**U.S. Department of Labor**

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

BRB Nos. 16-0193 BLA
and 16-0194 BLA

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| ALICE L. THOMAS<br>(Widow of JOHN E. THOMAS, SR.)<br><br>Claimant-Respondent<br><br>v.<br><br>KEYSTONE SERVICE INDUSTRIES<br><br>and<br><br>WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 02/09/2017<br><br>DECISION and ORDER |

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

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2013-BLA-05481 and 2013-BLA-05459) of Administrative Law Judge Pamela J. Lakes rendered 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 subsequent claim filed on January 5, 2007[1] and a survivor's claim filed on September 14, 2011.[2]

Relevant to the miner's claim, in a Decision and Order issued on March 9, 2009, Administrative Law Judge Linda S. Chapman found that the medical evidence developed since the denial of the prior claim established total respiratory disability and, thus, established a change in the applicable condition of entitlement. Considering the claim on the merits, however, Judge Chapman found that the miner failed to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Chapman denied benefits. The Board affirmed Judge Chapman's denial of benefits. *Thomas v. Keystone Service Industries*, BRB No. 09-0484 BLA (Mar. 12, 2010) (unpub.). The miner timely requested modification pursuant to 20 C.F.R. §725.310 on June 25, 2010. Director's Exhibits 86, 92. The district director denied modification and, at the miner's request, the claim was transferred to the Office of Administrative Law Judges for a hearing. Following the miner's death on June 5, 2011, claimant filed her survivor's claim, which was denied by the district director on May 14, 2012. Widow's Director's Exhibits 24, 27. Subsequently, claimant's survivor's claim and the miner's claim were consolidated and assigned to Judge Lakes (the administrative law judge), who held a hearing on April 21, 2015.

In a Decision and Order dated December 21, 2015, which is the subject of the current appeal, the administrative law judge considered the miner's claim pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4),[3] and credited the miner with eighteen years of

[1] This is the miner's third claim. Director's Exhibits 1, 2. The miner's first claim, filed on September 25, 1992, was denied by the district director on March 24, 1993, because he did not establish total respiratory disability. Director's Exhibit 1. The miner took no action with regard to the denial of that claim. The miner's second claim, filed on June 14, 1994, was denied by Administrative Law Judge Richard T. Stansell-Gamm on March 5, 1998, because the miner again failed to establish total respiratory disability and, thus, failed to establish a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309. Director's Exhibit 2.

[2] Claimant, the miner's widow, is also pursuing the miner's claim on the miner's behalf. Director's Exhibit 94.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those

qualifying coal mine employment. The administrative law judge found that the evidence submitted on modification, considered with the evidence originally submitted in the subsequent claim, established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge also found that employer did not rebut the presumption. The administrative law judge concluded that claimant was entitled to modification, based on a mistake in fact in Judge Chapman's ultimate determination pursuant to 20 C.F.R. §725.310, and that granting modification would render justice under the Act. Accordingly, the administrative law judge awarded benefits in the miner's claim.

With regard to the survivor's claim, the administrative law judge noted that Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), provides that a survivor of a miner who is determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement pursuant to Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's award of benefits in both claims. Regarding the miner's claim, employer argues that the administrative law judge erred in finding that the miner was totally disabled at 20 C.F.R. §718.204(b)(2)(i), (iv) and 718.204(b) overall and, therefore, erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Further, employer contends that the administrative law judge erred in finding that it did not rebut the presumption. Regarding the survivor's claim, employer asserts that the administrative law judge's error in awarding benefits in the miner's claim precludes entitlement in the survivor's claim. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[4]

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,

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in an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the record established at least eighteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9.

and in accordance with applicable law.[5] 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 a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected, including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

**The Miner's Claim**

**Invocation of the Section 411(c)(4) Presumption**

Employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory impairment. We disagree.

Evaluating the evidence relevant to total disability, the administrative law judge initially found that, as the preponderance of the pulmonary function studies are non-qualifying,[6] "the pulmonary function testing, standing alone, does not establish total disability under 20 C.F.R. §718.204(b)(2)(i)."[7] Decision and Order at 10.

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

[6] 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 and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The administrative law judge considered the results of eight pulmonary function studies, seven of which were originally submitted in the subsequent claims, and one that was submitted on modification. The administrative law judge noted that only two of the prior studies, performed on June 1, 2006 and December 13, 2007, produced qualifying values, and those results were invalidated by the administering or reviewing physicians. Decision and Order at 10. Considering the newly submitted pulmonary function study, dated August 7, 2007 and submitted by Dr. Forehand, the administrative law judge noted

Relevant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that all of the blood gas studies submitted with the subsequent claims, obtained between July 28, 1994 and July 18, 2007, were non-qualifying. The administrative law judge further found that while the April 10 and April 11, 2011 blood gas studies submitted on modification produced qualifying results, both were obtained while the miner was hospitalized. Decision and Order at 10. Considering the reliability of the qualifying blood gas studies pursuant to 20 C.F.R. §718.105, the administrative law judge noted that, although the April 10, 2011 blood gas study was performed while the miner was in respiratory failure, brought on by an adverse reaction to medication, his repeat blood gas studies, performed on April 11, 2011, were also qualifying after the acute episode resolved and he was cleared for discharge home. *Id.* at 10-11. The administrative law judge further noted that the miner's treating physician recorded that the miner's acute episode of respiratory failure had occurred "on top of" his chronic respiratory condition. *Id.* at 10; Director's Exhibit 94. Consequently, the administrative law judge found that the April 10 and April 11, 2011 blood gas studies "support[ed] a finding of total disability." *Id.* at 11.

Turning to the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Forehand, Zaldivar, and Fino, dating from February 1, 2012 through April 7, 2015, that were submitted with the subsequent claims and on modification. Decision and Order at 11-12. The administrative law judge noted that although "the physicians disputed whether the [m]iner was totally disabled on a pulmonary basis . . . they agreed that the [m]iner was disabled due to his breathing." *Id.* at 11. Specifically, the administrative law judge noted that Dr. Forehand, who examined the miner and performed objective testing on behalf of the Department of Labor, opined that the miner suffered from a totally disabling respiratory impairment based on the reduction in his FEV1 and FVC values on pulmonary function testing.[8] *Id.* at 11; Claimant's Exhibit 5, 6; Employer's Exhibit 1.

The administrative law judge noted that Dr. Zaldivar initially opined that the miner had a respiratory impairment in the form of restriction of FVC and air trapping,

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that, while qualifying, the study was performed during the same time frame as the prior pulmonary function studies of record. Thus, the administrative law judge found that the August 7, 2007 study was not sufficient to shift the preponderance of the evidence. *Id.*

[8] The administrative law judge noted that while Dr. Forehand diagnosed a totally disabling respiratory impairment, both in his initial report and in his most recent report and deposition, Dr. Forehand did not review the more recent medical records. Decision and Order at 11.

due to obesity and cigarette smoking, which may have been disabling. Decision and Order at 11; Director's Exhibits 19, 67. In a later report, Dr. Zaldivar stated that the miner did not have a "pulmonary impairment" because he had normal total lung capacity. Director's Exhibit 71. Dr. Zaldivar subsequently clarified that the miner was not totally disabled from a "pulmonary standpoint" because his impairment was not due to any "intrinsic" lung problem, but was due to the effects of obesity. Director's Exhibit 106. Dr. Zaldivar concluded that the miner may have been "disabled intermittently" as a "whole man," due to an obesity-related restriction, but was not disabled "from the pulmonary standpoint alone, if we separate the lungs from the rest of the body." Decision and Order at 12; Director's Exhibit 106 at 11; Employer's Exhibit 3 at 25-26.

Finally, the administrative law judge noted that Dr. Fino stated that the miner had air trapping due to smoking, and reduced FEV1 and FVC values reflecting a "restrictive-like defect," related to obesity, but no "true" pulmonary impairment. Decision and Order at 11; Director's Exhibits 47, 68 at 22-23, 106; Employer's Exhibit 4. Dr. Fino explained that he declined to characterize the miner's condition as a pulmonary or respiratory impairment, because it was not an "intrinsic" lung problem. Director's Exhibit 68 at 41. Rather, according to Dr. Fino, the miner's respiratory symptoms had a non-pulmonary etiology. Director's Exhibit 106 at 10. Dr. Fino concluded that the miner was disabled due to the effects of obesity on his lungs, but was not disabled due to his "pulmonary status." Director's Exhibit 67 at 32.

The administrative law judge found that because all of the doctors "agree that the [m]iner could not return to his previous coal mine employment due to his breathing, although Drs. Fino and Zaldivar stated he could do so looking at his lungs alone," the medical opinion evidence "standing alone" supports a finding of total disability. Decision and Order at 12.

Weighing all of the evidence relevant to total disability together, the administrative law judge agreed with Judge Chapman's finding that the evidence submitted with the subsequent claims established that the miner was totally disabled from a respiratory standpoint. Decision and Order at 12. The administrative law judge also noted that all of the pulmonary function studies and blood gas studies submitted on modification produced qualifying values. *Id.* Further, the administrative law judge found that, although they disagreed about the cause of the miner's disabling impairment, all of the physicians opined, both before Judge Chapman and now, that the miner was totally disabled from a respiratory standpoint. Noting that the miner performed heavy manual labor, the administrative law judge concluded that the miner "suffered from a pulmonary or respiratory impairment which, standing alone, would prevent him from performing his last or usual coal mine employment." *Id.* Therefore, the administrative law judge concluded that the miner established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.*

Employer contends that the administrative law judge erred in finding that the miner's April 10 and April 11, 2011 blood gas studies supported a finding of total disability. Specifically, employer contends that in finding the blood gas studies to be sufficiently reliable to establish total disability, the administrative law judge erred in applying the quality standards at 20 C.F.R. §718.105(d) which, employer contends, are inapplicable under the circumstances of this case.[9] Rather, employer contends, the administrative law judge should have considered that the blood gas studies were obtained in violation of Appendix C to 20 C.F.R. Part 718, which prohibits blood gas studies from being performed "during or soon after an acute respiratory or cardiac illness." Employer's Brief at 9. We disagree.

Initially, we note that the April 10 and April 11, 2011 blood gas studies are not subject to the specific quality standards set forth in 20 C.F.R. §718.105 and Appendix C, as they were not generated in connection with a claim for benefits.[10] *See* 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Thus, contrary to employer's argument, whether the administrative law judge considered the test results under the specific standards at 20 C.F.R. §718.105(d), or Appendix C to Part 718, is immaterial. Rather, the proper inquiry is whether the blood gas study results were sufficiently reliable to support a finding of total disability, despite the inapplicability of

[9] The administrative law judge applied the quality standard at Section 718.105(d), which provides:

> If one or more blood-gas studies producing qualifying results . . . is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.

20 C.F.R. §718.105(d); Decision and Order at 10-11. As employer correctly asserts, however, the April 10 and April 11, 2011 hospitalization did not result in the miner's death. Rather, the miner was discharged from the hospital on April 11, 2011, and died on June 5, 2011. Claimant's Exhibit 7.

[10] The record reflects that the April 10 and April 11, 2011 blood gas studies were performed after claimant was brought to the emergency room at Princeton Community Hospital, complaining of shortness of breath and right-sided pleuritic chest pain with coughing. Director's Exhibit 94 at 29, 32.

the quality standards.[11] In this case, the administrative law judge accurately noted that the April 10 and April 11, 2011 blood gas studies were conducted while the miner was hospitalized in respiratory distress. The administrative law judge permissibly found that because the miner's blood gas studies were still qualifying after he was cleared for discharge from the hospital, and because the miner's treating physician noted that he suffered from underlying "chronic" respiratory failure, the blood gas studies submitted on modification supported a finding of total disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 10-11.

Further, all of the physicians based their conclusions about the miner's ability to perform his usual coal mine work on the reduction in the miner's FEV1 and FVC values on pulmonary function testing, not on the results of the blood gas study evidence. Director's Exhibit 96; Employer's Exhibits 3, 4. In light of this factor, and in light of the administrative law judge's finding that the medical opinion evidence, "standing alone," supported a finding of total disability, any error by administrative law judge in concluding that the blood gas studies are sufficiently reliable, is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference").

Employer next contends that the administrative law judge erred in relying on the opinions of Drs. Forehand, Zaldivar, and Fino to find total disability established. Employer initially asserts that Dr. Forehand's diagnosis of a significant respiratory impairment is unsupported by his own non-qualifying pulmonary function study and blood gas study results, and that he did not review the more recent evidence of record. Thus, employer contends that Dr. Forehand's opinion is based on limited and incomplete data and lacks probative value. Employer's Brief at 13.

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[11] The Department of Labor explained in the comments to the 2001 revised regulations that evidence that is not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by 20 C.F.R. [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

Initially, we reject employer's contention that because the results of Dr. Forehand's objective testing "were all non-qualifying" his opinion is not probative. Employer's Brief at 13. Contrary to employer's contention, as the administrative law judge correctly noted, Dr. Forehand's August 7, 2007 pulmonary function study produced qualifying results. Decision and Order at 10; Claimant's Exhibit 9. Furthermore, the regulations do not require a physician's diagnosis of total disability to be based on qualifying objective testing. Rather, the regulations specify that even where total disability cannot be shown based on the objective testing, "total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine] employment." 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000).

We further reject employer's contention that the administrative law judge erred in crediting Dr. Forehand's opinion because Dr. Forehand did not review the entire record. Employer's Brief at 13. Dr. Forehand examined the miner and conducted objective testing, including an August 7, 2007 pulmonary function study which, as the administrative law judge noted, produced qualifying results.[12] Further, the administrative law judge acknowledged that Dr. Forehand did not review all of the recent evidence of record, but noted that his diagnosis of total disability is consistent with the newly submitted objective evidence, all of which produced qualifying results, and with the opinions of Drs. Zaldivar and Fino. Decision and Order at 10-12. It is the province of the administrative law judge to evaluate the physicians' opinions. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000). In asserting that Dr. Forehand's opinion lacks probative value because he did not review the entire record, employer essentially asks the Board to reweigh the evidence, which we are not

[12] The administrative law judge incorporated by reference the summaries of the medical evidence contained in Administrative Law Judge Linda S. Chapman's 2009 decision. Decision and Order at 6. As summarized by Judge Chapman, Dr. Forehand explained that the miner's 40% loss of breathing capacity, reflected by the reduced FEV1 and FVC values, left the miner with insufficient residual pulmonary capacity to perform the climbing, carrying, and lifting required by his last job. Dr. Forehand also explained that even with normal oxygenation, the miner's inability to breathe normally would lead to incapacitating shortness of breath due to the buildup of carbon dioxide in his body. Further, while Dr. Forehand did not review all of the more recent evidence, Dr. Forehand did review the more recent opinion of Dr. Zaldivar and explained that it did not alter his conclusion that the miner's respiratory impairment rendered him totally and permanently disabled from performing his usual coal mine work as a preparation plant operator. Director's Exhibit 17; Employer's Exhibit 1.

empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore hold that the administrative law judge permissibly credited Dr. Forehand's diagnosis of total disability. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer next asserts that because Drs. Zaldivar and Fino opined that the miner was not disabled from a pulmonary standpoint, but was disabled due to obesity, a non-respiratory condition, the administrative law judge mischaracterized their opinions as supporting a finding of total disability pursuant to 20 C.F.R. §718.204(a), (b). Employer's Brief at 14. Employer's contention lacks merit. Pursuant to 20 C.F.R. §718.204(a), "if . . . a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled . . . ." 20 C.F.R. §718.204(a). Thus, contrary to employer's contention, the issue is not whether a respiratory or pulmonary impairment is due to an intrinsic, or extrinsic, disease process; the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is, or was, present.

Pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge permissibly interpreted Dr. Zaldivar's opinion that the miner was disabled "as a whole man" due to his reduced lung capacity, as reflected by his reduced FEV1 and FVC values, as an opinion that the miner suffered from a totally disabling respiratory or pulmonary impairment that resulted from non-pulmonary causes. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Clark*, 12 BLR at 1-155; Decision and Order at 11-12. The administrative law judge further permissibly concluded that although Dr. Fino opined that the miner did not suffer from a "true" pulmonary impairment, Dr. Fino's opinion that the miner was disabled due to the reduction in FEV1 and FVC values as a result of the restrictive effects of obesity on his lungs nonetheless constituted an opinion that the miner suffered from a totally disabling respiratory or pulmonary impairment, albeit from non-pulmonary causes. *Id.* Thus, there is no merit to employer's assertion that the administrative law judge mischaracterized the opinions of Drs. Zaldivar and Fino as supporting a finding of total disability. Employer's Brief at 14-35. Because substantial evidence supports the administrative law judge's finding that "the physicians agreed" that the miner could not perform his usual coal mine work due to his breathing, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

Moreover, the administrative law judge properly weighed the medical opinion evidence with the pulmonary function and blood gas study evidence, and found that, when weighed together, the evidence established total disability pursuant to 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 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order on 18. This finding is, therefore, affirmed.

In light of our affirmance of the administrative law judge's findings that claimant established at least eighteen years of qualifying coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

**Rebuttal of the Section 411(c)(4) Presumption**

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[13] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer disproved the existence of legal pneumoconiosis,[14] the administrative law judge considered the opinions of Drs. Zaldivar and Fino, submitted both with the subsequent claims and on modification. Drs. Zaldivar and Fino opined that claimant does not suffer from legal pneumoconiosis, and that his respiratory impairment is due to obesity and the effects of air trapping related to cigarette smoking. Employer's Exhibits 3 at 21; 4 at 16. The administrative law judge discredited their opinions because she found that the doctors failed to adequately explain how they

[13] "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[14] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 14.

eliminated the miner's eighteen years of coal mine dust exposure as an aggravating or contributing factor to his disabling impairment. Decision and Order at 15-16.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Zaldivar and Fino. We disagree. The administrative law judge noted that Dr. Zaldivar relied, in part, on the absence of radiographic evidence of pneumoconiosis in opining that the miner's disabling impairment, reflected by the reduced FEV1 and FVC values, is not related to coal mine-dust exposure.[15] Decision and Order at 16; Employer's Exhibits 3 at 30; 7 at 38-39. The administrative law judge permissibly found this reasoning to be inconsistent with the regulatory framework which recognizes that a physician can render a credible diagnosis of pneumoconiosis "notwithstanding a negative x-ray." 20 C.F.R. §718.201(a)(2), 718.202(a)(4); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000). Contrary to employer's arguments, the administrative law judge recognized that Dr. Zaldivar provided additional reasons in support of his conclusion that coal dust exposure did not contribute to the miner's impairments, but still permissibly discredited Dr. Zaldivar's opinion because of this inconsistency. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); Decision and Order at 16; Employer's Brief at 41-42.

Further, the administrative law judge permissibly discredited Dr. Fino's opinion because she found that he did "not adequately address why coal mine dust exposure could not be a contributing or aggravating factor to the miner's emphysema/COPD or other obstructive or restrictive impairment." *See Looney*, 678 F.3d at 313-14, 25 BLR at 2-128; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); Decision and Order at 16. Employer asserts that the administrative law judge's reasoning is based on the unsupported "assum[ption] that [the miner] had emphysema/COPD and an obstructive or restrictive impairment." Employer's Brief at 44. Employer further contends that because Dr. Fino did not diagnose "emphysema, COPD, or any coal dust-related disease" and did not diagnose "any obstructive or restrictive 'respiratory' impairment caused by coal dust," the

[15] In his October 21, 2008 deposition, Dr. Zaldivar stated that he was able to exclude coal mine-dust exposure as a causative factor in the miner's impairment, in part, because of the "absence of any dust in the lungs, any reaction of the lungs to the dust that's visible radiographically as inflammation, which is what we categorize in the ILO classification." Employer's Exhibit 7 at 38-39. In his April 6, 2015 deposition, Dr. Zaldivar reiterated that he relied, in part, on the lack of coal dust deposition seen radiographically on x-ray and CT scans to exclude coal mine-dust exposure as a cause of the miner's impairment. Employer's Exhibit 3 at 30.

administrative law judge's determination to discredit his opinion for failing to explain why coal mine dust did not contribute to these conditions constitutes circular reasoning. *Id.*

We disagree. As employer correctly asserts, Dr. Fino opined that the miner did not suffer from COPD, or any obstructive impairment, and did not suffer from "true restriction due to pulmonary fibrosis." Employer's Exhibits 4 at 14; 8 at 22-24. However, consistent with the administrative law judge's characterization, Dr. Fino opined that the miner suffered from the reductions in his FEV1 and FVC values, as measured on his pulmonary function studies, which he characterized as a "restrictive-type" or "restrictive-like" pattern of impairment. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; Employer's Exhibits 4 at 14; 8 at 22-24. Thus, employer has not demonstrated reversible error in the administrative law judge's consideration of Dr. Fino's opinion.[16]

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Fino, the only opinions supportive of a finding that the miner did not suffer from legal pneumoconiosis, we affirm her finding that employer failed to establish that the miner did not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.[17] *See* 20 C.F.R. §718.305(d)(1)(i).[18]

Employer next contends that the administrative law judge did not adequately address whether employer could establish rebuttal by showing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Employer's Brief at 46.

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[16] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Fino, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[17] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

[18] Because employer bears the burden to prove that the miner did not have pneumoconiosis, we need not address employer's arguments regarding the weight the administrative law judge accorded to Dr. Forehand's opinion that the miner had legal pneumoconiosis, and that the miner's disability was due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i), (ii).

Contrary to employer's contention, the administrative law judge rationally found that the same reasons undercutting the opinions of Drs. Zaldivar and Fino on the issue of legal pneumoconiosis also undercut their opinions that the miner's disabling respiratory impairment was not caused by pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-24 (4th Cir. 2015), *citing Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 17. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii). We also affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a basis for modification pursuant to 20 C.F.R. §725.310 and that granting modification would render justice under the Act. Decision and Order at 17-18; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, we affirm the award of benefits in the miner's claim.

**The Survivor's Claim**

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate entitlement under Section 932(*l*): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Decision and Order at 19-20; *see* 30 U.S.C. §932(*l*). As the administrative law judge's findings are supported by substantial evidence, we affirm her determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge