U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0169 BLA

DELORIS J. MULLINS (o/b/o and Widow of TURL MULLINS)	)	
Claimant-Respondent	)	
v.	)	
RB & F COAL, INCORPORATED	)	DATE ISSUED: 02/26/2015
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer, RB & F Coal, Incorporated, appeals the Decision and Order (2012-BLA-5277) of Administrative Law Judge Linda S. Chapman awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944

(2012) (the Act). This case involves a miner's claim filed on May 14, 2009 and a survivor's claim filed on June 17, 2011.[1]

The administrative law judge adjudicated both claims. In regard to the miner's claim, the administrative law judge credited the miner with 20.23 years of coal mine employment,[2] and found that the evidence established the existence of clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1), (4). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the miner was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).[5] Accordingly, the administrative law judge awarded benefits in the miner's claim.

[1] Claimant is the surviving spouse of the miner, who died on May 12, 2011. Director's Exhibit 49.

[2] The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[4] "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).

[5] Although the administrative law judge credited the miner with 20.23 years of coal mine employment, she found that claimant failed to establish that the miner worked for at least fifteen years in underground mines, or in surface mining in conditions "substantially similar" to those in an underground mine. Decision and Order at 8, 29-30. The administrative law judge, therefore, found that claimant was not entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.305. *Id.*

In regard to the survivor's claim, the administrative law judge found that evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge also awarded benefits in the survivor's claim.

On appeal, employer argues that the administrative law judge erred in identifying it as the responsible operator. Employer further contends that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). In regard to the survivor's claim, employer contends that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's identification of employer as the responsible operator. The Director also responds in support of the administrative law judge's award of benefits in both claims. In a reply brief, employer reiterates its previous contentions.

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. 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is 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).

Responsible Operator

Employer, RB & F Coal, Incorporated, contends that the administrative law judge improperly designated it as the responsible operator. The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[6]

[6] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30,

Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and it is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The district director found that the miner worked for employer, RB & F Coal, Incorporated, for at least one year from 1985 to 1986. Director's Exhibit 36. Although the miner subsequently worked for Wilder Coal Company (Wilder Coal) from 1986 to 1988, the district director declined to identify Wilder Coal as the responsible operator. The district director explained that Wilder Coal was bankrupt, and that Rockwood Insurance Company (Rockwood), the insurance carrier that provided coverage for Wilder Coal on the miner's last day of employment, was also bankrupt. *Id.* Under Virginia law, claims filed against Rockwood before August 26, 1992, were to be paid by the Virginia Property and Casualty Insurance Guaranty Association (VPCIGA), a reinsurer. *See Boyd & Stevenson Coal Co. v. Director, OWCP* [*Slone*], 407 F.3d 663, 665, 23 BLR 2-288 (4th Cir. 2005). However, the district director noted that the miner's claim was filed after the deadline of August 26, 1992, and that no state claim was ever filed. Director's Exhibit 36. Because employer was the last viable operator to employ the miner for a full year,[7] the district director designated employer as the responsible operator. *Id.*

The administrative law judge found that employer was the properly named responsible operator, even though it was not the operator that most recently employed the miner. The administrative law judge specifically rejected employer's contention that Wilder Coal should have been designated as the responsible operator:

> [I]t was the Employer's burden to establish that Wilder Coal should have been designated as the responsible operator, because it, or its corporate

---

1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[7] Although the miner worked for J&R Contractors, Incorporated in 1988 and 1989, and for A G M Coal Company in 1989, the district director found that neither of these companies employed the miner for a full year. Director's Exhibit 36. While the miner worked for Kim-Stan, Incorporated in 1989 and 1990, the district director found that the company was not insured during the miner's dates of employment, and was no longer in business. *Id.*

> officers, have the ability to pay benefits in these claims. Similarly, it was the Employer's burden to establish that the assets of VPCIGA should be applied to these claims. The Employer provided absolutely no information to establish that a claim against Rockwood, Wilder [Coal]'s insolvent insurer, was a "covered claim" for which VCIPGA would be statutorily liable under Virginia law. Indeed as the [district director] noted in the Proposed Decision and Order, [the miner's] claim was filed after the Rockwood bankruptcy bar date of August 26, 1992, and no state claim was ever filed.

Decision and Order at 6.

Employer argues that the district director erred in failing to notify VPCIGA of the miner's and survivor's claims.[8] Employer concedes that the deadline for filing a claim with VPCIGA was August 26, 1992. However, citing *Slone*, employer asserts that the miner's untimely claim would have been excused under Virginia Law because the miner "could not have filed a claim prior to the cut-off date because he had no knowledge of the conditions that would have entitled him to file for benefits." Employer's Brief at 21.

Employer's reliance upon *Slone* is misplaced. In *Slone*, the United States Court of Appeals for the Fourth Circuit held that VPCIGA was liable for a survivor's claim, even though the claim was filed after August 26, 1992, the deadline for filing claims for which VPCIGA would be held liable. The court explained that the survivor's claim was derivative of a miner's claim, which had been filed before the deadline. *Slone*, 407 F.3d at 668, 23 BLR at 2-299. In this case, by contrast, both the miner's claim and the survivor's claim were filed after the August 26, 1992 deadline. Thus, the facts presented in this case differ materially from the facts that were presented in *Slone*. Moreover, Virginia courts have recognized that VPCIGA is not liable for benefits where a claimant files his claim after the final date set by a court for the filing of claims against an insolvent insurer. *Uninsured Employer's Fund v. Mounts*, 484 S.E. 2d 140 (Va. Ct. App. 1997), *aff'd*, 497 S.E.2d 464 (Va. 1998). Because the current claims were filed after August 26, 1992, VPCIGA could not be deemed responsible for the payment of benefits. *Id*. Furthermore, contrary to employer's argument, state-run insurance guaranty associations are not covered by 20 C.F.R. §726.203(c), which prohibits private insurance carriers from limiting their liability for black lung claims. *See Slone*, 407 F.3d at 669, 23 BLR at 2-299; *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 21 BLR 2-353 (7th Cir.

[8] Employer does not dispute that Wilder Coal Company and Rockwood Insurance Company are incapable of paying benefits.

1998). We affirm, therefore, the administrative law judge's determination that the district director properly designated employer as the responsible operator in the current claims.[9]

The Miner's Claim

The Existence of Clinical Pneumoconiosis

Turning to the merits, employer argues that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis. The administrative law initially considered the x-ray evidence, consisting of seven interpretations of four x-rays taken on April 24, 2009, July 7, 2009, November 19, 2009, and August 18, 2010. The administrative law judge accurately noted that six of the seven x-ray interpretations were interpreted as positive for pneumoconiosis, including four x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists.[10] Decision and Order at 29. Based upon the "overwhelming preponderance" of the evidence, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R.

[9] Employer asserts that the administrative law judge "failed to consider that [the miner's] employment for either Deblin Coal or Crystal Coal took place after his employment with [employer] and that employment cumulatively totaled more than one year." Employer's Brief at 27. The miner's Social Security records reveal that the miner worked for Deblin Coal Company from 1977 to 1979, well before he worked for employer. Although the miner briefly referenced "Crystal Coal Company" during a September 17, 2009 deposition, Director's Exhibit 26 at 5, there is no indication in the record as to when, or for how long, the miner worked for this company. Also, employer provides no support for its assertion that "Crystal Coal was a successor to Deblin." Employer's Reply Brief at 4. Consequently, employer has failed to carry its burden to prove that Crystal Coal satisfies the requirements of a potential responsible operator. *See* 20 C.F.R. §725.495(c)(2).

[10] Drs. Miller and Alexander, each dually qualified as a B reader and Board-certified radiologist, interpreted the April 24, 2009 x-ray as positive for pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 5. Drs. Miller and Navani, each dually qualified as a B reader and Board-certified radiologist, interpreted the July 7, 2009 x-ray as positive for the disease. Director's Exhibits 10, 13. Although Dr. Jarboe, a B reader, interpreted the November 19, 2009 x-ray as negative for pneumoconiosis, Director's Exhibit 14, Dr. Alexander, a B reader and Board-certified radiologist, interpreted the x-ray as positive for the disease. Director's Exhibit 13. Finally, Dr. Fino, a B reader, interpreted the August 18, 2010 x-ray as positive for pneumoconiosis. Director's Exhibit 44. Director's Exhibit 44.

§718.202(a)(1). Because employer does not challenge this finding, it is affirmed.[11] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer next argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of clinical pneumoconiosis.[12] The administrative law judge considered the medical opinions of Drs. Forehand, Sergent, Smiddy, Jarboe, Fino, and Rosenberg. While Drs. Forehand, Sergent, and Smiddy diagnosed clinical pneumoconiosis, Director's Exhibit 9; Claimant's Exhibits 2, 3; Employer's Exhibits 12, 13, Drs. Jarboe, Fino, and Rosenberg opined that the miner did not suffer from the disease. Director's Exhibits 14, 44; Employer's Exhibits 1-4, 9 The administrative law judge found that Dr. Forehand's diagnosis of clinical pneumoconiosis was well-reasoned and "consistent with [her] finding on the totality of the x-ray evidence." Decision and Order at 30. The administrative law judge noted that Dr. Forehand's opinion was supported by the well-reasoned opinions of the miner's treating physicians, Drs. Smiddy and Sargent. *Id.* at 33-34. By contrast, the administrative law judge found that the contrary opinions of Drs. Jarboe, Fino, and Rosenberg were speculative, equivocal, poorly reasoned, and not supported by the objective evidence. *Id.* at 30-33. The administrative law judge, therefore, found that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 34.

[11] Employer contends that the administrative law judge erred in not weighing the CT scan evidence against the x-ray evidence. Dr. Saadeh interpreted two CT scans, taken on September 10, 2009 and April 28, 2010, as revealing "extensive interstitial lung disease" that was "most likely" related to usual interstitial pneumonitis/interstitial pulmonary fibrosis. Decision and Order at 28; Employer's Exhibit 11. Because Dr. Saadeh "did not make any findings of pneumoconiosis," the administrative law judge found that the CT scan evidence did not establish the existence of pneumoconiosis. Decision and Order at 30. Although the administrative law judge did not explicitly weigh the CT scan evidence against the x-ray evidence, we note that the administrative law judge relied upon the radiological qualifications of the readers in evaluating the x-ray evidence. Because Dr. Saadeh's radiological qualifications are not in the record, the administrative law judge's error, if any, in not providing a more detailed explanation for her weighing of the CT scan evidence was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

[12] The administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). Decision and Order at 28-29.

Employer argues that the administrative law judge erred in finding that Dr. Forehand's opinion established the existence of clinical pneumoconiosis. In finding that Dr. Forehand's diagnosis of clinical pneumoconiosis was supported by the x-ray evidence, employer contends that the administrative law judge ignored the doctor's statement that the x-rays could be consistent with idiopathic pulmonary fibrosis (IPF). We disagree. The administrative law judge noted that, although Dr. Forehand acknowledged that the miner's x-ray findings could be consistent with "early idiopathic pulmonary fibrosis," the doctor opined that this finding would not eliminate other considerations. Decision and Order at 11; Employer's Exhibit 12 at 6, 16. In fact, Dr. Forehand specifically opined that it remained his opinion that the x-ray findings were "consistent with the effects of coal mine dust in the lungs." *Id.* at 6. The administrative law judge, therefore, permissibly credited Dr. Forehand's opinion, that the miner suffered from clinical pneumoconiosis because she found that it was consistent with the x-ray evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also 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).

We also reject employer's contention that the administrative law judge erred in according less weight to the opinions of Drs. Jarboe, Fino, and Rosenberg. The administrative law judge noted that Dr. Jarboe was the only reader who rendered a negative x-ray interpretation. The administrative law judge permissibly found that the November 19, 2009 x-ray that Dr. Jarboe relied upon as negative for pneumoconiosis was interpreted as positive for pneumoconiosis by a better qualified physician, thus calling into question the reliability of Dr. Jarboe's opinion.[13] *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 30-31.

The administrative law judge found that the opinions of Drs. Fino and Rosenberg merited less weight because they were not well-supported by the x-ray evidence. The administrative law judge found that Dr. Fino's opinion, that the miner did not have pneumoconiosis, relied on the physician's finding that the miner's x-rays showed only irregular opacities, not rounded opacities, which he stated are typical of coal workers' pneumoconiosis. The administrative law judge further found that Dr. Rosenberg's opinion, that the miner did not have pneumoconiosis, similarly relied on the physician's finding that the miner's x-rays showed only irregular opacities, not rounded opacities.

[13] Although Dr. Jarboe, a B reader, interpreted the November 19, 2009 x-ray as negative for pneumoconiosis, Director's Exhibit 14, Dr. Alexander, a B reader and Board-certified radiologist, interpreted the x-ray as positive for the disease. Director's Exhibit 13.

The administrative law judge determined that the weight of the x-ray evidence failed to support the findings of Drs. Fino and Rosenberg that only irregular opacities were seen, as more highly qualified physicians interpreting the x-rays detected either rounded opacities, or a combination of rounded and irregular opacities. Decision and Order at 31-33.

Contrary to employer's contention, the administrative law judge did not err in her analysis of the medical opinions. The determination of whether a medical opinion is reasoned and documented is within the discretion of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Here, the administrative law judge rationally found that the reasoning of Drs. Rosenberg and Fino, that only irregular opacities were present on x-ray, was not supported by the weight of the x-ray evidence, as a majority of the other physicians who reviewed the miner's x-rays noted either rounded opacities, or a combination of rounded and irregular opacities.[14] *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 141 (1985).

Thus, the administrative law judge permissibly credited Dr. Forehand's opinion, that the miner suffered from clinical pneumoconiosis, over the contrary opinions of Drs. Jarboe, Fino, and Rosenberg.[15] Because it is based upon substantial evidence,[16] we

---

[14] The administrative law judge noted that five of the seven x-ray readings included findings of round opacities, as well as irregular opacities:

> Dr. Alexander reported that the April 24, 2009 x-ray showed primary rounded opacities (p), and secondary irregular opacities (s); he reported that the November 19, 2009 x-ray showed primary irregular opacities (s), and secondary rounded opacities (p). Dr. Miller reported primary rounded opacities (q) and secondary irregular opacities (s) on the April 24, 2009 and July 7, 2009 x-rays. Dr. Forehand reported primary rounded opacities (p) and secondary irregular opacities (t) on the July 7, 2009 x-ray.

Decision and Order at 31.

The administrative law judge also accurately noted that four of the seven x-ray readings "include findings of *primary* p or q changes (i.e., rounded opacities)." *Id.* at 32.

[15] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Jarboe, Fino, and Rosenberg, any error she may have made in according less weight to their opinions for other reasons would be harmless. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore,

affirm the administrative law judge's finding that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also found that all of the evidence of record, when weighed together, established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 35. Because it is supported by substantial evidence, this finding is affirmed.

Total Disability

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence established that the miner was totally disabled pursuant to Section 718.204(b)(2)(iv).[17] Employer asserts that the administrative law judge erred in failing to consider the physical requirements of the miner's previous coal mine work in conjunction with the medical opinion evidence. We disagree. The administrative law judge accurately found that "[e]very physician who has addressed [the] issue has concluded that [the miner] had a totally disabling oxygen transfer impairment."[18]

---

we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Jarboe, Fino, and Rosenberg.

[16] Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Sergent and Smiddy. We note that, even if the administrative law judge had discounted the opinions of Drs. Sergent and Smiddy, Dr. Forehand's opinion, which the administrative law judge permissibly credited as better reasoned than the opinions of Drs. Jarboe, Fino, and Rosenberg, would still constitute substantial evidence in support of the administrative law judge's finding that the medical opinion evidence established clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986).

[17] The administrative law judge found that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 35. Because this finding is unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[18] Dr. Jarboe opined that the miner suffered from "a totally disabling impairment of gas exchange." Employer's Exhibit 9. Dr. Fino opined that the miner was "clearly disabled" due to "severe oxygen transfer problems." Director's Exhibit 44. Dr. Rosenberg diagnosed a "severe oxygenation abnormality," and opined that the miner

Decision and Order at 35. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b).

Disability Causation

Employer argues that the administrative law judge erred in finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge noted that, although Dr. Forehand explained that the miner's arterial blood gas study results could be consistent with IPF, the doctor further explained that the results "could be consistent with a lot of other conditions that cause scarring of the lungs." Decision and Order at 36; Employer's Exhibit 12 at 10. In this case, Dr. Forehand found that the miner's severe respiratory impairment (a pO2 of 43) was due to his clinical pneumoconiosis. Director's Exhibit 9. The administrative law judge permissibly found that Dr. Forehand's opinion, that the miner's totally disabling pulmonary impairment was due to clinical pneumoconiosis, was well reasoned. *See Compton*, 211 F.3d at 212, 22 BLR at 2-176; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276. Conversely, the administrative law judge permissibly accorded less weight to Dr. Jarboe's opinion because the doctor did not provide "any support for his claim that the miner's desaturation with exercise was not characteristic of [clinical] pneumoconiosis." Decision and Order at 36-37. The administrative law judge also permissibly accorded less weight to Dr. Rosenberg's opinion because the doctor "did not explain or support his conclusory statement that the inhalation of coal mine dust did not have a material adverse effect on the [miner's] pulmonary well-being." Decision and Order at 37.

The administrative law judge accorded less weight to Dr. Fino's opinion because the doctor relied on the fact that the miner's diffusing capacity was too low to have been caused by coal mine dust exposure. Decision and Order at 37. We need not address whether this was a proper basis for according less weight to Dr. Fino's opinion. The administrative law judge accurately found that Dr. Fino, along with Drs. Jarboe and Rosenberg, did not diagnose the miner with clinical pneumoconiosis. Since the administrative law judge found the existence of clinical pneumoconiosis established, she "could only give weight to the causation opinions of the physicians who had not diagnosed pneumoconiosis 'if [s]he provided specific and persuasive reasons for doing

---

suffered from a totally disabling pulmonary impairment. Employer's Exhibits 1, 4 at 11. Dr. Forehand also opined that the miner was "totally and permanently disabled" explaining that the miner did not have sufficient residual ventilatory capacity to return to his last coal mining job. Director's Exhibit 9.

so, and those opinions could carry little weight at the most.'" *Collins v. Pond Creek Coal Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006) (Shedd, J., dissenting), quoting *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *see also Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). We therefore reject employer's contention that the administrative law judge erred in according diminished probative value to the opinions of Drs. Fino, Jarboe, and Rosenberg regarding the cause of the miner's totally disabling pulmonary impairment. Consequently, the opinions of Drs. Fino, Jarboe and Rosenberg do not counter Dr. Forehand's opinion. *Id.* Under these circumstances, we affirm the administrative law judge's finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's award of benefits in the miner's claim.

The Survivor's Claim

Having affirmed the administrative law judge's award of benefits in the miner's claim, we hold that claimant has satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(*l*) of the Act: that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*). Because claimant is derivatively entitled to survivor's benefits, we remand this case to the district director for the entry of an award of benefits pursuant to Section 932(*l*).[19]

[19] In light of our disposition of this case, we need not address employer's contention that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b).

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim is affirmed. In regard to the survivor's claim, this case is remanded to the district director for the entry of an appropriate order.

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge