U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0231 BLA

PEGGY S. DUTTON (Widow of HAROLD D. DUTTON) Claimant-Petitioner v. CLINCHFIELD COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/28/2018 DECISION and ORDER

Appeal of the Decision and Order Denying Award of Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Peggy S. Dutton, Castlewood, Virginia.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel,[2] the Decision and Order Denying Award of Benefits (2013-BLA-05248) of Administrative Law Judge Morris D.

[1] Claimant is the widow of the miner, who died on November 1, 2011. Director's Exhibit 8. There is no evidence in the record that the miner filed a claim for benefits.

Davis, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on December 29, 2011.

After crediting the miner with at least thirty-six years of coal mine employment the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis and that claimant therefore could not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2012); 20 C.F.R. §718.304. Because the evidence did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge also found that claimant did not invoke the rebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012).

Considering whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge accepted employer's concession that the miner had simple, clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. The administrative

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Therefore, Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, is not applicable in this case.

[2] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Here, the administrative law judge noted claimant's testimony that the miner worked underground for about ten years and "then he was a repairman who fixed equipment on the mine site property." Decision and Order at 3; Hearing Tr. at 15. The administrative law judge further noted that employer conceded to at least thirty-six years of coal mine employment and "did not allege that any part of those years did not meet the conditions required for credit towards the [fifteen] year presumption." Decision and Order at 4, 5; Hearing Tr. at 6.

law judge further found, however, that the evidence did not establish that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

The Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption of death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more large opacities (greater than one centimeter in diameter) that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c). The United States Court of Appeals for the Fourth Circuit has held, "'[b]ecause prong (A) sets out an entirely objective scientific standard' - i.e., an opacity on an x-ray greater than one centimeter - x-ray evidence provides the benchmark for determining what under prong (B) is a 'massive lesion' and what under prong (C) is an equivalent diagnostic result reached by other means." *E. Assoc. Coal Corp. v. Director* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), *quoting Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). In addition, the Fourth Circuit has recognized that a diagnosis of massive lesions, standing alone, can satisfy the "statutory ground" for invocation of the irrebuttable presumption. *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006). Claimant bears the burden of proof to

[4] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 22.

establish the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

Here, the primary evidence relevant to the existence of complicated pneumoconiosis[5] consists of pathology evidence from Drs. Dennis, Hudgens, Harley, Bush, and Caffrey,[6] pursuant to 20 C.F.R. §718.304(b). Dr. Dennis, the autopsy prosector, identified "a large macule measuring greater than 1.5 cm x 0.3 cm thickness" and diagnosed "[p]rogressive massive fibrosis with emphysema, macular development greater than 1.5 cm, fibrosis and pulmonary congestion."[7] Director's Exhibit 10. Similarly, Dr.

[5] All of the pathologists diagnosed at least simple pneumoconiosis.

[6] The administrative law judge noted that, relevant to 20 C.F.R. §718.304(a), there are two x-ray interpretations contained in the miner's hospitalization and treatment records. Decision and Order at 3 n.4, *referencing* Director's Exhibits 9, 11. Neither x-ray was taken for the purpose of diagnosing pneumoconiosis and neither interpretation mentions the presence or absence of the disease. *Id.* The administrative law judge also considered Dr. Hippensteel's medical opinion, relevant to 20 C.F.R. §718.304(c). Dr. Hippensteel reviewed the medical records, the death certificate, and the autopsy reports of Drs. Dennis, Hudgens, Bush and Caffrey. Employer's Exhibit 3. In a report dated August 29, 2015, Dr. Hippensteel opined that the miner had simple coal workers' pneumoconiosis, but not complicated coal workers' pneumoconiosis or progressive massive fibrosis. *Id*. During a September 18, 2015 deposition, Dr. Hippensteel testified that the miner had simple coal workers' pneumoconiosis. Employer's Exhibit 5.

[7] Dr. Dennis, who at the time was Board-certified in anatomical and clinical pathology, performed the autopsy on the miner's lungs on November 2, 2011. Director's Exhibit 10. In a report dated January 30, 2012, Dr. Dennis noted that gross examination of the right lung showed "a nodular presentation of macular development" and a superficial process of black pigment deposition that formed macules. *Id*. Dr. Dennis did not give measurements for any macules identified in the right lung. *Id.* Gross examination of the left lung showed emphysema, black pigment deposition, and "macular development measuring greater than 1 cm diameter" with fibrosis and moderate black pigment deposition. *Id*. On microscopic examination, Dr. Dennis stated, in pertinent part:

> Sections show emphysema moderate diffuse with panlobular and acinar changes as well. Macular development measuring greater than 1.5 cm x 0.3 cm thickness is appreciated.
>
> Section F [taken from the left lung] shows a large macule measuring greater than 1.5 cm x 0.3 cm thickness.

Hudgens[8] diagnosed progressive massive fibrosis "based on the largest nodule measuring 1.5 cm." Claimant's Exhibit 2. Dr. Harley[9] also identified a macronodule of coal workers' pneumoconiosis measuring "1.5 cm in greatest dimension," but he opined that "the term progressive massive fibrosis (PMF – Complicated Pneumoconiosis) does not appear to be justified in this case." Claimant's Exhibit 1 at 3. Drs. Bush[10] and Caffrey[11] similarly

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. . .

> DIAGNOSIS GROSS AND MICROSCOPIC: 1. Progressive massive fibrosis with emphysema, macular development measuring greater than 1.5 cm, fibrosis and pulmonary congestion.

Director's Exhibit 10.

[8] Dr. Hudgens reviewed the miner's autopsy slides, the death certificate, the medical records, and the autopsy reports of Drs. Dennis and Caffrey. Claimant's Exhibit 2. In a report dated October 2, 2012, Dr. Hudgens noted that the histologic sections of the lung tissue showed numerous anthracotic macules and anthrosilicotic nodules with surrounding focal emphysema. *Id.* Dr. Hudgens also noted that autopsy slide F showed that the largest nodule is 1.5 centimeters in its largest dimension. *Id.*

[9] Dr. Harley, who is a Board-certified pathologist and professor emeritus of pathology at the Medical University of South Carolina, reviewed the miner's autopsy slides and the autopsy report of Dr. Hudgens. Claimant's Exhibit 1. In a report dated February 10, 2015, Dr. Harley noted that "[c]onfluent subpleural nodules of one cm or more are seen in several slides. Such a lesion in slide F is 1.5 by 0.5." He ultimately diagnosed: "Coal workers' pneumoconiosis (CWP) with micro-and macro nodule formation, emphysema, and small airways disease." Claimant's Exhibit 1 at 3. Dr. Harley stated that "[t]his is not the worst example of [coal workers' pneumoconiosis] but is nevertheless significant." *Id.*

[10] Dr. Bush, who is Board-certified in anatomic and clinical pathology, reviewed the miner's autopsy slides, the death certificate, and the autopsy report of Dr. Dennis. Employer's Exhibit 2. In a report dated April 15, 2013, Dr. Bush diagnosed a mild to moderate degree of simple coal workers' pneumoconiosis. *Id.* Dr. Bush identified macules and micronodules of coal workers' pneumoconiosis in the lung parenchyma, but none "exceed[ing] the size of 0.5 cm in diameter." *Id.* He also observed, on slide F, an area of prominent fibrosis "extend[ing] along the pleura for 1 cm." Dr. Bush disagreed, however, with Dr. Dennis's diagnosis of progressive massive fibrosis based on his identification of a lesion measuring 1.5 cm x 0.3 cm, stating that "[p]rogressive massive fibrosis refers to coal worker[s] pneumoconiosis lesions which attain the size of greater than 1.0 cm in diameter,

opined that the miner did not have progressive massive fibrosis or complicated pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 4. The administrative law judge acknowledged that the record contains evidence that, "taken alone and at face value," could establish the existence of complicated pneumoconiosis. Decision and Order at 12. The administrative law judge found, however, that when weighed together the evidence does not establish the existence of complicated pneumoconiosis under the standards set forth in the statute and in the case law of the Fourth Circuit. Decision and Order at 14.

The administrative law judge initially noted that while three physicians diagnosed large lesions of coal workers' pneumoconiosis, "[t]here was no evidence that the largest

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rather than 1.0 cm in greatest dimension as apparently described [by Dr. Dennis]." *Id.* Dr. Bush added:

> The 1979 *Archives of Pathology and Laboratory Medicine* further describes progressive massive fibrosis as consisting of lesions which are solid, heavily pigmented, rubbery to hard and occurring most commonly in the apical posterior sections of the lungs. Progressive massive fibrosis lesions frequently cross and obliterate lobar and lesser fissures. The remainder of the lungs, in cases of progressive massive fibrosis is almost invariably heavily pigmented. None of these features of progressive massive fibrosis i[s] described in [Dr. Dennis's] post-mortem lung examination report."

Employer's Exhibit 2 at 2-3.

[11] Dr. Caffrey, who is Board-certified in anatomic and clinical pathology, reviewed the miner's autopsy slides, the death certificate, the medical records, and the autopsy reports of Drs. Dennis and Hudgens. Director's Exhibit 12. In a report dated July 16, 2012, Dr. Caffrey opined that the miner had simple coal workers' pneumoconiosis. *Id*. In a supplemental report dated December 20, 2012, and during a September 8, 2015 deposition, Dr. Caffrey again opined that the miner had simple coal workers' pneumoconiosis, but not complicated coal workers' pneumoconiosis. Employer's Exhibits 1, 4. Dr. Caffrey explained that he did not observe an individual discrete lesion measuring 1.0 cm or greater, either on slide F or elsewhere. *Id.* Rather, on slide F he observed two lesions, an 8 x 3 mm macronodule and a 4 mm micronodule, that are "in close proximity but . . . are not contiguous." Employer's Exhibit 1 at 2. Dr. Caffrey concluded that as none of the lesions he observed approached 1.0 cm in size, he was unable to diagnose either complicated pneumoconiosis or progressive massive fibrosis. *Id.*

lesion would have shown as an opacity greater than one centimeter in diameter on an x-ray." Decision and Order at 14. Thus, the administrative law judge correctly found that claimant could not establish the existence of complicated pneumoconiosis through an equivalency determination. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61; Decision and Order at 14.

The administrative law judge next considered whether the pathology evidence established the presence of "massive lesions," which the Fourth Circuit has recognized as an independent "statutory ground" for invocation of the irrebuttable presumption. Decision and Order at 14, *citing Perry*, 469 F.3d at 365, 23 BLR at 2-384. Because a diagnosis of progressive massive fibrosis may establish "massive lesions" under 20 C.F.R. §718.304(b), the administrative law judge examined the conflicting opinions as to whether progressive massive fibrosis was present.[12] *See Perry*, 469 F.3d at 365, 23 BLR at 2-384; *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *see also* 65 Fed. Reg. 79,920, 79,951 (Dec. 20, 2000) (the term "progressive massive fibrosis" is generally considered to be equivalent to the term "complicated pneumoconiosis."); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 3 BLR 2-36, 2-38 (1976) ("Complicated pneumoconiosis . . . involves progressive massive fibrosis as a complex reaction to dust and other factors . . . ."). Drs. Hudgens and Dennis diagnosed progressive massive fibrosis while the other pathologists did not. The administrative law judge discounted Dr. Hudgens' opinion because, unlike Drs. Bush, Caffrey, Harley, and Dennis, his qualifications are not in the record. Decision and Order at 5-10, 13.

The administrative law judge also discounted Dr. Dennis's diagnosis of progressive massive fibrosis, finding several weaknesses in his report. First, the administrative law judge found that he was "unable to determine the exact size of the largest lesion from the information Dr. Dennis provided" because "Dr. Dennis never offered an exact measurement of any lesion." Decision and Order at 13. Instead, Dr. Dennis described the lesion as "*greater than* 1 cm diameter," on gross examination and "*greater than* 1.5 cm," on microscopic examination. Decision and Order at 12, *quoting* Director's Exhibit 10

[12] The administrative law judge noted that the largest lesion described was not so large that it could be inferred to be massive. Decision and Order at 14, *referencing Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 n.5, 23 BLR 2-374, 2-386 n.5 (4th Cir. 2006) (noting that there was no reason to believe that nodules measuring four to six centimeters would not produce x-ray opacities greater than one centimeter). We note however, that in *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 258, 22 BLR 2-93, 2-105 (4th Cir. 2000), the Fourth Circuit observed that there was no reason to believe that even a nodule of only 1.7 centimeters would not produce x-ray opacities greater than one centimeter.

(emphasis added). The administrative law judge further found that it was "unclear if what Dr. Dennis described as 'greater than 1 cm diameter [on gross examination],' 'greater than 1.5 cm by 0.3 thickness [on microscopic examination]' and 'greater than 1.5 cm [in Section F]' refers to the same lesion or to more than one lesion." Decision and Order at 13, *quoting* Director's Exhibit 10.

Additionally, the administrative law judge found that, assuming Dr. Dennis was referencing the same lesion seen in Section F, his opinion that the lesion measured 1.5 cm was called into question by Dr. Caffrey, who stated that Section F actually contains two adjacent smaller lesions, not one large lesion.[13] Decision and Order at 14; Employer's Exhibit 1. The administrative law judge also noted that "Dr. Bush said he saw no lesion that was greater than 0.5 centimeters in diameter." Decision and Order at 13, *referencing* Employer's Exhibit 2.

Finally, the administrative law judge observed that even if Dr. Dennis correctly identified a lesion measuring 1.5 cm x 0.3 cm, Drs. Harley and Bush opined that a lesion measuring 1.5 cm "in greatest dimension" does not justify a diagnosis of progressive massive fibrosis. Decision and Order at 13-14. The administrative law judge noted that neither physician explained why a lesion exceeding one centimeter in greatest dimension does not establish progressive massive fibrosis. Decision and Order at 14 n.7. The administrative law judge observed, however, that mathematically, a 1.5 cm x 0.3 cm lesion is "substantially smaller in overall size than a lesion measuring one centimeter in diameter." Decision and Order at 14. For all these reasons, the administrative law judge determined that the opinions of Drs. Harley, Bush, and Caffrey that the miner did not have progressive massive fibrosis "are the most persuasive." Decision and Order at 14. Thus the administrative law judge concluded that claimant did not establish "massive lesions" at 20 C.F.R. §718.304(b). *Id.*

In discrediting the opinion of Dr. Dennis and crediting the opinions of Drs. Harley, Bush, and Caffrey, however, the administrative law judge has failed to adequately explain his findings and resolve conflicts in the evidence. As an initial matter, the administrative law judge criticized Dr. Dennis because he provided "estimated" size descriptions expressed as "greater than" values, and because his report was "unclear" as to whether he saw one, or more than one, large lesion. Decision and Order at 12-14. The administrative law judge did not explain how the fact that Dr. Dennis may have seen more than one lesion that was larger than 1.5 cm undermined his conclusion that the miner suffered from progressive massive fibrosis. Consequently, the administrative law judge's decision does

[13] Dr. Caffrey stated that neither lesion was itself of sufficient size to support a diagnosis of progressive massive fibrosis. Employer's Exhibit 1.

not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Nor has the administrative law judge adequately explained his determination that the opinions of Drs. Harley, Bush, and Caffrey that the miner did not have a lesion of sufficient size to warrant a diagnosis of progressive massive fibrosis are more persuasive than Dr. Dennis's opinion. First, the administrative law judge did not explain why he found Dr. Caffrey's opinion that Section F does not contain a single large lesion but contains two smaller adjacent lesions to be persuasive, in light of the fact that Dr. Caffrey alone drew that conclusion.[14] *See Wojtowicz*, 12 BLR at 1-165.

Further, the administrative law judge has not explained why he was persuaded by the opinions of Drs. Harley and Bush that a lesion measuring 1.5 cm x 0.5 cm, or 1.5 cm in greatest dimension, does not warrant a diagnosis progressive massive fibrosis in light of his acknowledgment that neither physician explained his conclusion.[15] Decision and Order at 14 n.7. Moreover, as the Department of Labor has declined to adopt a specific numerical criterion for the pathological diagnosis of complicated pneumoconiosis, Dr. Harley's and Dr. Bush's diagnostic medical criteria are not controlling under the regulations.[16] *See*

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[14] Dr. Harley identified a discrete lesion measuring 1.5 cm x 0.5 cm, consistent with Dr. Dennis's opinion. Claimant's Exhibit 1. Dr. Hudgens also opined that "the largest nodule measures 1.5 cm in its largest dimension (Block F)." Claimant's Exhibit 2. Further, contrary to the administrative law judge's finding, while Dr. Bush stated that there were no *parenchymal* lesions measuring greater that 0.5 cm, he acknowledged that Section F showed an area of significant fibrosis extending along the *pleura* for one centimeter. Employer's Exhibit 2 at 2. He did not identify two separate smaller, adjacent lesions in Section F.

[15] Further, while the administrative law judge theorized that a lesion measuring 1.5 cm x 0.5 cm "may be smaller in size" than a lesion measuring greater than one centimeter in diameter, no doctor has proffered this opinion. Decision and Order at 14 n.7

[16] The Fourth Circuit has declared that the "definition [of massive lesions] must be applied so that the term 'massive lesions' will describe the same condition that would be disclosed by application of the prong (A) standard based on the size of x-ray opacities." *Scarbro*, 220 F.3d at 259, 22 BLR at 2-106. Notably, the ILO classification form used for the interpretation of x-rays defines Category A opacities as those "[h]aving a *greatest* diameter exceeding about 10 mm . . . ." *See* Form CM-933 (emphasis added). Thus it appears that if a lesion measuring 1.5 cm in greatest dimension showed on x-ray as greater

Scarbro, 220 F.3d at 258, 22 BLR at 2-103-04; *see also The Pittsburg & Midway Coal Mining Co.* [*Cornelius*], 508 F.3d 975, 984, 24 BLR 2-72, 2-88 (11th Cir. 2007) (observing that neither the Act nor the regulations defines the term "massive lesions"). In light of these factors, the administrative law judge did not adequately explain why the fact that Drs. Harley and Bush apparently disagreed with the diagnostic criteria used by Dr. Dennis necessarily undermined the credibility of Dr. Dennis's diagnosis of progressive massive fibrosis. *See Scarbro*, 220 F.3d at 258, 22 BLR at 2-103. We therefore vacate the administrative law judge's finding that "the irregularly shaped lesion Dr. Dennis and Dr. Hudgens believed to be progressive massive fibrosis was not a lesion greater than one centimeter in diameter or large enough to constitute a massive lesion," pursuant to 20 C.F.R. §718.304(b). Decision and Order at 15-16. Thus, we vacate the administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis. *Id.* at 14.

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

Having credited the miner with at least fifteen years of qualifying coal mine employment, the administrative law judge next considered whether claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, could invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Decision and Order at 14-15. Because there are no qualifying pulmonary function studies or arterial blood gas studies, the administrative law judge properly found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). Decision and Order at 15. Furthermore, as there is no evidence in the record indicating that the miner suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that total disability was not established at 20 C.F.R. §718.204(b)(2)(iii). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Dennis, Harley, Hudgens, Bush, Caffrey, and Hippensteel, and the miner's medical treatment records. The administrative law judge correctly found that none of the physicians specifically addressed whether the miner had a totally disabling pulmonary or respiratory impairment. Decision and Order at 15; Director's Exhibits 10, 12; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2, 3. He further found that total disability could not "be reasonably inferred from any of their narrative discussions." *Id.* The administrative law judge also correctly determined that the treatment records did not

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than one centimeter in greatest dimension, such a lesion would satisfy the regulatory criteria.

support a finding of total respiratory disability.[17] Decision and Order at 15; Director's Exhibits 9, 11. As substantial evidence supports the administrative law judge's determinations, we affirm his finding that claimant did not establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). *See* 20 C.F.R. §718.204(a); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-338 (4th Cir. 1998); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 BLR 2-1, 2-5 (4th Cir. 1994); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc). We therefore affirm the administrative law judge's finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b), in light of the administrative law judge's appropriate findings under 20 C.F.R. §718.204(b)(2)(i)-(iv). *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); Decision and Order at 15.

Because we affirm the administrative law judge's finding that claimant did not establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), we also affirm his finding that claimant did not invoke the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4).

20 C.F.R. §718.205(b)

In a survivor's claim where the Section 411(c)(3) and Section 411(c)(4) statutory presumptions are not invoked, a claimant must establish that the miner had either clinical or legal pneumoconiosis[18] arising out of coal mine employment, and that his death was due

[17] The administrative law judge noted that the medical treatment records documented that the miner had a wide range of medical problems. Decision and Order at 15. While the administrative law judge acknowledged that some of the treatment records referenced breathing problems, including a recurrent assessment of chronic airway obstruction, he noted that there were no pulmonary function studies ordered. Nor is there other objective testing that could support a finding of total disability. While Dr. Al-Khasawneh, a pulmonologist who treated the miner less than a year prior to his death in November 2010, opined that the miner had "health care associated pneumonia" and possible recurrent aspiration pneumonia, he did not diagnose any impairment or disability. Director's Exhibit 11. Further, none of the other treatment records includes a diagnosis or opinion that the miner was disabled from a pulmonary or respiratory standpoint.

[18] "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.

to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if the evidence establishes that it was a substantially contributing cause of death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); s*ee Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992). Failure to establish any one of the required elements precludes entitlement to benefits. *See Trumbo*, 17 BLR at 1-87-88.

Having found that employer conceded that the autopsy evidence established the existence of simple pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), the administrative law judge turned to the question of whether the evidence established that the miner's death was due to pneumoconiosis. Decision and Order at 15, *referencing* Hearing Tr. at 6.

Pursuant to 20 C.F.R. §718.205(b), the administrative law judge considered the opinions of Drs. Dennis, Harley, Bush, Caffrey and Hippensteel.[19] Drs. Dennis[20] and Harley[21] opined that the miner's coal workers' pneumoconiosis contributed to his death,

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§718.201(a)(1). 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).

[19] The record also contains the miner's death certificate signed by Dr. Kumar. Director's Exhibit 8. The death certificate listed the immediate cause of the miner's death as cardio-respiratory arrest due to prostatic adenocarcinoma and chronic obstructive pulmonary disease (COPD), but it did not address whether the COPD was related to coal mine dust exposure. *See* 20 C.F.R. §718.201(b); Director's Exhibit 8. The administrative law judge did not state what weight he accorded to the death certificate.

[20] Dr. Dennis opined: "This patient died a respiratory death which was hastened by the presence of coal workers['] pneumoconiosis with progressive massive fibrosis and moderate to severe emphysematous change coexistent with that process and part of that process." Director's Exhibit 10.

[21] Dr. Harley opined that the miner's simple pneumoconiosis contributed to his death, stating:

> The cause of death, according to the death certificate, was cardiorespiratory arrest secondary to COPD. He also had evidence of adenocarcinoma of the prostate.

while Drs. Bush, Caffrey, and Hippensteel opined that the miner's coal workers' pneumoconiosis did not cause, contribute to, or hasten his death.[22] Director's Exhibits 10, 12; Claimant's Exhibit 1; Employer's Exhibits 1-5. The administrative law judge discounted Drs. Dennis's opinion because he relied on the false premise that the miner suffered from progressive massive fibrosis.[23] Decision and Order at 17; Director's Exhibits 12. Because we have vacated the administrative law judge's finding that the autopsy evidence does not establish the presence of progressive massive fibrosis, we also vacate the administrative law judge's related determination to discredit Dr. Dennis's opinion as to the cause of the miner's death, pursuant to 20 C.F.R. §718.205(b).

We further note that the administrative law judge did not address whether Dr. Dennis's opinion supported the conclusion that the miner's simple pneumoconiosis

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> The amount of smoking he did would be unlikely to cause severe COPD. The autopsy slides do show moderate emphysema which, considering the amount of [coal workers' pneumoconiosis] present, was probably mostly the result of coal mine dust inhalation. Most of the small airways in the slides are distorted by [coal workers' pneumoconiosis]-associated nodules, therefore much of his COPD was probably secondary to small airways disease.
>
> Given that his death was listed as being cardiorespiratory arrest secondary to COPD and that the main pathologic features of COPD in the autopsy slides appear to be secondary to [coal workers' pneumoconiosis] it does appear that [coal workers' pneumoconiosis] resulting from exposure to coal mine dust contributed substantially to causing [the miner's] death.

Claimant's Exhibit 1 at 3.

[22] Dr. Hudgens did not render an opinion regarding the cause of the miner's death. Claimant's Exhibit 2.

[23] The administrative law judge also erred to the extent he discredited Dr. Harley's opinion that the miner's COPD and coal workers' pneumoconiosis contributed to his death because Dr. Harley did not review the miner's treatment records which do not reflect that he was diagnosed with either condition. Decision and Order at 17. As the administrative law judge himself observed, the miner's treatment records include a recurrent assessment of chronic airway obstruction. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 15.

contributed to his death. Nor did the administrative law judge make a specific finding as to whether the miner suffered from legal pneumoconiosis and, if so, whether it contributed to his death.[24]

On remand, the administrative law judge must reconsider the autopsy evidence, determine whether it supports a finding of "massive lesions" resulting from "a chronic dust disease of the lung," pursuant to 20 C.F.R. §718.304(b), and explain his findings and credibility determinations. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283, 24 BLR 2-269, 2-280-81 (4th Cir. 2010); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc). If the administrative law judge again finds that the miner did not suffer from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, he must revisit whether claimant established that the miner's death was due to either clinical or legal pneumoconiosis, pursuant to 20 C.F.R. §718.205(b).[25] In so doing, the administrative law judge must explain the weight he accords to each medical opinion.

[24] Dr. Dennis diagnosed moderate to severe emphysematous change coexistent with and part of the presence of coal workers' pneumoconiosis with progressive massive fibrosis and Dr. Harley opined that the miner suffered from emphysema due to coal mine dust inhalation. Director's Exhibit 10; Claimant's Exhibit 1 at 3. Drs. Hudgens, Caffrey, and Bush also diagnosed emphysema. Director's Exhibit 12; Claimant's Exhibit 2; Employer's Exhibits 1, 2, 4.

[25] The administrative law judge should begin his inquiry by determining whether the evidence establishes that the miner also suffered from legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge