U.S. Department of Labor

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

BRB No. 15-0181 BLA

FLORENCE HAGY (Widow of TROY L. HAGY) Claimant-Petitioner v. WESTMORELAND COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/26/2016 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

Sarah M. Hurley, (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, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-5367) of Administrative Law Judge Richard A. Morgan, rendered on a survivor's claim filed on December 15, 2011, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that the miner had at least forty-two years of coal mine employment, with at least fifteen years underground. The administrative law judge initially determined that claimant proved that the miner had clinical and legal pneumoconiosis, but found that the objective studies and medical opinion evidence were insufficient to establish that the miner was totally disabled from performing his previous coal mine job, which required heavy manual labor. Therefore, the administrative law judge concluded that claimant was unable to invoke the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305. The administrative law judge further determined that claimant was unable to demonstrate that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in denying her request to submit rehabilitative evidence concerning the medical opinions of Drs. Rasmussen and Abraham. Claimant also argues that the administrative law judge erred in finding that the miner did not have a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), when the record contains a qualifying exercise blood gas study. Claimant further alleges that the administrative law judge did not adequately explain why Dr. Rosenberg's opinion, that the miner did not have a totally disabling respiratory or pulmonary impairment, was entitled to more weight than Dr. Rasmussen's contrary opinion at 20 C.F.R. §718.204(b)(2)(iv). Further, claimant contends that the administrative law judge incorrectly determined that she failed to establish that the miner's death was due to pneumoconiosis under 20 C.F.R.

[1] Claimant is the widow of the miner, who died on May 14, 2010. Decision and Order at 2, 5; Director's Exhibit 9. The miner filed seven claims for Black Lung Benefits, all of which were finally denied. Decision and Order at 2 n.2; Director's Exhibit 1.

[2] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

§718.205(c). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, asserting that the administrative law judge erred in denying claimant's request to submit rehabilitative evidence, and in crediting Dr. Rosenberg's opinion on the issue of total disability.[3]

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.[4] 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).

I. Request to Submit Additional Evidence

In this case, claimant submitted the medical report of Dr. Rasmussen as affirmative evidence prior to the hearing, held on April 9, 2014. Claimant's Exhibit 2. Claimant also identified as affirmative evidence x-ray readings, the results of pulmonary function and blood gas studies, treatment records, and Dr. Dennis's autopsy report. Claimant's Exhibits 1-6, 9-11; Director's Exhibit 11. At the hearing, employer submitted seven exhibits, consisting of x-ray and CT scan interpretations and treatment records, and joined in claimant's request that the record be held open to allow for the development of post-hearing evidence, based on the difficulties the parties had in obtaining the tissue slides from Dr. Dennis. Employer's Exhibits 1-7; Hearing Transcript at 19-20, 22-23. The administrative law judge granted the joint request and indicated that the record would be held open until August 30, 2014. *Id*. at 21. Prior to that deadline, claimant submitted a report from Dr. Abraham[5] on May 21, 2014; and employer proffered the

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least forty-two years of coal mine employment, with at least fifteen years underground, and his determination that the miner's previous coal mine employment required heavy manual labor. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibit 1, 3-4. Accordingly, the Board will apply the law 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).

[5] Claimant initially designated Claimant's Exhibit 7, "Pathology review, not yet received," as one of her two affirmative medical reports. *See* Claimant's Evidence Summary Form dated April 9, 2014. This exhibit was ultimately submitted as Claimant's Exhibit 12, a post-hearing report from Dr. Abraham, a pathologist, based on his review of

reports of Drs. Caffrey and Oesterling as affirmative and rebuttal autopsy reports on August 13, 2014, and the report of Dr. Rosenberg as an affirmative medical report on August 29, 2014. Claimant's Exhibit 12; Employer's Exhibits 9-11. Thereafter, the administrative law judge granted employer two additional extensions of time,[6] totaling 105 days, to develop and submit the medical report of Dr. Zaldivar and the depositions of Drs. Zaldivar and Rosenberg. *See* September 2, 2014 Order; November 3, 2014 Order. Pursuant to the administrative law judge's orders, employer submitted Dr. Zaldivar's report on October 7, 2014, and submitted the depositions of Drs. Zaldivar and Rosenberg on November 10, 2014 and December 10, 2014, respectively. Employer's Exhibits 8, 12-13.

On December 11, 2014, one day after employer submitted Dr. Rosenberg's deposition and prior to the expiration of the December 15, 2014 deadline the administrative law judge set for employer's submissions, claimant filed a Motion for Leave to Submit Rehabilitative Evidence, maintaining that the opinions of Drs. Zaldivar, Rosenberg, Caffrey, and Oesterling tended to undermine the conclusions of Drs. Rasmussen and Abraham. The administrative law judge denied claimant's motion and extended the deadline for the submission of post-hearing briefs. December 29, 2014 Order at 2. The administrative law judge stated, "the continuing disputes over evidence and attempts to have ever more reports submitted seems to exhibit less than diligent efforts and is delaying the resolution of the claim." *Id*. In addition, the administrative law judge found that claimant could have submitted a supplemental autopsy report from Dr. Dennis, in light of employer's submission of Dr. Oesterling's rebuttal autopsy report, and could have submitted medical reports in rebuttal to the initial medical reports of Drs. Rosenberg and Zaldivar, but chose not to do so. *Id*. The administrative law judge also stated that claimant's counsel "had ample opportunity to cross-examine both of employer's physicians [at deposition] . . . and did so effectively." *Id*. The administrative law judge concluded that he agreed with employer that claimant's counsel was merely trying to present a better case than originally submitted. *Id*.

Dr. Rasmussen's medical report, "[o]ther reports in the records," and autopsy slides. *See* Claimant's Exhibit 12. Claimant also identified Claimant's Exhibit 12 as "the medical report of Dr. J. Abraham" when she submitted it for the record. *See* Claimant's May 21, 2014 Letter.

[6] Employer's second request for an extension of time was filed on August 29, 2014, the day before the initial deadline to submit post-hearing evidence. *See* Employer's Motion dated August 29, 2014. Employer's third request for an extension of time was filed on October 29, 2014, the day of the second deadline to submit evidence. *See* Employer's Motion dated October 30, 2014.

Claimant argues that the evidence she sought to admit should have been entered into the record pursuant to 20 C.F.R. §725.414(a)(2)(ii), which provides, in relevant part, that when employer's "rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion . . . ." 20 C.F.R. §725.414(a)(2)(ii). Claimant specifically contends that the use of the word "shall" in the regulation required the administrative law judge to allow her to enter rehabilitative evidence in response to the medical opinions of Drs. Zaldivar, Rosenberg, Caffrey, and Oesterling, which undermined the opinions of Drs. Rasmussen and Abraham.

The Director agrees that claimant was entitled to enter additional evidence into the record but on a different basis. The Director states that the administrative law judge should have treated the additional medical reports that claimant sought to admit as supplements to the admissible initial reports of Drs. Rasmussen and Abraham. The Director also contends that the administrative law judge erred in finding that claimant's ability to cross-examine Drs. Zaldivar and Rosenberg during their depositions substituted for permitting supplemental opinions from Drs. Rasmussen and Abraham. The Director further alleges that the administrative law judge erred in finding that claimant was attempting to delay the proceedings.

After reviewing the procedural history and the parties' arguments on appeal, we hold that the administrative law judge did not provide a valid rationale for denying claimant's motion.[7] The administrative law judge's characterization of claimant's counsel's request as "less than diligent," and an attempt to "delay[] the resolution of the case," is not supported by the record. December 29, 2014 Order at 2. The administrative law judge initially held the record open until August 30, 2014 at the joint request of claimant and employer, because the parties had been unable to obtain the autopsy slides that were necessary for the development of their evidence. Hearing Transcript at 19-23. The remaining delays occurred as a result of the administrative law judge's granting of employer's two additional requests for extension of time, due to an inability of employer to timely submit Dr. Zaldivar's report and deposition, and Dr. Rosenberg's deposition.

[7] We decline to reach the issue of whether the evidence that claimant asked the administrative law judge to admit constituted rehabilitative evidence under 20 C.F.R. §725.414(a)(2)(ii), because the reports of Drs. Rasmussen and Abraham were otherwise admissible under the evidentiary limitations. *See Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007) (Although decided in the context of a request for modification, the Board's holding stands for the proposition that the evidentiary limitations favor permitting a party to submit the full complement of evidence available under 20 C.F.R. §725.414(a)(2), (a)(3)).

See September 2, 2014 Order; November 3, 2014 Order. Claimant's motion was filed only one day after employer completed its post-hearing evidentiary development with the submission of Dr. Rosenberg's deposition, and prior to the deadline for submission of evidence established by the administrative law judge's order granting employer's third request for an extension. *See* December 29, 2014 Order at 1; November 3, 2014 Order. Based on this record, the administrative law judge did not provide an adequate justification for concluding that claimant's motion was dilatory, or attributing the "less than effective" post-hearing evidentiary development to claimant, while affording employer an additional three and a half months to submit its evidence. December 29, 2014 Order at 2.

The administrative law judge's acceptance of employer's characterization of claimant's motion as an attempt "to present a better case than the one submitted" and "a belated attempt [at the] fine-tuning of his trial strategy[,]" is also unsupported by the chronology of the post-hearing evidentiary submissions. December 29, 2014 Order at 2. Because employer submitted the majority of its affirmative and rebuttal evidence after the hearing, *and* after claimant submitted her post-hearing evidence, we agree with the Director that claimant "should not be criticized for striving, within the parameters of the evidentiary rules, to present the best case [s]he could." Director's Letter Brief at 7.

With respect to the admissibility of supplemental medical reports from Drs. Rasmussen and Abraham, the regulation at 20 C.F.R. §725.414(a) provides that a physician's review of "available admissible evidence" constitutes a "medical report." 20 C.F.R. §725.414(a)(1); *see also* 64 Fed. Reg. 54,995 (Oct. 8, 1999) (recognizing that a physician who prepares a medical report may address medical reports prepared by other physicians that are in the record and in conformance with the evidentiary limitations). In addition, the evidentiary limitations do not require that a "medical report" be contained in a single document. Thus, we agree with the Director that claimant's request is not precluded by the evidentiary limitations, as any supplemental report is considered to have merged with the initial report. *See* 20 C.F.R. §725.414(a)(1), (2)(i); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006); *see also C.L.H.* [*Hill*] *v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA, slip op. at 4 (Oct. 31, 2007) (unpub.) (The Board deferred to the Director's position that supplemental medical reports based on a review of admissible evidence do not exceed the two-report limitation). We further agree with the Director that claimant's counsel's opportunity to cross-examine Drs. Zaldivar and Rosenberg during their depositions did not substitute for the ability of claimant to ensure that Dr. Rasmussen's and Dr. Abraham's reports are well-reasoned and well-documented. *See generally United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389, 21 BLR 2-639, 2-648 (4th Cir. 1999) (Claimant's burden is to present reliable, probative, and substantial evidence of such quality to persuade the administrative law judge that facts supporting the claim are more probable than their non-existence). Consequently, to the extent the administrative law judge found that claimant's request to

submit additional evidence was inconsistent with the evidentiary limitations, we vacate his finding.

Accordingly, we vacate the administrative law judge's denial of claimant's motion to submit additional evidence and remand the case to the administrative law judge for reconsideration of whether claimant is entitled to submit supplemental medical reports from Drs. Rasmussen and Abraham, pursuant to the evidentiary limitations set forth in 20 C.F.R. §725.414. Furthermore, because the administrative law judge may not have based his Decision and Order on all admissible evidence, we must vacate his findings that claimant failed to prove that the miner was totally disabled under 20 C.F.R. §718.204(b)(2) or that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). To promote judicial efficiency, however, we will address claimant's additional arguments concerning the administrative law judge's weighing of the evidence relevant to these issues.

II. Invocation of the Section 411(c)(4) Presumption – Total Disability

The administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii), because none of the pulmonary function studies is qualifying[8] and there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 24. At 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge noted that the sole resting blood gas study, obtained by Dr. Rasmussen on December 5, 2005, is non-qualifying and the accompanying exercise blood gas study is qualifying. *Id*. at 25; Claimant's Exhibit 2. The administrative law judge then found that the miner's last coal mine employment required heavy manual labor and considered the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 25. The administrative law judge concluded that this evidence was, at best, in equipoise because Dr. Rasmussen's opinion, that the miner was totally disabled from a respiratory standpoint, was based on limited information and testing, while Dr. Rosenberg's contrary opinion was entitled to greater weight because he considered more evidence. *Id*. at 26; Claimant's Exhibit 2; Employer's Exhibits 9, 13. The administrative law judge also indicated that, while Dr. Zaldivar did not explicitly address lifetime disability, his opinion appeared to suggest that the miner did not have a disabling respiratory impairment during his lifetime. Decision and Order at 26; Employer's Exhibits 8, 12. Consequently, the administrative law judge determined that claimant did not establish that the miner was totally disabled due to a respiratory

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

impairment under 20 C.F.R. §718.204(b)(2) and, therefore, did not invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. Decision and Order at 26.

Claimant argues that the administrative law judge should have determined that she established total disability based on the qualifying exercise blood gas study and the medical opinion of Dr. Rasmussen. Claimant maintains that exercise studies are more probative because they assess oxygen levels during physical exertion and, therefore, are a better indicator of the miner's ability to perform the exertional requirements of his previous coal mine employment. Claimant contends that the administrative law judge did not adequately explain why he gave more weight to Dr. Rosenberg's opinion, as the fact that a physician reviews more records does not automatically make his opinion more credible. Additionally, claimant argues that the administrative law judge did not resolve the conflict between Dr. Rosenberg's attribution of the miner's abnormal exercise blood gas study to heart disease, and Dr. Rasmussen's contrary findings. Specifically, claimant asserts that Dr. Rasmussen indicated that he was aware that the miner was previously diagnosed with arteriosclerotic heart disease, and underwent coronary artery bypass grafting with implantation of a pacemaker, but did not detect any heart abnormalities that would have caused the abnormal exercise blood gas study on December 5, 2005. The Director agrees that the administrative law judge erred in crediting Dr. Rosenberg's opinion concerning total disability.

Initially, we reject claimant's assertion that the administrative law judge erred in failing to give greater weight to claimant's exercise blood gas study. As claimant maintains, the administrative law judge could have given more weight to the exercise blood gas study at 20 C.F.R. §718.204(b)(2)(ii), especially given his finding that the miner's last coal mine employment required heavy labor, but he was not required to do so. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). However, claimant contends accurately that, in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge erred in crediting Dr. Rosenberg's opinion as a definitive diagnosis that the miner did not have a respiratory impairment. Dr. Rosenberg acknowledged that the miner had a decreased diffusing capacity, and hypoxemia that worsened with exercise, but indicated that these impairments were not truly respiratory or pulmonary in nature because they were due to "secondary conditions . . . for example, gas exchange as noted by Dr. Rasmussen." Employer's Exhibit 13 at 23. Dr. Rosenberg's attribution of the miner's impairments to nonpulmonary "secondary conditions" is not relevant to the inquiry at 20 C.F.R. §718.204(b)(2), which concerns the *existence* of a chronic respiratory or pulmonary impairment, rather than the *cause* of such impairment. *Id.*; *see* 20 C.F.R. §718.204(b)(1), (c)(1).

Additionally, the administrative law judge's reason for giving more weight to Dr. Rosenberg's opinion – that he "considered a plethora of evidence" – is not supported by

the record. Decision and Order at 26. Although the administrative law judge correctly determined that Dr. Rosenberg reviewed more medical records than Dr. Rasmussen, Dr. Rosenberg cited only the results of Dr. Rasmussen's 2005 objective studies in his explanation of why the miner did not have a totally disabling respiratory impairment. *See* Employer's Exhibits 9; 13 at 16-18, 22-23. Because Drs. Rosenberg and Rasmussen[9] relied on the same data to reach their conclusions concerning total disability, the administrative law judge's finding that Dr. Rosenberg's review of additional records gave him an advantage cannot be affirmed. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). In light of the flaws in the administrative law judge's consideration of the medical opinions of Drs. Rosenberg and Rasmussen, we vacate the administrative law judge's findings with respect to these opinions pursuant to 20 C.F.R. §718.204(b)(2).

III. 20 C.F.R. §718.205(c) – Death Due to Pneumoconiosis

The administrative law judge also considered whether claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c),[10] without the benefit of the amended Section 411(c)(4) presumption.[11] When weighing the relevant evidence, the administrative law judge indicated that he would "give no special deference to Dr. Dennis'[s] opinion," based on his status as autopsy prosector, and that Dr. Dennis's report was not relevant to 20 C.F.R. §718.205(c), because "he did not explicitly identify

[9] The Director, Office of Workers' Compensation Programs (the Director), indicated that Dr. Rasmussen's total disability diagnosis is well-supported by the objective studies he conducted, and is consistent with the miner's treatment and hospitalization records, diagnosing the miner's breathing difficulties and documenting that, during the last years of his life, he was consistently prescribed oxygen to assist with his breathing. *See* Director's Brief at 6; Claimant's Exhibits 4-6; Employer's Exhibits 6-7; Hearing Testimony at 11.

[10] For survivors' claims filed on or after January 1, 1982, death is considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert denied*, 506 U.S. 1050 (1993).

[11] *See* n.2, *supra*.

the cause of death or the contributing factors."[12] Decision and Order at 28. The administrative law judge also gave little weight to the death certificate because it was prepared by Dr. Harvey, who did not have the opportunity to review the autopsy results. *Id*. at 29. Further, the administrative law judge gave less weight to Dr. Abraham's opinion, that the miner's death was due to coal dust exposure, because he "did not set forth sufficient reasoning nor could he quantify various contributory factors." *Id*. The administrative law judge gave greater weight to the contrary opinions of Drs. Oesterling and Caffrey, who are Board-certified pathologists, and Drs. Zaldivar and Rosenberg, who are Board-certified pulmonologists, because he found that they "convincingly explained that the miner's simple, clinical [coal workers' pneumoconiosis] played absolutely no role whatsoever in his death . . . ." *Id*.

Claimant contends that Dr. Abraham's opinion, that pneumoconiosis contributed to the miner's death, should have been given the greatest weight because he is the most qualified physician and was the only physician who reviewed the miner's clinical records. Claimant also argues that the administrative law judge erred in giving weight to Dr. Oesterling's contrary opinion, as he did not diagnose simple clinical pneumoconiosis, unlike the other physicians of record. The Director alleges that the administrative law judge "overlooked the infirmities in Dr. Rosenberg's reasons for downplaying the miner's respiratory difficulties at the time of his death." Director's Letter Brief at 5. The Director maintains that Dr. Rosenberg determined that the mild degree of emphysema that Dr. Oesterling diagnosed would not have affected the miner's respiratory condition, but did not address Dr. Caffrey's diagnosis of "moderate" and "significant" emphysema in the autopsy slides he examined. *Id*. at 6; *see* Employer's Exhibits 10, 13 at 17. The Director also maintains that Dr. Rosenberg's opinion, that the miner did not have chronic obstructive pulmonary disease (COPD), was contradicted by the miner's medical records, and that Dr. Rosenberg cited only to the results of the miner's 2005 pulmonary function studies, conducted four and one-half years prior to the miner's death. Director's Brief at 6. Further, the Director contends that Dr. Rosenberg's equivocal opinion, that the miner's reduced diffusing capacity was "probably" related to his heart disease, "leaves open the question" of whether the combination of the miner's simple clinical pneumoconiosis and emphysema could have caused the miner's reduced diffusing capacity. *Id*.; *see* Employer's Exhibit 13 at 17-18.

There is some merit to these arguments. The administrative law judge acted within his discretion in finding that Dr. Abraham's qualifications as a Board-certified pathologist were equal to those of Drs. Oesterling and Caffrey, who are also Board-

[12] Dr. Dennis diagnosed a variety of medical conditions, including mild emphysema, coal workers' pneumoconiosis, progressive massive fibrosis, and pulmonary congestion. Director's Exhibit 11.

certified pathologists. Decision and Order at 17. Although the administrative law judge could have determined that Dr. Abraham's qualifications were superior, based on his professorship in pathology and his extensive publications, which the administrative law judge acknowledged, he was not required to do so. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc); Decision and Order at 11, 17. Further, although Dr. Abraham reviewed medical records in addition to the autopsy slides, the administrative law judge was not required to give his opinion greater weight on that basis, as the administrative law judge observed that Dr. Abraham stated that he would "limit [his] comments to the pathology material, which does confirm coal worker[s'] pneumoconiosis." Decision and Order at 11, *quoting* Claimant's Exhibit 12.[13]

As claimant suggests, however, Dr. Abraham was not required to quantify the degree of contribution from other factors that played a role in the miner's death. He merely had to render a reasoned and documented conclusion that pneumoconiosis was a substantially contributing cause of the miner's death, i.e., hastened the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92 (4th Cir. 1992). Claimant's argument regarding the administrative law judge's crediting of Dr. Oesterling's opinion on the issue of death causation also has merit. Because the administrative law judge explicitly determined that the miner had clinical pneumoconiosis,[14] he should have considered the effect of Dr. Oesterling's finding to the contrary on the probative value of his opinion that pneumoconiosis was not a contributing cause of the miner's death. *See Scott v. Mason Coal Co.*, 289 F.3d 262, 269-70, 22 BLR 2-373, 2-384 (4th Cir. 2002) (In the context of total disability causation, the court held that medical opinions that do not diagnose pneumoconiosis, contrary to the administrative law judge's finding, "may not be credited at all" on causation, unless "specific and

[13] Dr. Abraham stated that his review of the medical records revealed "[a] chest x-ray reading indicat[ing] evidence of pneumoconiosis consistent with coal workers pneumoconiosis" and "[o]ther reports in the records indicat[ing] there was no evidence of pulmonary fibrosis or pneumoconiosis." Claimant's Exhibit 12. Dr. Abraham reasoned that, regardless of the radiological findings, "pathology is the 'gold standard' for such things" and "the fact that these are documented in [the miner's] lung tissues is irrefutable." *Id.*

[14] The administrative law judge found that the pathology evidence was sufficient to establish the existence of simple, clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 16. He further determined that the medical opinion in which Dr. Rasmussen diagnosed emphysema caused, in part, by coal dust exposure, was sufficient to establish the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). *Id*. at 18-19.

persuasive reasons" exist establishing that the physician's view is independent from his misdiagnosis.); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, BLR (4th Cir. 2015) ; *Toler v. Eastern Associated Coal Co*., 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

In addition, the Director is correct in asserting that the administrative law judge did not explain his crediting of Dr. Rosenberg's opinion in light of the physician's reliance on Dr. Oesterling's diagnosis of *mild* emphysema without considering Dr. Caffrey's diagnosis of *moderate* emphysema; address whether Dr. Rosenberg's opinion that the miner did not have COPD detracted from his opinion on death causation; or address the equivocation in Dr. Rosenberg's statement regarding the cause of the miner's diffusion impairment. In light of the errors in the administrative law judge's consideration of the relevant medical opinions, we vacate his finding that claimant failed to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c).

IV. Remand Instructions

On remand, the administrative law judge must initially consider whether claimant is entitled to submit supplemental medical reports in compliance with the evidentiary limitations at 20 C.F.R. §725.414. The administrative law judge must then reconsider whether claimant has established that the miner had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), based on the objective studies and the medical opinion evidence of record. When the administrative law judge is reconsidering whether the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), he must take into consideration the credibility of the physicians' explanations, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge must also make a finding as to whether each physician had an accurate understanding of the nature of claimant's usual coal mine job, in weighing the evidence to determine whether claimant is totally disabled. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997). If the administrative law judge finds total disability established based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), he must further determine, based on a weighing of all the evidence, whether claimant satisfied her burden to establish that the miner had a totally disabling respiratory or pulmonary impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc).

If the administrative law judge finds that the miner had a totally disabling respiratory or pulmonary impairment, claimant is entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 20 C.F.R.

§718.305(b)(1), (c)(2); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). The administrative law judge must then consider whether employer has rebutted the presumption by establishing that the miner did not have legal *and* clinical pneumoconiosis,[15] or by establishing that no part of the miner's death was caused by legal *and* clinical pneumoconiosis. 20 C.F.R. §718.305(d)(2).

However, if the administrative law judge determines that claimant is not entitled to invocation of the Section 411(c)(4) presumption, the administrative law judge is required to reconsider whether claimant can establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c), without benefit of the presumption, and in light of any additional evidence that he has admitted on remand. *See* 20 C.F.R. §718.205(c); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In reaching his findings on remand, the administrative law judge must set them forth in detail, including the underlying rationale, in compliance with the Administrative Procedure Act, 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[15] As previously indicated, the administrative law judge found that claimant established the existence of simple clinical pneumoconiosis, and that Dr. Rasmussen's diagnosis of emphysema caused, in part, by coal dust exposure, was sufficient to establish the existence of legal pneumoconiosis. Decision and Order at 16, 18-19. When considering rebuttal under the first prong, the administrative law judge must put the burden on employer to affirmatively disprove the existence of legal and clinical pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge