumoconiosis," but did not explain why he apparently determined that the diagnosis of anthracosis in the miner's lymph nodes rendered by Dr. Gruetter was a diagnosis of pneumoconiosis in this case.[3] Decision and

[3] The administrative law judge also indicated that Dr. Oesterling's observation of anthracotic pigment and fibrosis in the miner's lymph nodes supported a finding of pneumoconiosis. Decision and Order at 35; Employer's Exhibit 11.

Order at 35, *quoting Taylor v. Director, OWCP*, BRB No. 01-0837 BLA, slip op. at 4 (July 30, 2002) (unpub.). Thus, the administrative law judge did not comply with the APA, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

With respect to the administrative law judge's weighing of the autopsy report of Dr. Oesterling, we agree with employer that the administrative law judge's decision to accord diminished weight to Dr. Oesterling's determination that the autopsy evidence did not support a diagnosis of pneumoconiosis cannot be affirmed. The administrative law judge stated that he discredited Dr. Oesterling's autopsy finding, that there was no fibrosis in the miner's lymph nodes, because it was "inconsistent with his biopsy report, which found limited fibrosis in the [m]iner's lymph nodes." Decision and Order at 35-36; Employer's Exhibits 10, 11. Because the administrative law judge did not explain his apparent finding that the observations of anthracosis and fibrosis in the miner's lymph nodes constituted diagnoses of pneumoconiosis, the rationale provided by the administrative law judge is not sufficient. *See Hapney*, 22 BLR at 1-114; *Bueno*, 7 BLR at 1-340. The absence of a finding on this issue also calls into question the administrative law judge's determination that Dr. Oesterling "stands alone among the pathologists," in opining that the miner did not have pneumoconiosis.[4]

In addition, we cannot affirm the administrative law judge's determination that Dr. Oesterling's opinion, "that there is an insufficient amount of anthracotic pigmentation and silica in the [m]iner's lungs to diagnose CWP . . . suffer[s] the same failed logic as the pregnant negative." Decision and Order at 36. In rendering this finding, the administrative law judge suggests that the detection of any amount of anthracotic pigmentation and silica in lung tissue is sufficient to constitute a diagnosis of CWP. This view is not consistent with the regulations and represents an attempt by the administrative law judge to substitute his opinion for those of the medical experts. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

Regarding Dr. Dennis's autopsy report, employer is correct in maintaining that the administrative law judge's decision to give it greatest weight cannot be affirmed. The administrative law judge found that Dr. Dennis's diagnosis of anthracosilicosis was

[4] Dr. Oesterling's qualifications are of record and indicate that he is Board-certified in anatomical and clinical pathology. Employer's Exhibit 19. A review of the record does not reveal the qualifications of Drs. Gruetter and Dennis.

substantiated by the biopsy findings of anthracosis and fibrosis in the miner's lymph nodes reported by Drs. Gruetter and Oesterling. Because the administrative law judge did not render a finding as to whether these diagnoses constituted diagnoses of pneumoconiosis, however, we cannot affirm his determination that these diagnoses supported Dr. Dennis's observations of "black pigmentation with associated fibrosis." Decision and Order at 35; Director's Exhibit 60. In addition, employer is correct in asserting that the administrative law judge did not adequately explain how Dr. Dennis's ability to conduct a gross examination of the miner's lungs gave him an advantage. Decision and Order at 36. The administrative law judge stated that a key issue was "the amount of pigmentation present" and that, as autopsy prosector, Dr. Dennis "was likely in a better position to make an assessment" regarding this issue. *Id*. The administrative law judge's analysis conflicts with Section 718.202(a)(2), which provides that "[a] finding in an autopsy or biopsy of anthracotic pigmentation . . . shall not be sufficient, by itself, to establish the existence of pneumoconiosis." 20 C.F.R. 718.202(a)(2). Moreover, as employer alleges, because Drs. King, Rosenberg and Vuskovich indicated that they relied upon Dr. Dennis's autopsy findings, the administrative law judge's determination that the reports in which they diagnosed clinical pneumoconiosis substantiated Dr. Dennis's diagnosis of anthracosilicosis is not rational. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 36; Director's Exhibit 17; Employer's Exhibits 5-9, 20.

In light of the foregoing, we vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a)(2). On remand, the administrative law judge must reconsider whether the biopsy and autopsy evidence is sufficient to establish the existence of pneumoconiosis. In so doing, the administrative law judge must determine whether the diagnoses of anthracosis and fibrosis in the miner's lymph nodes constitute diagnoses of pneumoconiosis. Regarding Dr. Dennis's autopsy report, the administrative law judge must reconsider whether it is documented and reasoned and must set forth his findings in detail, including his underlying rationale.

Pursuant to Section 718.202(a)(4), because the administrative law judge credited the opinions in which Drs. King, Rosenberg and Vuskovich diagnosed clinical pneumoconiosis, based upon Dr. Dennis's autopsy findings, and we have vacated the administrative law judge's crediting of Dr. Dennis's autopsy report, we must also vacate the administrative law judge's determination that the existence of pneumoconiosis was established by the medical opinion evidence. The administrative law judge must reconsider whether the medical opinions are sufficient to establish the existence of pneumoconiosis in light of his findings on remand regarding Dr. Dennis's autopsy report.

We affirm, however, the administrative law judge's determination that Dr. Wiot's negative readings of the CT scans dated September 28, 2004 and October 19, 2004 and

Dr. Halbert's negative reading of the CT scan dated October 19, 2004, did not detract from the evidence indicating that the miner suffered from clinical pneumoconiosis. The administrative law judge rationally determined that employer did not submit evidence establishing that CT scans are more accurate than biopsy or autopsy evidence. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*); *Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (McGranery & Hall, J.J., concurring and dissenting); Decision and Order at 36; Employer's Exhibits 3, 4, 13. Although employer notes correctly that Dr. Wiot testified that CT scans can be helpful in assessing the accuracy of x-rays, he did not indicate that they are superior to biopsy or autopsy evidence. Employer's Exhibits 3, 4. Additionally, because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge is not required to weigh together the different types of evidence relevant to the existence of pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

D. Pneumoconiosis Arising Out of Coal Mine Employment

Pursuant to Section 718.203(c), the administrative law judge considered the medical opinions of Drs. King, Rosenberg and Vuskovich. Dr. King was one of the miner's treating physicians. In a report dated November 1, 2004, Dr. King diagnosed CWP, based upon Dr. Gruetter's biopsy report. Director's Exhibit 17. Dr. King indicated that the miner's CWP was entirely attributable to coal dust exposure and that CWP caused fifty percent of the miner's respiratory impairment, with the remainder attributable to chronic obstructive pulmonary disease.[5] *Id*. Dr. Rosenberg examined the miner on November 1, 2004 and reviewed portions of the miner's medical records. Employer's Exhibits 5-7. In his written reports, Dr. Rosenberg concluded that the miner did not have CWP or any other dust related lung disease. Employer's Exhibits 5, 6. However, Dr. Rosenberg indicated at his deposition that, "at worst," the miner had "a very minimal case of [CWP]." Employer's Exhibit 7 at 16. Dr. Vuskovich reviewed portions of the miner's medical records and determined, in a report dated February 20, 2007, that the miner had mild simple CWP, caused by coal dust exposure. Employer's Exhibits 8, 9.

[5] Pursuant to Section 718.202(a)(4), the administrative law judge determined that Dr. King's diagnosis of chronic obstructive pulmonary disease caused by smoking and coal dust exposure was insufficient to establish the existence of legal pneumoconiosis, as Dr. King did not adequately explain the basis for his conclusion. Decision and Order at 38.

The administrative law judge determined that Dr. King's opinion was "well-reasoned and persuasive as he considers both the [m]iner's history of tobacco abuse and coal dust exposure" and because it was consistent with the pathology evidence, which the administrative law judge described as "the most probative evidence in this record." Decision and Order at 39. With respect to the opinions of Drs. Rosenberg and Vuskovich, the administrative law judge stated, "I afford less weight to Drs. Rosenberg's and Vuskovich's opinions [which] do not accept a diagnosis of pneumoconiosis on causation as their opinions are flawed, because the predicate, the existence of pneumoconiosis, is contrary to the full weight of the evidence." *Id*. at 40. Accordingly, the administrative law judge found that the burden of establishing that the miner's pneumoconiosis arose out of coal mine employment was satisfied. *Id*.

Employer contends that the administrative law judge erred in determining that Dr. King's report was well-reasoned, as Dr. King did not identify either the smoking history or the employment history upon which he relied and provided no explanation for attributing the miner's CWP to coal dust exposure. Employer also maintains that the administrative law judge did not consider all of the relevant evidence.

As an initial matter, we hold that we must vacate the administrative law judge's finding under Section 718.203(c), in light of our decision to vacate the administrative law judge's determination that the existence of pneumoconiosis was established under Section 718.202(a)(2), (4). In addition, there is merit to employer's argument concerning the administrative law judge's weighing of Dr. King's opinion. The administrative law judge credited Dr. King's diagnosis of anthracosis caused by coal dust exposure because the doctor considered the miner's coal mine employment history, but the administrative law judge did not address the fact that Dr. King's report contains no reference to the length of the miner's coal mine employment.[6] Director's Exhibit 17. Because this factor is relevant to the credibility of a physician's opinion regarding whether a miner's pneumoconiosis arose out of coal mine employment, the administrative law judge should address it on remand. *See Addison v. Director, 0WCP*, 11 BLR 1-68 (1988); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Long v. Director, OWCP*, 7 BLR 1-254 (1984).

[6] Based upon the administrative law judge's determination that the existence of legal pneumoconiosis was not established pursuant to Section 718.202(a)(4), which we affirmed as unchallenged on appeal, the extent to which smoking contributed to any respiratory or pulmonary impairment experienced by the miner is not relevant to the inquiry regarding the source of the miner's clinical pneumoconiosis. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Thus, employer's contention that the administrative law judge erred in crediting Dr. King's report, despite Dr. King's failure to indicate the extent of the miner's smoking history, is without merit.

Employer is also correct in noting that the administrative law judge did not weigh all of the medical opinions relevant to the issue of the cause of claimant's pneumoconiosis, as the administrative law judge did not assign any weight to the reports of Drs. Dennis and Oesterling, but acknowledged that they detected anthracotic pigment "of coal mine origin" in their reports. Decision and Order at 39 n.20; Director's Exhibit 60; Employer's Exhibits 10, 11; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

On remand, if the administrative law judge concludes that the existence of pneumoconiosis has been demonstrated, he must reconsider his finding at Section 718.203(c) in light of his findings under Section 718.202(a)(2), (4). When reconsidering this issue, the administrative law judge must weigh all of the evidence pertaining to the etiology of the miner's clinical pneumoconiosis – whether it is labeled anthracosis, anthracosilicosis or CWP – and set forth his findings in detail, including his underlying rationale. *See Wojtowicz*, 12 BLR at 1-165. In assessing the medical opinion evidence, the administrative law judge must determine whether each opinion is adequately reasoned and documented and must explain his findings. *Id*.

E. Total Disability

Pursuant to Section 718.204(b)(2)(iii), the administrative law judge determined that the diagnosis of cor pulmonale rendered by Dr. Dennis in his autopsy report was sufficient to establish total disability. Decision and Order at 41; Director's Exhibit 60. Employer argues correctly that the administrative law judge's finding does not accord with the language of the regulation. Section 718.204(b)(2)(iii) provides, in relevant part, that total disability is established when the miner "has been shown by the medical evidence to be suffering from cor pulmonale *with right-sided congestive heart failure*." 20 C.F.R. §718.204(b)(2)(iii) (emphasis added). Accordingly, a medical opinion diagnosing cor pulmonale, that does not also diagnose right-sided congestive heart failure, is insufficient to demonstrate total disability under Section 718.204(b)(2)(iii). *See Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). While employer argues that no other physician of record found that the miner had right-sided congestive heart failure, this is a question of fact for the administrative law judge to resolve. We vacate, therefore, the administrative law judge's determination that total disability was established under Section 718.204(b)(2)(iii) and instruct the administrative law judge to reconsider this issue on remand. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

The administrative law judge also found total disability established under Section 718.204(b)(2)(iv), based upon the medical opinions of Drs. Musgrave, King, Rosenberg

and Vuskovich.[7] Dr. Musgrave, one of the miner's treating physicians, checked boxes on a questionnaire indicating that the miner suffered from a totally disabling pulmonary impairment. Director's Exhibit 17. Dr. King, also a treating physician, completed an identical questionnaire and indicated that the miner had a moderate pulmonary impairment that rendered him unable to perform his usual coal mine employment. *Id*. Dr. Rosenberg examined the miner on November 1, 2004 and reviewed medical records. Employer's Exhibits 5, 6. Dr. Rosenberg determined in his written reports that the miner was not disabled from a pulmonary standpoint but, at his deposition, he stated that the miner "was disabled from a pulmonary perspective," towards the end of his life. Employer's Exhibit 7 at 17. Dr. Vuskovich performed a review of the miner's medical records and concluded in his written report that the miner had normal pulmonary function before he developed lung cancer. Employer's Exhibit 8. At his deposition, Dr. Vuskovich had the following colloquies with employer's counsel:

> Q. Prior to his lung cancer, was he disabled from a pulmonary perspective?
>
> A. No, ma'am. He had normal pulmonary function.
>
> Q. After his cancer, though, did he become disabled?
>
> A. Yes, ma'am.
>
> Q. In your opinion, was this respiratory [or] pulmonary impairment related to the inhalation of coal mine dust?
>
> A. No, ma'am. It was from lung cancer. He had a terrible disease.
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> ***
>
> Q. Doctor, based upon your review of the records, in regard to whether or not this gentleman was disabled from a respiratory or pulmonary perspective prior to his death or prior to his lung cancer, was he disabled from a respiratory or pulmonary perspective?

[7] The administrative law judge discredited the opinion in which Dr. Baker stated, based upon his examination of the miner on October 8, 2004, that the miner retained the respiratory capacity to perform his usual coal mine employment, as Dr. Baker did not have the opportunity to review any of the later pathology evidence. Decision and Order at 43; Director's Exhibit 15. We affirm the administrative law judge's finding with respect to Dr. Baker's opinion, as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

A. No, ma'am. He had normal pulmonary function.

Q. Prior to his lung cancer, would he retain the respiratory capacity to return to his previous job in and around the mining industry, or a job requiring similar, arduous manual labor?

A. Yes ma'am.

Employer's Exhibit 9 at 11-12, 18-19.

The administrative law judge determined that the medical opinions of Drs. Musgrave, King, Rosenberg and Vuskovich were sufficient to establish total disability at Section 718.204(b)(2)(iv). Decision and Order at 43. Employer maintains that the administrative law judge erred in treating the medical opinions of Drs. Musgrave and King as reasoned and documented on the issue of total disability. Employer also asserts that the administrative law judge mischaracterized the opinions of Drs. Rosenberg and Vuskovich as containing diagnoses of total pulmonary disability. Employer's contentions have merit, in part.

Regarding the administrative law judge's decision to credit the opinions of Drs. Musgrave and King, employer is correct in alleging that the administrative law judge did not set forth the rationale underlying his determination that their diagnoses of total disability were reasoned and documented, as is required by the APA. *See Wojtowicz*, 12 BLR at 1-165. If the administrative law judge reaches the issue of total disability on remand, he must reconsider whether the diagnoses of total disability rendered by Drs. Musgrave and King are adequately reasoned and documented. *See Collins v. J&L Steel Co.*, 21 BLR 1-181 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

With respect to the opinions of Drs. Rosenberg and Vuskovich, we cannot affirm the administrative law judge's finding that the physicians stated in their deposition testimony that the miner was totally disabled from a pulmonary standpoint at the time of his death. In addressing their deposition testimony, the administrative law judge did not address the fact that neither physician explicitly described the miner as being *totally* disabled, i.e., unable to perform his usual coal mine work or comparable and gainful work. 20 C.F.R. §718.204(b)(1); *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; Employer's Exhibit 7 at 17; Employer's Exhibit 9 at 11-12, 18-19. We vacate, therefore, the administrative law judge's findings regarding the opinions of Drs. Rosenberg and Vuskovich under Section 718.204(b)(2)(iv) and instruct him to reconsider whether their opinions support a finding of total disability.

Lastly, we note that, if the administrative law judge finds total disability established under Section 718.204(b)(2)(iii) and/or (iv) on remand, he must weigh the

evidence supportive of a finding of total disability against the contrary probative evidence to determine whether total disability has been established. *See Fields*, 10 BLR at 1-21; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*).

F. Total Disability Due to Pneumoconiosis

Pursuant to Section 718.204(c), the administrative law judge considered the medical opinions of Drs. Musgrave, King, Rosenberg and Vuskovich. Drs. Musgrave and King indicated on questionnaires that pneumoconiosis was a significant contributing cause of the miner's totally disabling pulmonary impairment. Director's Exhibits 16, 17. Drs. Rosenberg and Vuskovich opined that the miner's total disability was not related to pneumoconiosis or coal dust exposure. Employer's Exhibits 5-9.

The administrative law judge stated that he gave greater weight to the opinions of Drs. Musgrave and King, "because I find them to be most supported by the evidence in the record." Decision and Order at 45. The administrative law judge discredited Dr. Rosenberg's opinion on the grounds that he provided conflicting conclusions on the issue of total disability and he relied upon incomplete spirometry data and blood gas study evidence that conflicted with "pathologic evidence of cor pulmonale." *Id*. at 44. The administrative law judge found that Dr. Vuskovich's opinion was entitled to less weight because he indicated that simple pneumoconiosis is not likely to be totally disabling, relied upon objective studies that were invalid or in conflict with the pathology evidence, and did not examine the miner. *Id*. at 45. The administrative law judge concluded that total disability due to pneumoconiosis was established, based upon the opinions of Drs. Musgrave and King. *Id*.

Employer contends that the administrative law judge erred in relying upon the opinions of Drs. Musgrave and King at Section 718.204(c). Employer maintains that, in light of the decision of the United States Court of Appeals for the Sixth Circuit in *Best v. Lowe Home Centers, Inc.*, 563 F.3d 161 (6th Cir. 2009), the administrative law judge was required to discredit the conclusions offered by Drs. Musgrave and King because they did not render differential diagnoses, i.e., they did not both address smoking and lung cancer as possible alternative causes of the miner's pulmonary impairment. Similarly, employer argues that under *Best*, the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Vuskovich because they offered differential diagnoses. Employer also alleges that the administrative law judge erred in treating the opinions of Drs. Musgrave and King as adequately reasoned and documented on the issue of total disability causation. Employer further maintains that the administrative law judge applied a higher level of scrutiny to the opinions of Drs. Rosenberg and Vuskovich and provided invalid reasons for discrediting them.

We hold, as an initial matter, that we must vacate the administrative law judge's finding that claimant established total disability due to pneumoconiosis at Section 718.204(c) because he relied upon findings with respect to the existence of pneumoconiosis arising out of coal mine employment and total disability that we have vacated. Regarding employer's reliance upon *Best*, however, the Board has held that it does not present a new standard for evaluating disability causation opinions in black lung cases, as the Sixth Circuit's holding pertained to the admissibility of an expert's differential diagnosis under the Rule 702 of the Federal Rules, which do not apply to administrative proceedings, unless specifically provided by statute or regulation. *Stover v. Peabody Coal Co.*, BLR , BRB No. 08-0549 BLA (Jan. 27, 2010) (*en banc* Decision and Order on Recon.).

Nevertheless, employer is correct in maintaining that the administrative law judge did not apply the same level of scrutiny to the opinions of Drs. Musgrave and King as he applied to the opinions of Drs. Rosenberg and Vuskovich. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). The administrative law judge examined the documentation underlying the latter opinions in detail, but did not do so with respect to the opinions of Drs. Musgrave and King. Decision and Order at 44-45. In addition, although the administrative law judge indicated that the conclusions set forth by Drs. Musgrave and King regarding the cause of the miner's impairment were "substantiated by the biopsy and autopsy evidence," he did not explain how this evidence supported a determination that pneumoconiosis was a contributing cause of the miner's totally disabling impairment. *Id*. at 45.

Furthermore, employer is correct in alleging that the administrative law judge did not set forth the rationale underlying his determination that the diagnoses of total disability set forth by Drs. Musgrave and King were reasoned and documented, as is required by the APA. *See Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *Wojtowicz*, 12 BLR at 1-165; *Fields*, 10 BLR at 1-22; *Fuller*, 6 BLR at 1-1294. We must vacate, therefore, the administrative law judge's findings with respect to the opinions of Drs. Musgrave and King at Section 718.204(c). If the administrative law judge reaches the issue of total disability causation on remand, he must reconsider whether the diagnoses rendered by Drs. Musgrave and King are adequately reasoned and documented, set forth his findings in detail and include his underlying rationale. *Id*.

With respect to the administrative law judge's discrediting of Dr. Rosenberg's opinion on the ground that he relied upon a blood gas study that produced results that conflicted with Dr. Dennis's diagnosis of cor pulmonale, because we have vacated the administrative law judge's finding regarding the presence of cor pulmonale, we must also vacate this finding. In addition, the administrative law judge did not reconcile the inconsistency between his decision to credit Dr. Rosenberg's deposition testimony, that the miner was disabled from a pulmonary perspective, under Section 718.204(b)(2)(iv),

and his determination, under Section 718.204(c), that Dr. Rosenberg's opinion as to disability causation was entitled to little weight because he gave conflicting opinions on the issue of total disability. Decision and Order at 43, 44.

Employer is also correct in alleging that the administrative law judge's characterization of Dr. Rosenberg's opinion as being based upon the incomplete pulmonary function study that he obtained on November 1, 2004, is not accurate. Dr. Rosenberg rendered his opinion, that pneumoconiosis played no role in the miner's pulmonary condition, based upon his own examination of the miner and a review of blood gas studies appearing in the miner's treatment records and the objective studies performed by Dr. Baker during his examination of the miner on October 8, 2004, the validity of which the administrative law judge has not questioned. Director's Exhibit 15; Employer's Exhibit 5.

Accordingly, we vacate the administrative law judge's findings with respect to Dr. Rosenberg's opinion at Section 718.204(c). *See Wojtowicz*, 12 BLR at 1-165; *Tackett*, 7 BLR at 1-705; *Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-690 (1985)*; McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). If the administrative law judge reaches the issue of total disability causation on remand, he must reconsider Dr. Rosenberg's opinion.

Regarding the administrative law judge's finding that Dr. Vuskovich's opinion was entitled to diminished weight under Section 718.204(c), the administrative law judge stated inaccurately that Dr. Vuskovich relied upon invalid pulmonary function studies. In addition to the incomplete study obtained by Dr. Rosenberg on November 1, 2004, Dr. Vuskovich reviewed the pulmonary function study that Dr. Baker obtained on October 8, 2004, the validity of which the administrative law judge has not questioned. Director's Exhibit 15; Employer's Exhibit 8. As previously indicated, because we have vacated the administrative law judge's finding on the issue of the existence of cor pulmonale, we cannot affirm the administrative law judge's determination that Dr. Vuskovich's reliance upon blood gas study values that were contradicted by Dr. Dennis's diagnosis of cor pulmonale detracted from the credibility of his opinion.

Lastly, we agree with employer that the administrative law judge's finding that Dr. Vuskovich's opinion "boarder[s] [sic] on being hostile to the Act," is not supported by substantial evidence. During his deposition, Dr. Vuskovich was asked whether it was his view that simple pneumoconiosis cannot be totally disabling. He replied: "If it's severe CWP it can. It's just like anything else, it exists on a spectrum. If it's very mild CWP, it would probably not be disabling, but if it was very severe, it would be disabling." Employer's Exhibit 9 at 22. Because Dr. Vuskovich did not exclude the possibility that simple pneumoconiosis, even a very mild case, can be totally disabling, we cannot affirm

the administrative law judge's finding in this regard. *See Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987).

Accordingly, we vacate the administrative law judge's findings with respect to Dr. Vuskovich's opinion at Section 718.204(c). *See Wojtowicz*, 12 BLR at 1-165; *Tackett*, 7 BLR at 1-705; *Fetterman*, 7 BLR at 1-690; *McCune*, 6 BLR at 1-998. If the administrative law judge reaches the issue of total disability causation on remand, he must reconsider Dr. Vuskovich's opinion.

G. Summary

We vacate the administrative law judge's determination, based upon a weighing of the newly submitted evidence, that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(2), (3) and 718.203(c) and total disability due to pneumoconiosis pursuant to Section 718.204(b)(2)(iii), (iv) and (c) in the miner's claim. On remand, the administrative law judge must first render a finding as to whether the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement under Section 725.309(d). If the administrative law judge finds that the terms of Section 725.309(d) have been satisfied, he must then address entitlement on the merits based upon a weighing of all of the evidence of record.

II. The Survivor's Claim

A. Claimant's Burden of Proof

In order to establish entitlement to benefits in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis, or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(2); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

B. The Existence of Pneumoconiosis Arising Out of Coal Mine Employment

Pursuant to Section 718.202(a), the administrative law judge noted that employer relied upon the evidence submitted in the miner's claim, while claimant submitted a new autopsy report from Dr. DeLara, a new medical report from Dr. Musgrave and two CT scan readings by Dr. Baker. Decision and Order at 45. The administrative law judge stated:

> After considering the evidence, I find that [claimant] has also established clinical pneumoconiosis and its etiology. None of the new evidence submitted by the [m]iner disturbs my conclusion in the living [m]iner's claim that the [m]iner suffered from clinical pneumoconiosis and that pneumoconiosis resulted from his coal mine employment. Both Dr. Musgrave's and Dr. De Lara's opinion that the [m]iner suffered from clinical pneumoconiosis is substantiated by the pathology evidence. Dr. De Lara diagnosed the [m]iner with clinical pneumoconiosis based on his autopsy. Additionally, Dr. De Lara attributed the [m]iner's clinical pneumoconiosis to be causally related to coal dust inhalation.

Id. at 45-46. The administrative law judge also credited Dr. Baker's CT scan readings as diagnoses of pneumoconiosis and gave them greater weight than Dr. Wiot's negative readings on the ground that Dr. Baker's readings were consistent with the pathology evidence. *Id*. at 46.

Because the administrative law judge primarily relied upon the findings in the miner's claim that we have vacated in determining that claimant established the existence of pneumoconiosis arising out of coal mine employment in the survivor's claim, we must vacate this determination as well. The administrative law judge must reconsider his weighing of the medical evidence under Sections 718.202(a) and 718.203(c).

In addition, employer is correct in alleging that the administrative law judge did not properly address the CT scan evidence in the survivor's claim pursuant to Section 718.202(a)(4). The administrative law judge erred in omitting Dr. Halbert's negative reading of the CT scan dated October 19, 2004 from consideration. *Tackett*, 7 BLR at 1-705; Employer's Exhibit 12. In Dr. Baker's report of his interpretations of the CT scans dated September 20, 2004 and October 19, 2004, Dr. Baker stated:

> [T]here [is] evidence of fibrosis present within the lungs that could be compatible with early pneumoconiosis. There is also some increased thickness of pulmonary strands that could also be pulmonary fibrosis caused by [CWP].
>
> As you may or may not be aware, there is very poor correlation between CT scan findings and [CWP] in early stages. In fact, many studies have found no good correlation between CT scan readings and B readings for pneumoconiosis on regular x-rays. These films do show some evidence of fibrosis. As the patient has had a significant history of coal dust exposure, this could represent [CWP].

Claimant's Exhibit 2. The administrative law judge was required to discuss the qualified nature of Dr. Baker's CT scan readings, but did not do so. *See Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501 (1984). Accordingly, on remand, the administrative law judge must consider Dr. Halbert's CT scan interpretation, in addition to the interpretations offered by Drs. Baker and Wiot, and must address the equivocal terms used by Dr. Baker.

C. Death Due to Pneumoconiosis

Under Section 718.205(c), the administrative law judge determined that the opinions of Drs. Dennis, Musgrave and DeLara were sufficient to establish that pneumoconiosis hastened the miner's death. Decision and Order at 47; Director's Exhibit 60; Claimant's Exhibit 6. The administrative law judge discredited the contrary opinions of Drs. Rosenberg and Vuskovich, as they did not diagnose clinical pneumoconiosis and did not fully address the concept of hastening. Decision and Order at 47; Employer's Exhibits 5-9, 19. Because we have vacated many of the findings that the administrative law judge relied upon in weighing the evidence relevant to the issue of death due to pneumoconiosis, we also vacate his determination that claimant satisfied her burden of proof at Section 718.205(c). The administrative law judge must reconsider his weighing of the medical evidence under Section 718.205(c) in light of his findings on remand in the miner's claim.

In addition, we find merit in employer's argument that the administrative law judge did not adequately address whether Dr. Musgrave's opinion, recorded on a questionnaire dated September 6, 2005, was reasoned and documented. On the form submitted to her by claimant's counsel, Dr. Musgrave checked "yes" in response to the question regarding whether "pneumoconiosis contributed to or played a hastening role in the miner's death." Director's Exhibit 60. In the space provided for a rationale, Dr. Musgrave wrote: "Patient died [of] respiratory failure – had severe fibrosis and cor pulmonale." *Id*. The Sixth Circuit held in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003), that pneumoconiosis hastens a miner's death "if it does so through a specifically defined process that reduces the miner's life by an estimable time." More recently, in *Conley v. National Mines Corp.*, F.3d , 2010 WL 481292, slip op. at 10 (6th Cir. Feb. 12, 2010), the court explained that under the *Williams* standard, "[a] medical opinion that pneumoconiosis expedited death through a 'specifically defined process' must explain why that is so and generally should be able to explain how and to what extent—customarily through a range of time—that process hastened a specific patient's death." In the present case, the administrative law judge did not address whether Dr. Musgrave's opinion, or the opinions of Drs. Dennis and DeLara, satisfied this standard. He must do so on remand.

We also find merit in employer's contention that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Vuskovich. Citing comments made by the Department of Labor (DOL) in promulgating the amended regulations, the administrative law judge found that the physicians did not fully address the concept of hastening because they did not explicitly consider whether pneumoconiosis weakened the miner such that he died more quickly from his other conditions. Decision and Order at 47, *citing* 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000). In *Williams*, the Sixth Circuit specifically rejected the premise cited by the administrative law judge, stating:

> One can always claim, as [the doctor] did, that if pneumoconiosis makes someone weaker, it makes them less resistant to some other trauma. If, for instance, a miner with pneumoconiosis gets hit by a train and bleeds to death, [this doctor] (or someone adopting his position) would argue that the pneumoconiosis "hastened" his death because he bled to death somewhat more quickly than someone without pneumoconiosis. This is absurd and presumably not what Congress meant by "hasten."

Williams, 338 F.3d at 517-18, 22 BLR at 2-655. When reconsidering the opinions of Drs. Rosenberg and Vuskovich under Section 718.205(c) on remand, the administrative law judge must consider the Sixth Circuit's language in *Williams*. *See also Conley*, slip op. at 10-11.

We reject, however, employer's allegation that the administrative law judge improperly relied upon evidence outside the record when he referred to the preamble to the amended regulations. The material in the Federal Register does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). The preamble, and the DOL's response to comments on the amended regulations, are relevant to the appropriate interpretation of the newly adopted regulations. They set forth the legal and factual principles that the DOL relied on in promulgating them and, as such, their use cannot come as a surprise to parties involved in the litigation of black lung claims under these regulations.

D. Summary

We vacate the administrative law judge's determinations in the survivor's claim that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(2), (3) and 718.203(c) and death due to pneumoconiosis pursuant to Section 718.205(c). On remand, the administrative law judge must reconsider all relevant evidence and set forth his findings in detail, including his underlying rationale.

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim and the survivor's claim is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge