

BRB No. 11-0235 BLA

BRENDA NEWSOME)
(Widow of and o/b/o the Estate of GRANT)
NEWSOME, JR.))
)
Claimant-Respondent)
)
v.)
)
D & N COAL CORPORATION/OLD)
REPUBLIC INSURANCE COMPANY) DATE ISSUED: 01/23/2012
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

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

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

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (07-BLA-05190 and 07-BLA-05191) of Administrative Law Judge Pamela Jane Lakes rendered on claims filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(I)). This case involves a miner's subsequent claim filed on December 22, 2003,¹ and a survivor's claim filed on December 9, 2005.

The administrative law judge adjudicated both the miner's 2003 subsequent claim and the survivor's claim pursuant to 20 C.F.R. Part 718,² and properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005.³ Decision and Order at 2. With regard to the miner's claim, the administrative law judge credited the miner with "more than

¹ The current claim is the miner's third claim. His most recent prior claim, filed on April 10, 1996, was denied by Administrative Law Judge Richard Morgan on November 26, 1997, because the miner did not establish any element of entitlement. Director's Exhibits 1-1, 1-674. There is no indication that the miner took any further action in regard to his 1996 claim.

² Because the miner's 2003 subsequent claim and the survivor's claim were both filed after January 19, 2001, they are each subject to the evidentiary limitations of 20 C.F.R. §725.414. See 20 C.F.R. §725.2(c). When a miner files a subsequent claim, all the evidence from the prior claim(s) is specifically made part of the record in the miner's claim. See 20 C.F.R. §725.309(d)(1). Such an inclusion is not automatically available, however, in a survivor's claim filed pursuant to the revised regulations. The parties must designate the claim that each piece of evidence supports, and the administrative law judge should consider this evidence on the specific issues of entitlement in each claim, and in accordance with the evidentiary rules applicable to each claim. See *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241-42 (2007)(*en banc*). Consequently, in this case, the administrative law judge reviewed different sets of evidence designated for her consideration in each claim.

³ In a May 28, 2010 Order, the administrative law judge provided the parties with notice of Section 1556, and of its potential applicability to this case, and set a schedule for the parties to submit additional evidence and argument. Claimant, employer, and the Director, Office of Workers' Compensation Programs, each submitted briefs in response to the administrative law judge's order.

eight and less than ten” years of coal mine employment,⁴ Decision and Order at 10, and determined that the amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), are inapplicable to the miner’s claim, because it was filed before January 1, 2005, and because the miner was credited with fewer than fifteen years of coal mine employment. The administrative law judge further found that the new evidence established that the miner suffered from clinical and legal pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(c), and total disability, due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b), (c), elements that were adjudicated against the miner in the prior claim. Thus, the administrative law judge found that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner’s prior claim became final. 20 C.F.R. §725.309. Considering the miner’s 2003 claim on the merits, the administrative law judge found that the evidence in the miner’s claim established that the miner was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits in the miner’s claim.

In adjudicating the survivor’s claim, the administrative law judge properly found that the March 23, 2010, amendments to the Act are applicable to the survivor’s claim, as it was filed after January 1, 2005, and was pending on or after March 23, 2010. The administrative law judge correctly noted that the amendments, in pertinent part, revive Section 932(l) of the Act, which provides that the eligible survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor’s benefits, without having to establish that the miner’s death was due to pneumoconiosis. 30 U.S.C. §932(l). The administrative law judge found that claimant is an eligible survivor of the miner, and, based on the award of benefits in the miner’s claim, found claimant entitled to receive benefits under amended Section 932(l). Accordingly, the administrative law judge awarded benefits in the survivor’s claim.

On appeal, relevant to the miner’s claim, employer argues that the administrative law judge erred in excluding a portion of Dr. Caffrey’s medical report, submitted by employer in rebuttal to Dr. Perper’s report, pursuant to 20 C.F.R. §725.414. Employer further asserts that the administrative law judge erred in finding that claimant established the requisite change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Alternatively, employer challenges the administrative law judge’s findings, on the merits, that claimant established the existence of clinical and legal pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R.

⁴ The record reflects that the miner’s last coal mine employment was in Kentucky. Director’s Exhibits 4, 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

§§718.202(a)(2), (4); 718.203(c), and that the miner's disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Employer further challenges the administrative law judge's award of augmented benefits, on behalf of the miner's adult, disabled son. With respect to the survivor's claim, employer challenges the administrative law judge's length of coal mine employment determination, the administrative law judge's application of amended Section 932(l) to award benefits, and the administrative law judge's augmentation of those benefits. Claimant⁵ responds in support of the administrative law judge's award of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject employer's arguments regarding the administrative law judge's exclusion of portions of Dr. Caffrey's medical report, and her application of amended Section 932(l) to the survivor's claim. Employer filed a combined reply brief, reiterating its allegations of error.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Employer initially argues that, by refusing to consider Dr. Caffrey's opinion in its entirety, the administrative law judge improperly denied employer an opportunity to submit rebuttal evidence to Dr. Perper's medical report. Employer's contention lacks merit. In an Order dated May 28, 2010, the administrative law judge permissibly found that Dr. Perper's report, submitted by claimant, contained both a review of the miner's biopsy tissue slides, as well as his written assessment of the miner's respiratory condition based on his review of additional medical records, and, therefore, it constituted both a biopsy interpretation and a medical report for the purposes of the evidentiary limitations. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239 (2006)(*en banc*); May 28, 2010 Order at 3. The administrative law judge further found that Dr. Caffrey's report, designated by employer as biopsy rebuttal to Dr. Perper's report, also contained both a review of the biopsy slides, and Dr. Caffrey's consideration of additional medical records that were unrelated to the biopsy and, thus, was both a biopsy rebuttal report, and a medical report. The administrative law judge correctly found that, to the extent that Dr. Perper's report was an affirmative biopsy report, the regulations permitted employer to submit a biopsy rebuttal report, 20 C.F.R. §725.414(a)(2)(ii), but that the regulations do not provide for the rebuttal of medical reports. May 28, 2010 Order at 3. Further, as

⁵ Claimant is the widow of the deceased miner, who died on November 23, 2005. Director's Exhibit 11.

employer had already designated two affirmative medical reports, those of Drs. Dahhan and Fino, Dr. Caffrey's opinion could not be admitted as an affirmative medical report. 20 C.F.R. §725.414(a)(3)(i); May 28, 2010 Order at 4. Therefore, the administrative law judge reasonably concluded that Dr. Caffrey's report would be considered only to the extent it related to the biopsy and to Dr. Perper's interpretation of the biopsy slides and biopsy findings. May 28, 2010 Order at 4.

Employer asserts that, under *L.P. [Preston] v. Amherst Coal Co.*, 24 BLR 1-55 (2008), the administrative law judge erred in failing to admit Dr. Caffrey's opinion in its entirety. Employer's Brief at 18-19. Employer's reliance on *Preston* is misplaced. In *Preston*, the Board "recognized only a right to cross-examine a [treating] physician whose report is admissible under Section 725.414(a)(4)" and admit his testimony into the record. *Preston*, 24 BLR at 1-63; Director's Brief at 3. Dr. Caffrey, however, was not the miner's treating physician; rather, employer simply sought to admit a third medical report from Dr. Caffrey that it labeled as "rebuttal" to Dr. Perper's combined biopsy report and affirmative medical report.

Further, even assuming that Dr. Caffrey's report included review and criticism of Dr. Perper's report that employer believed was necessary "to ensure the integrity and fundamental fairness of the adjudications" of these claims, employer could have either designated Dr. Caffrey's report as one of its two affirmative reports, or argued to the administrative law judge that "good cause" existed to admit Dr. Caffrey's complete report, in excess of the evidentiary limitations, pursuant to 20 C.F.R. §725.456(b)(1). Director's Brief at 3. As a review of the record reveals that employer did neither, we hold that the administrative law judge did not abuse her discretion in excluding that portion of Dr. Caffrey's report that did not relate to the biopsy or to Dr. Perper's interpretation of the biopsy slides and biopsy findings.⁶ May 28, 2010 Order at 4.

The Miner's Claim

⁶ Employer asserts that it was "ambushed" by the administrative law judge's evidentiary rulings, and that the administrative law judge did not provide employer an opportunity to argue good cause. Employer's Reply Brief at 3. Contrary to employer's contention, in her May 28, 2010 Order, the administrative law judge allowed the parties thirty days to submit supplemental briefing addressing the applicability of the recent amendments *and* to "show cause" why her evidentiary rulings were incorrect. May 28, 2010 Order at 5. Employer submitted a brief addressing the applicability of the recent amendments, but did not challenge the administrative law judge's evidentiary rulings. Employer's June 24, 2010 Response at 1-3.

In order to establish entitlement to benefits under Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied because he failed to establish that he had pneumoconiosis, that he was totally disabled by a respiratory or pulmonary impairment, or that his total disability was due to pneumoconiosis. Director's Exhibit 1-1. Consequently, to obtain review of the merits of the miner's claim, claimant had to submit new evidence establishing either that the miner suffered from pneumoconiosis or that he was totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Employer asserts that the administrative law judge erred in relying, in part, on biopsy evidence from 1996 to find that claimant established the existence of clinical pneumoconiosis, and a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309. Employer's Brief at 23-24. Employer contends that, as the 1996 biopsy evidence addressed the miner's condition at the time of his prior claim, it does not constitute new evidence establishing that the miner's condition changed after the denial of his prior claim. Employer's Brief at 23-24. Employer's contention has merit. Because the administrative law judge must base her determination as to whether there has been a change in an applicable condition of entitlement on new evidence, it was error for her to rely on evidence associated with the prior claim. *See* 20 C.F.R. §725.309(d)(3). This error is harmless, however, as a review of the administrative law judge's decision reveals that she also found that claimant established a change in an applicable condition of entitlement through new evidence establishing the existence of a totally disabling respiratory impairment, a condition of entitlement that the miner did not establish in his prior claim. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 417 n.8, 21 BLR 2-192, 2-200 n.8 (6th Cir. 1997); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 6, 18-19; Director's Exhibits 11, 13; Employer's Exhibits 1, 3, 4-9. Moreover, this finding is both supported by substantial evidence, and is unchallenged by employer. We, therefore, affirm the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b) and, therefore, established a change in an applicable condition of

entitlement, pursuant to 20 C.F.R. §725.309(d).⁷ See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁸ The administrative law judge considered the medical opinions of Drs. Perper, Rasmussen, Rivera, Dahhan, and Fino. Drs. Perper, Rasmussen, and Rivera diagnosed legal pneumoconiosis, opining that the miner suffered from chronic obstructive pulmonary disease (COPD) and emphysema due to both cigarette smoking and coal mine dust exposure.⁹ 20 C.F.R. §718.201(a)(2); Claimant's Exhibit 1; Director's Exhibits 11-1, 13-2, 61-2. Drs. Dahhan and Fino opined that the miner's coal mine dust exposure did not contribute to his COPD or emphysema.¹⁰ Employer's Exhibits 1, 3-9.

The administrative law judge credited Dr. Perper's opinion, finding it to be persuasive, and corroborated by both the reasoned and documented opinion of Dr. Rasmussen, and by the opinion of Dr. Rivera, the miner's treating physician. Decision and Order at 16. Conversely, the administrative law judge accorded diminished weight to the opinions of Drs. Dahhan and Fino, in part, because she found that the doctors failed to

⁷ As the administrative law judge properly found a change in an applicable condition of entitlement established through new evidence of total disability, the administrative law judge permissibly considered the evidence submitted with the miner's prior claims in determining, on the merits, that claimant established the existence of pneumoconiosis. See 20 C.F.R. §725.309(d)(1).

⁸ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

⁹ Dr. Perper diagnosed significant centrilobular emphysema due to both coal mine dust exposure and cigarette smoking. Claimant's Exhibit 1 at 30, 37. Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD) and emphysema due to both coal mine dust exposure and smoking. Director's Exhibits 11, 13. Dr. Rivera opined that the miner suffered from chronic occupational lung disease due, in part, to coal mine dust exposure. Director's Exhibit 61-2.

¹⁰ Dr. Dahhan diagnosed a severe obstructive ventilatory impairment, due to cigarette smoking. Employer's Exhibits 1, 4, 8, 9. Dr. Fino diagnosed severe COPD, with chronic obstructive bronchitis and emphysema, causally related to cigarette smoking. Employer's Exhibits 3, 5-7.

adequately explain how they eliminated the miner's coal mine dust exposure as a contributor to his COPD and emphysema. Decision and Order at 16. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in according greater weight to the opinions of Drs. Perper, Rasmussen, and Rivera, that the miner suffered from legal pneumoconiosis, than to the contrary opinions of Drs. Dahhan and Fino. Employer asserts that the administrative law judge's determination to credit Dr. Perper's opinion is unexplained, and that the opinions of Drs. Rasmussen and Rivera are insufficiently reasoned to corroborate Dr. Perper's opinion. Employer's Brief at 28. These arguments lack merit.

Dr. Perper explained that, while the miner's smoking habit significantly contributed to his emphysema, reliable scientific literature establishes that centrilobular emphysema is also a direct result of exposure to mixed coal mine dust containing silica. Claimant's Exhibit 1 at 32. Dr. Perper opined that it is, therefore, "equally legitimate to recognize the significant role of exposure to coal mine dust and there is no logical reason to exclude it" as a cause of the miner's emphysema. *Id.* The administrative law judge specifically found that Dr. Perper based his opinion on the medical evidence of record, including his review of the lung tissue slides, and found that Dr. Perper discussed the epidemiological evidence in the context of the miner's individual situation, in supporting his conclusion that the miner's emphysema was due to both smoking and coal mine dust exposure. Decision and Order at 16. Therefore, contrary to employer's contention, the administrative law judge set forth her reasons for finding Dr. Perper's opinion to be persuasive on the issue of legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

The administrative law judge also acted within her discretion in finding Dr. Perper's opinion to be corroborated by those opinions of Drs. Rasmussen and Rivera. Contrary to employer's assertion, the administrative law judge permissibly found Dr. Rasmussen's diagnosis of legal pneumoconiosis corroborative of Dr. Perper's opinion, noting that Dr. Rasmussen supported his opinion with his examination findings and test results. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 15, 16; Director's Exhibit 11. In addition, the administrative law judge acted within her discretion in finding that Dr. Rivera's diagnosis of legal pneumoconiosis, although conclusory, was based on his treatment of the miner for a period of years and further corroborated Dr. Perper's opinion. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. We, therefore, affirm the administrative law judge's permissible finding that Dr. Perper's

diagnosis of legal pneumoconiosis, in the form of emphysema, due, in part, to coal mine dust exposure, was “persuasive” and corroborated by the opinions of Drs. Rasmussen and Rivera, and was therefore sufficient to satisfy claimant’s burden of proof. *See* 20 C.F.R. §718.201(a)(2), (b); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 15; Claimant’s Exhibit 3.

In contrast, contrary to employer’s argument, the administrative law judge permissibly questioned the opinions of Drs. Dahhan and Fino, that the miner’s COPD and emphysema were due solely to smoking, because neither physician adequately explained how he eliminated the miner’s coal mine dust exposure as even an aggravating or contributing factor in the miner’s obstructive impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 16. The administrative law judge, therefore, permissibly accorded less weight to the opinions of Drs. Dahhan and Fino with respect to the existence of legal pneumoconiosis.¹¹

Finally, the administrative law judge considered the other medical evidence of record and permissibly concluded that it did not undermine the medical opinion evidence. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 17. Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of emphysema and COPD arising out of coal mine employment, pursuant to 20 C.F.R. §718.202(a).¹² *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305-06, 23 BLR 2-261, 2-283-85 (6th Cir. 2005).

¹¹ Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Dahhan and Fino, *i.e.*, that they did not adequately explain why the miner’s coal mine dust exposure did not also contribute to his COPD and emphysema, 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).

¹² Although employer challenges the administrative law judge’s additional finding of clinical pneumoconiosis, the Board has long held that 20 C.F.R. §718.202(a) provides four alternative methods for establishing the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and has declined to extend the holdings in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), outside the jurisdictions of the United States Courts of Appeals for the Third and Fourth Circuits, respectively. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*). Thus, our affirmance of the administrative law judge’s finding of legal

Relationship of Pneumoconiosis to Coal Mine Employment

Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly found that she was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(c), as her finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 18. We, therefore, reject employer's argument to the contrary. Employer's Brief at 30-31.

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Dahhan and Fino, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom. Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 19-20; Employer's Brief at 32. The fact that Dr. Fino stated that his opinion would remain the same even if he were to assume the existence of "coal workers' pneumoconiosis," does not compensate for Dr. Fino's opinion that the miner did not have legal pneumoconiosis as found by the administrative law judge, namely, COPD and emphysema due, in part, to coal mine dust exposure. *See Skukan*, 993 F.2d at 1233, 17 BLR at 2-104; Employer's Brief at 32; Employer's Exhibits 3 at 7, 7 at 16. Moreover, as the administrative law judge rationally relied, in part, on the opinion of Dr. Rasmussen to find that claimant established that the miner had legal pneumoconiosis, she permissibly found that Dr. Rasmussen's opinion supported a finding that the miner was totally disabled due to legal pneumoconiosis. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and affirm the administrative law judge's award of benefits in the miner's claim.

pneumoconiosis at 20 C.F.R. §718.202(a)(4) obviates the need to address employer's challenges to the administrative law judge's finding of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(2), (4). *Dixon*, 8 BLR at 1-345.

The Survivor's Claim

As set forth above, having found the miner entitled to benefits, the administrative law judge concluded that pursuant to the recent amendments to the Act, claimant is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.¹³ 30 U.S.C. §932(*l*); Decision and Order at 21-23.

Employer contends that the operative date for determining eligibility for survivor's benefits pursuant to amended Section 932(*l*) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer's Brief at 32-35; Employer's Reply Brief at 4-6. Employer further asserts that the administrative law judge erred in applying the automatic entitlement provision at amended Section 932(*l*) when the miner's claim was not finally awarded at the time of his death. Employer's Brief at 35. Employer also argues that this case should be held in abeyance pending the resolution of legal challenges to Public Law No. 111-148. Employer's Brief at 35-36; Employer's Reply Brief at 6.

Initially, we reject employer's contention regarding the operative filing date for determining eligibility pursuant to amended Section 932(*l*). The operative date for determining eligibility for survivors' benefits under amended Section 932(*l*) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *W. Va.*

¹³ As it existed prior to March 23, 2010, Section 932(*l*) provided that:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(*l*). On March 23, 2010, Public Law No. 111-148 amended Section 422(*l*) as follows: “(b) Continuation of Benefits – Section 422(*l*) of the Black Lung Benefits Act (30 U.S.C. §932(*l*)) is amended by striking ‘except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981’.” Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*)). Section 1556 of Public Law No. 111-148 provides further that “[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. §921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act.” Pub. L. No. 111-148, §1556(c).

CWP Fund v. Stacy, F.3d , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010). Further, we hold that amended Section 932(l) applies to the current claim, despite the fact that the miner was not receiving payments as a result of an award of benefits at the time of his death. Contrary to employer's assertion, as long as the miner is ultimately determined to be eligible to receive benefits, a survivor is entitled to payment of benefits. 30 U.S.C. §§901(a), 932(l); *see* 20 C.F.R. §725.212(a)(3)(ii); *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-70 (3d Cir. 1988); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); Employer's Brief at 35. Finally, we reject employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Stacy*, No. 11-1020, 2011 WL 6396510 at *3 n.2; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.).

In this case, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended 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 March 23, 2010; and that the miner was determined to be eligible to receive benefits. Therefore, we affirm the administrative law judge's determination that claimant is entitled to receive payment of benefits pursuant to amended Section 932(l) of the Act.¹⁴ 30 U.S.C. §932(l).

Augmentation of Benefits

Finally, employer contends that the administrative law judge erred in awarding claimant augmented benefits on behalf of her adult, disabled son. Decision and Order at 23; Employer's Brief at 36-37. Employer's contention has merit.

The regulations provide that a child of a deceased miner is entitled to benefits if the requisite standards of relationship and dependency are met. 20 C.F.R. §725.218(a). An unmarried adult child satisfies the dependency requirement if such child is eighteen years of age or older and is under a disability as defined in Section 223(d) of the Social

¹⁴ Because the administrative law judge awarded benefits pursuant to the automatic entitlement provision of amended Section 932(l) of the Act, we need not address employer's assertion that the administrative law judge erred in finding, in the survivor's claim, that claimant established eleven and one-half years of coal mine employment. As employer concedes, the administrative law judge's length of coal mine employment finding did not affect the disposition of the survivor's claim. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 21, 23.

Security Act, 42 U.S.C. §423(d), provided that the disability began before the child attained age twenty-two. 20 C.F.R. §§725.209(a)(2)(ii), 725.221. The Social Security Act defines “disability” as an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §423(d)(1)(A); *Tackett v. Director, OWCP*, 10 BLR 1-117, 1-118 (1987). Statements of a claimant, standing alone, are insufficient to prove the existence of disability; thus, medical evidence must be produced. 42 U.S.C. §423(d)(5)(A); *Tackett* at 1-118.

As employer correctly asserts, the administrative law judge did not determine, under the facts of this case, whether claimant’s disabled adult child satisfies the requisite standards of relationship and dependency. Decision and Order at 33-34. Consequently, this aspect of the administrative law judge’s decision does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). We must, therefore, vacate the administrative law judge’s determination that claimant is entitled to augmented benefits on behalf of an adult, disabled son, and remand this case to the administrative law judge for further consideration of this issue, and for the administrative law judge to explain her augmentation finding consistent with the APA.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge