BRB Nos. 12-0313 BLA
and 12-0430 BLA

LINDA BELCHER (Widow of, and on behalf of, JOHNNY BELCHER)	)	
Claimant-Respondent	)	
v.	)	
HARMAN MINING COMPANY, INCORPORATED	)	DATE ISSUED: 02/28/2013
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2008-BLA-05012 and 2008-BLA-05013) of Administrative Law Judge Pamela J. Lakes, rendered on a miner's subsequent claim and a survivor's claim, filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] With respect to the miner's subsequent claim, the administrative law judge determined that the newly submitted evidence was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) in the miner's claim. The administrative law judge further found that the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), was invoked, as the miner had in excess of fifteen years of underground coal mine

[1] The miner's first claim for benefits, filed on April 27, 1995, was denied by Administrative Law Judge Jeffrey Tureck, as the miner did not establish the existence of pneumoconiosis. Living Miner's (LM) Director's Exhibit 1. The Board, and the United States Court of Appeals for the Fourth Circuit, affirmed the denial of benefits. *Belcher v. Harman Mining Co.*, No. 97-2616 (4th Cir. Sept. 22, 1998); *Belcher v. Harman Mining Co.*, BRB No. 97-0242 BLA (Oct. 23, 1997) (unpub.). The miner filed a request for modification that was denied by Administrative Law Judge Thomas F. Phalen because the miner did not establish the existence of pneumoconiosis or that he was totally disabled. LM Director's Exhibit 1. The miner's second request for modification was denied by Administrative Law Judge Edward Terhune Miller on the same grounds. *Id*. The Board affirmed the denial of benefits based on Judge Miller's finding that claimant did not establish the existence of pneumoconiosis. *Belcher v. Harman Mining Co.*, BRB No. 02-0361 BLA (Oct. 21, 2002) (unpub.); LM Director's Exhibit 1. The miner filed the present subsequent claim on April 10, 2006 and died on August 24, 2006, while his claim was pending. LM Director's Exhibits 3, 13. Claimant, the miner's spouse, filed her survivor's claim on September 22, 2006. Survivor's Claim (SC) Director's Exhibit 2. The district director made an initial finding of entitlement in both claims. LM Director's Exhibits 32, 36; SC Director's Exhibits 26, 28. Upon receipt of employer's request for a hearing, the district director consolidated the claims and transmitted them for a hearing before Administrative Law Judge Pamela J. Lakes, whose Decision and Order is the subject of this appeal. LM Director's Exhibit 37; SC Director's Exhibit 33.

employment and total disability was established pursuant to 20 C.F.R. §718.204(b).[2] The administrative law judge determined that employer did not rebut the presumption and, therefore, awarded benefits in the miner's claim, effective April 1, 2006. With respect to the survivor's claim, the administrative law judge found that, pursuant to amended Section 422(*l*), 30 U.S.C. §932(*l*), claimant was automatically entitled to benefits, and awarded benefits, commencing August 1, 2006.

On appeal, employer argues that the administrative law judge erred in finding that the evidence was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2). Employer further argues that the administrative law judge imposed an improper burden of proof on rebuttal of the amended Section 411(c)(4) presumption. With respect to the survivor's claim, employer asserts that if the Board vacates the miner's award, it must remand the survivor's claim for reconsideration without reference to amended Section 932(*l)*. Claimant responds, urging affirmance of the awards of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, asserting that the administrative law judge applied the correct rebuttal standard.

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

[2] On March 23, 2010, Congress enacted amendments to the Act, contained in the Patient Protection and Affordable Care Act, which affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. In pertinent part, these amendments reinstated the presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4), which provides that if a miner establishes at least fifteen years of underground coal mine employment, or in conditions that are substantially similar to those found in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. The amendments also revived Section 422(*l*), 30 U.S.C. §932(*l*), which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2; LM Director's Exhibit 1.

I. The Miner's Claim

A. Invocation of the Amended Section 411(c)(4) Presumption

The administrative law judge determined that claimant established that the miner had at least twenty-five years of underground coal mine employment. Decision and Order at 7. We affirm this finding as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The administrative law judge also determined that claimant established that the miner had a totally disabling respiratory impairment, based on a qualifying pulmonary function test obtained by Dr. Rasmussen on June 27, 2006[4] and the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(i), (iv).[5] Decision and Order at 13. The administrative law judge concluded, therefore, that the amended Section 411(c)(4) presumption was invoked. *Id*.

Employer contends that, in finding that the miner was totally disabled prior to his death, the administrative law judge ignored the fact that the requirements of 20 C.F.R. §718.204(b) were not satisfied, as the cause of claimant's disability was cancer, not a primary respiratory or pulmonary impairment. Employer specifically contends that the administrative law judge erred in relying on a "questionable" qualifying pulmonary function test and ignored testimony by Drs. Hippensteel and Fino that the impairment shown by the test values was caused by the miner's lung cancer surgery and radiation therapy.[6] Employer's Petition for Review at 13. Employer further asserts that claimant must establish that the miner's lung cancer was a chronic respiratory disease, before establishing total disability at 20 C.F.R. §718.204(b)(2), and that the administrative law judge's failure to impose this burden on claimant requires remand. We disagree.

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[4] A "qualifying" pulmonary function test yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B.

[5] The administrative law judge found that the one arterial blood gas test, dated June 26, 2006, was non-qualifying and that there was no evidence in the record to establish that the miner had cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(ii), (iii); 20 C.F.R. Part 718, Appendix C; Decision and Order at 11; LM Director's Exhibit 15. We affirm these findings as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Employer alleges that the results of the qualifying June 27, 2006 pulmonary function test were "questionable," as the test was obtained after the miner underwent a lung resection, radiation and chemotherapy. Employer's Petition for Review at 11-12.

Pursuant to 20 C.F.R. §718.204(b)(1), "a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from engaging" in his or her usual coal mine employment or comparable and gainful employment. 20 C.F.R. §718.204(b)(1). In this case, Drs. Fino and Hippensteel concurred with Dr. Rasmussen that claimant's June 27, 2006 qualifying pre-bronchodilator and post-bronchodilator pulmonary function test established that claimant would not be able to return to his usual coal mine work due to a "respiratory impairment" or "lung" disease. Living Miner's (LM) Director's Exhibit 15; LM Employer's Exhibits 4 at 17, 5 at 20. Thus, contrary to employer's argument, the opinions of Drs. Fino and Hippensteel support the administrative law judge's finding that claimant established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (en banc), *aff'd*, 9 BLR 1-104 (1986) (en banc). The statements by Drs. Fino and Hippensteel indicating that the miner's impairment, as revealed by the 2006 pulmonary function test, was caused by cancer and the treatment of his lung cancer, are relevant to determining whether employer has rebutted the amended Section 411(c)(4) presumption by establishing that the miner's totally disabling impairment was not due to pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011). Accordingly, we affirm the administrative law judge's determination that the medical opinion evidence, and the 2006 qualifying pulmonary function test, outweigh the contrary probative evidence at 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc). We further affirm, therefore, the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and invocation of the amended Section 411(c)(4) presumption.

B. Rebuttal of the Presumption

1. The Proper Standard

Employer asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of the miner's disabling respiratory impairment. Employer's Petition for Review at 17. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's totally disabling respiratory or pulmonary impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 13,

quoting 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, the United States Court of Appeals for the Fourth Circuit has stated, explicitly, that, in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to the miner's pulmonary impairment by coal dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case. Decision and Order at 17, 20.

2. Disproving the Existence of Pneumoconiosis

With respect to the issue of whether employer rebutted the amended Section 411(c)(4) presumption by proving that the miner did not have pneumoconiosis, the administrative law judge considered the autopsy reports of Drs. Abrenio, Naeye, and Oesterling under 20 C.F.R. §718.202(a)(2).[7] Dr. Abrenio, a Board-certified anatomical pathologist, noted that the miner's slides showed evidence of bronchopneumonia and coal workers' pneumoconiosis that was "relatively severe." LM Claimant's Exhibit 1. Dr. Abrenio also indicated that there was evidence of interstitial fibrosis, as well as coal dust pigment-laden macrophages within, or near, the walls of the bronchioles and several anthracotic pigment laden macrophages. LM Director's Exhibit 36. Dr. Naeye, a Board-certified anatomical and clinical pathologist, also prepared a report based upon the autopsy slides. Dr. Naeye opined that the miner did not have coal workers' pneumoconiosis because black pigment occupied less than 1% of the lung tissues available for microscopic review and there were no birefringent crystals tiny enough to be fibrogenic silica. LM Employer's Exhibit 1. Dr. Oesterling, a Board-certified clinical and anatomic pathologist, also reviewed the tissue slides and noted the presence of relatively sparse micronodular and macular interstitial coal workers' pneumoconiosis, in addition to fibrosis and evidence of pneumonia. LM Director's Exhibit 36. Dr. Oesterling specified that the slides did not suggest "significant coal workers' pneumoconiosis." *Id*. The administrative law judge reviewed these reports and stated:

> Taken together, I find that the autopsy evidence suggests the presence of coal workers' pneumoconiosis. Although Drs. Abrenio and Oesterling

[7] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that the x-ray evidence submitted with the miner's subsequent claim "suggests the absence" of clinical pneumoconiosis and that the previously submitted evidence "preponderates against a finding of clinical pneumoconiosis." Decision and Order at 14. Clinical pneumoconiosis is defined as a disease "characterized by [the] 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).

> dispute the severity of the coal workers' pneumoconiosis, two of the three doctors providing autopsy reports found that there was evidence of clinical pneumoconiosis. I therefore find that the autopsy evidence, standing alone, fails to preponderate against a finding of clinical pneumoconiosis.

Decision and Order at 15.

Employer contends that the administrative law judge erred in finding that the autopsy evidence precluded employer from establishing the absence of clinical pneumoconiosis. Employer argues that the administrative law judge ignored the opinion of Dr. Naeye, and did not consider that Drs. Fino and Hippensteel, who reviewed Dr. Naeye's report, believed that it was better reasoned than the report of Dr. Abrenio. Employer also maintains that the administrative law judge did not consider the qualifications of the experts in resolving the conflicting evidence and "elevated Dr. Abrenio's report to the status of a full autopsy, giving it more weight than was warranted." Employer's Petition for Review at 14. We reject employer's allegations of error.

There is no support for employer's contention that the administrative law judge gave more weight to Dr. Abrenio's report on the basis that he performed a full autopsy. Although the administrative law judge noted that Dr. Abrenio conducted the autopsy of the miner, she indicated correctly that Dr. Abrenio's conclusions regarding the presence of coal workers' pneumoconiosis were based on his review of the miner's tissue slides. *See* Decision and Order at 14-15; LM Claimant's Exhibit 1. In addition, contrary to employer's contention, the administrative law judge summarized Dr. Naeye's report and acknowledged his conclusions when she stated, "two of the three doctors providing autopsy reports found that there was evidence of clinical pneumoconiosis." Decision and Order at 15. Because employer has raised no other arguments regarding the administrative law judge's findings at 20 C.F.R. §718.202(a)(2), we affirm her determination that "the autopsy evidence, standing alone, fails to preponderate against a finding of clinical pneumoconiosis." *Id.*; *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered Dr. Rasmussen's opinion, that the miner had legal, [8] rather than clinical, pneumoconiosis and the opinions of Drs. Fino and Hippensteel, attempting to rule out the existence of both forms of pneumoconiosis. *See* Decision and Order at 15-16; LM Director's Exhibit 15; LM Employer's Exhibits 6, 7. The administrative law judge found that the evidence was

[8] 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).

inconclusive on the issue of the existence of clinical pneumoconiosis, as Dr. Rasmussen "did not have the benefit of reviewing the later x-ray interpretations or the autopsy reports" and Drs. Fino and Hippensteel acknowledged in their depositions that the pathology evidence showed "sparse pneumoconiosis." Decision and Order at 16, *citing* LM Employer's Exhibits 6 at 15, 7 at 4-8. The administrative law judge concluded, therefore, that the medical opinion evidence was insufficient to establish the absence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(4). *Id*.

Employer asserts that the administrative law judge erred in omitting from consideration Dr. Fino's statement that the miner's 2005 CT scan "failed to describe any pulmonary fibrosis." Employer's Petition for Review at 14, *quoting* LM Employer's Exhibit 6 at 8. Employer further argues that the administrative law judge did not consider that Dr. Rasmussen's opinion supported a finding that the miner did not have clinical pneumoconiosis. Employer's contentions are without merit.

During his deposition, Dr. Fino stated:

> Dr. Abrenio . . . described coal macules, some coal macules consistent with simple pneumoconiosis, but he is not describing lots of them … [t]hat would be consistent with what Dr. Oesterling found, which would be sparse pneumoconiosis . . . So I think there is clinical pneumoconiosis present . . . I think they are – as I read both pathology reports – they are consistent with what I see clinically, which is no evidence of pneumoconiosis, which I would expect if there are only a few coal macules seen or sparse pneumoconiosis.

LM Employer's Exhibit 6 at 14-15. Because the administrative law judge acted within her discretion in interpreting Dr. Fino's remarks as a concession that the reports of Drs. Abrenio and Oesterling supported a diagnosis of sparse pneumoconiosis/clinical pneumoconiosis, her omission of Dr. Fino's statement regarding the CT scan evidence does not constitute error, particularly in light of her rational finding that autopsy evidence is more probative than other evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003). Similarly, the administrative law judge rationally found that Dr. Hippensteel conceded that there is pathological evidence of coal workers' pneumoconiosis, based on Dr. Oesterling's description of relatively sparse coal workers' pneumoconiosis, and Dr. Hippensteel's statement that autopsy reports reflect the most sensitive tests for the presence of coal workers' pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; Decision and Order at 16.

Further, contrary to employer's contention, the administrative law judge noted that Dr. Rasmussen opined that the miner did not suffer from clinical pneumoconiosis, based on his negative x-ray reading, but correctly determined that Dr. Rasmussen's opinion did not conclusively establish the absence of clinical pneumoconiosis, as he did not have the benefit of reviewing the autopsy reports. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 15-16. The administrative law judge therefore rationally found that, because Dr. Rasmussen based his opinion solely on his own chest x-ray reading and examination, his medical opinion on the issue of clinical pneumoconiosis was less probative than those of Drs. Hippensteel, and Fino, who had the benefit of reviewing the autopsy reports and conceded that they show evidence of sparse coal workers' pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Lastly, the administrative law judge considered whether "other evidence" was sufficient to establish that the miner did not have clinical pneumoconiosis. Decision and Order at 17. The administrative law judge reviewed treatment and hospitalization records from May 2005 – when the miner was diagnosed with lung cancer – to the time of his death in August 2006. *Id.* The administrative law judge indicated that treatment notes from the miner's oncologist, Dr. Cowan, assessed the miner as having pneumoconiosis and chronic obstructive pulmonary disease, for which he was prescribed an inhaler and two liters of oxygen, as needed. *Id.*; LM Claimant's Exhibit 3. The administrative law judge considered that a final x-ray report from August 20, 2006 stated:

> Increased density is identified in the left hilar and perihilar distribution which is correlated with previous CT scan study of the chest. It would appear to be predominantly due to post radiation fibrosis involving the paramediastinal lung. However, there does appear to be an increase in this density laterally raising the possibility of active infiltrate such as pneumonia or possibly progression of malignancy.

Decision and Order at 17, *quoting* LM Claimant's Exhibit 4. The administrative law judge found that, although the records primarily discuss the miner's cancer diagnosis and treatment, his last record noted possible pneumonia, which was consistent with Dr. Abrenio's opinion that the immediate cause of death was bronchopneumonia with coal workers' pneumoconiosis as a contributing cause. *Id.* at 14. The administrative law judge concluded that the treatment and hospitalization records were in equipoise and "not sufficiently definitive to resolve the issue of whether [the miner] suffered from either form of pneumoconiosis." *Id.* at 17.

Employer alleges that, because the record contains over 200 pages of treatment and hospitalization notes that do not mention pneumoconiosis, the administrative law judge should have determined that this evidence was sufficient to rebut the presumption

that the miner had pneumoconiosis. We disagree. The administrative law judge acted within her discretion as fact-finder in determining that the lack of explicit statements as to the presence or absence of pneumoconiosis rendered them "not sufficiently definitive" to support a finding of rebuttal. Decision and Order at 17; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Thus, we affirm her finding. Based upon our affirmance of the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a), we also affirm the administrative law judge's determination that employer failed to rebut the presumption by establishing that the miner did not have pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 17.

2. Disproving Total Disability Causation

In determining whether employer rebutted the amended Section 411(c)(4) presumption by establishing that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment, the administrative law judge considered the opinions of Drs. Rasmussen, Fino and Hippensteel. Decision and Order at 18. Dr. Rasmussen indicated that the miner had obstructive and restrictive impairments to which coal dust exposure contributed. LM Director's Exhibit 15. Dr. Fino opined that the miner's total disability was due to scarring and obliteration of the lung from the radiation he received to treat his lung cancer, which caused his forced vital capacity to be reduced. LM Employer's Exhibit 4. Dr. Fino based his opinion on the fact that the miner did not have a disabling respiratory impairment in 2000, when Dr. Fino last examined him, but did have a restrictive impairment in 2006, a year after he was diagnosed with cancer. LM Employer's Exhibit 6. Dr. Fino also noted that the miner had a normal diffusing capacity and normal blood gases in May 2005, around the time his cancer was first diagnosed. *Id*. Dr. Hippensteel stated that the miner's disabling impairment was due to radiation and chemotherapy, rather than coal mine dust exposure. LM Employer's Exhibit 5. He based his opinion on the acute change in the miner's pulmonary function tests from June 2005—shortly before he started receiving treatment for his cancer—to June 2006. LM Employer's Exhibit 7. Dr. Hippensteel admitted that prior to being diagnosed with cancer, the miner had a variable and, "at most[,] mild amount of airflow obstruction impairment." *Id*. Dr. Hippensteel concluded that the variability suggested this impairment was caused by the miner's cigarette smoking and not his coal dust exposure. *Id.*

The administrative law judge found that, based on the significant decline in the miner's pulmonary function between June 2005 – when he was diagnosed with cancer – and June 2006 – after he received radiation and chemotherapy, the miner's disability is largely attributable to his cancer treatment. Decision and Order at 19. The administrative law judge, however, observed that, pursuant to 20 C.F.R. §718.204(c)(1)(i), pneumoconiosis is a substantially contributing cause of a disability if it materially

worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id.* The administrative law judge determined that, although Dr. Rasmussen stated that there are multiple "possible causes" for the miner's disabling lung disease, Dr. Rasmussen declared, without equivocation, that the miner had an obstructive impairment that was due to a combination of smoking and coal dust exposure, and that when radiation and chemotherapy cause a respiratory impairment, it is restrictive in nature. *Id*., *quoting* LM Director's Exhibit 15. The administrative law judge discredited Dr. Fino's opinion because, contrary to the administrative law judge's finding, he did not diagnose an obstructive impairment. Decision and Order at 19. The administrative law judge credited Dr. Hippensteel's opinion on the issue of total disability causation as reasoned and concluded that the medical opinions were in equipoise. *Id*. at 20. Thus, the administrative law judge concluded that employer failed to rebut the amended Section 411(c)(4) presumption by proving that the miner's disability was unrelated to pneumoconiosis. *Id*.

Employer asserts that the administrative law judge erred in crediting Dr. Rasmussen's opinion as reasoned and in rejecting Dr. Fino's opinion. Employer also maintains that the administrative law judge erred in failing to consider Dr. Oesterling's statement that, because there was limited structural change in the miner's lungs, coal dust exposure did not contribute to the miner's disabling impairments. Employer's arguments lack merit.

Contrary to employer's contention, the administrative law judge did not err in crediting Dr. Rasmussen's opinion on the issue of total disability causation after finding that his opinion on the issue of the existence of clinical pneumoconiosis was less probative. The administrative law judge rationally found that Dr. Rasmussen's diagnosis of total disability due to legal pneumoconiosis was distinct from his determination that the miner did not have clinical pneumoconiosis, which was made without the benefit of a review of the additional x-ray and autopsy evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. The administrative law judge also permissibly determined that Dr. Rasmussen's opinion, that the miner's exposure to coal mine dust was one of two causes of his obstructive impairment, supported a finding that that the miner's pneumoconiosis materially worsened the totally disabling respiratory or pulmonary impairment caused by his cancer and subsequent treatment. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-10 (2003).

In addition, the administrative law judge permissibly found that, because Dr. Fino did not address whether the miner had an obstructive impairment, his opinion was not probative on the issue of disability causation. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Although employer is correct in stating that the administrative law judge did not consider Dr. Oesterling's comment regarding the significance of the structural changes in the miner's lungs, the

administrative law judge's rationale for discrediting Dr. Fino's opinion would apply with equal force to Dr. Oesterling's opinion, as Dr. Oesterling did not acknowledge that the miner had an obstructive impairment. *Id*. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by establishing that the miner's total disability did not arise out of, or in connection with, his coal mine employment. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Accordingly, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis and further affirm the award of benefits in the miner's subsequent claim. 30 U.S.C. §921(c)(4).

II. The Survivor's Claim

In light of our affirmance of the award of benefits in the miner's subsequent claim, and the administrative law judge's unchallenged findings that the survivor's claim was filed after January 1, 2005 and was pending on March 23, 2010, and that claimant is an eligible survivor, *see Skrack*, 6 BLR at 1-711, we affirm the administrative law judge's determination that claimant is automatically entitled to receive survivor's benefits pursuant to amended Section 932(*l*). *See* 30 U.S.C. §932(*l*); Decision and Order at 21.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge