BRB Nos. 11-0284 BLA
and 11-0291 BLA

THELMA CHILDRESS (o/b/o and Widow of ROCKY CHILDRESS) Claimant-Respondent v. JEWELL SMOKELESS COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/20/2012 DECISION and ORDER

Appeal of the Decision and Order of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

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

Ann Marie Scarpino (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (06-BLA-6090 and 09-BLA-5052) of Administrative Law Judge Christine L. Kirby awarding benefits 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(*l*)) (the Act). This case involves a miner's subsequent claim filed on May 7, 2004,[1] and a survivor's claim filed on July 11, 2007. After crediting the miner with fifteen years of coal mine employment,[2] the administrative law judge found that the autopsy and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), thereby establishing 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.[3] *See* 20 C.F.R. §725.309. The administrative law judge, therefore, considered the miner's 2004 claim on the merits.

In considering the merits of the claim, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge further found that the miner was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits on the miner's claim.

With respect to the survivor's claim, the administrative law judge noted that, after the record closed on the miner's claim and the survivor's claim, on March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted.[4] The amendments, in pertinent part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which

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[1] The miner's two previous claims, filed on May 14, 1991 and March 28, 2000, were finally denied because the miner failed to establish any element of entitlement. Director's Exhibits 1, 2.

[2] The record reflects that the miner's coal mine employment was in Virginia and West Virginia. Director's Exhibits 1, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[3] The administrative law judge also found that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[4] The recent amendments do not apply to the miner's claim, because it was filed before January 1, 2005. However, the recent amendments apply to the survivor's claim, which was filed after January 1, 2005. *See* Pub. L. No. 111-148, §1556(c).

provides that a survivor of a miner who was 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. Pub. L. No. 111-148, §1556(b), (c).

The administrative law judge found that the miner was determined to be eligible to receive benefits at the time of his death, that claimant[5] filed her survivor's claim on July 11, 2007, and that she is an eligible survivor of the miner. The administrative law judge, therefore, found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer contends that the administrative law judge erred in not admitting deposition testimony from Drs. Tomashefski and Dennis into the record in the miner's claim. Employer also argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer further argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis. In regard to the survivor's claim, employer challenges the administrative law judge's application of amended Section 932(*l*) to this case. Claimant responds in support of the administrative law judge's award of benefits in both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs, has filed a limited response, requesting that the Board reject employer's contention that amended Section 932(*l*) cannot be applied to the survivor's claim.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Admission of Evidence

Employer initially argues that the administrative law judge erred in excluding the May 7, 2009 deposition testimony of Dr. Tomashefski, and the March 17, 2008 deposition testimony of Dr. Dennis from the record in the miner's claim.

[5] Claimant is the surviving spouse of the miner, who died on March 5, 2007. Director's Exhibit 63.

Background Information

In light of the potential applicability of the recent amendments to the survivor's claim,[6] the administrative law judge issued an order providing the parties with an opportunity to submit supplemental evidence addressing the change in law. The administrative law judge specifically allowed each party to "submit one supplemental medical report from any physician who prepared an affirmative 'medical report' as defined at 20 C.F.R. §725.414(a)(1), and/or deposition testimony as permitted by 20 C.F.R. §725.457(c)." August 5, 2010 Order at 2. The administrative law judge further instructed the parties that the supplemental medical report or deposition should be "limited to addressing medical issues . . . in light of the potential applicability of [amended Section 411(c)(4)]" to the survivor's claim.[7] *Id.*

In response, employer submitted the May 7, 2009 deposition testimony of Dr. Tomashefski, and the March 17, 2008 deposition testimony of Dr. Dennis. Claimant objected to the admission of this evidence, arguing, *inter alia*, that it was outside the scope of the administrative law judge's Order allowing supplemental evidence.

In an Order dated November 22, 2010, the administrative law judge found that Dr. Tomashefski's deposition testimony was "non-responsive" to her August 5, 2010 Order, and exceeded the evidentiary limitations. The administrative law judge further found that Dr. Dennis's deposition testimony exceeded the evidentiary limitations. The administrative law judge, therefore, found that the supplemental evidence submitted by employer was not admissible.

Discussion

Employer argues that the administrative law judge erred in excluding Dr. Tomashefski's May 7, 2009 deposition testimony. We disagree. The administrative law judge properly found that Dr. Tomashefski's deposition testimony was not responsive to her Order, which allowed the parties to submit evidence relevant to the recent

[6] The administrative law judge accurately noted that the recent amendments are "inapplicable to the miner's claim," because it was filed before January 1, 2005. June 23, 2010 Order at 1 n.1.

[7] Section 411(c)(4) provides, in relevant part, that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

amendments to the Act. Because the recent amendments have no effect on the miner's claim, Dr. Tomashefski's deposition testimony is not relevant to the miner's claim, and therefore is not responsive to the administrative law judge's Order. Moreover, the administrative law judge accurately found that the admission of Dr. Tomashefski's deposition testimony would exceed the evidentiary limitations. In the miner's claim, employer submitted the affirmative medical reports of Drs. Castle and Hippensteel. Hearing Transcript at 41; *see* 20 C.F.R. §725.414(a)(3)(i). After the district director denied the miner's claim, in a Proposed Decision and Order on February 8, 2005, the miner timely requested modification. *See* 20 C.F.R. §725.310. On modification, employer submitted Dr. McSharry's April 6, 2009 medical report and April 17, 2009 deposition testimony. Hearing Transcript at 45; *see* 20 C.F.R. §725.310(b). Because employer had already submitted its three permissible affirmative medical reports, the admission of Dr. Tomashefski's deposition testimony would exceed the evidentiary limitations.[8] The administrative law judge, therefore, properly ruled that Dr. Tomashefski's May 7, 2009 deposition testimony was not admissible. June 23, 2010 Order at 3.

Employer also challenges the administrative law judge's exclusion of Dr. Dennis's March 17, 2008 deposition testimony.[9] Citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24

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[8] The regulations at 20 C.F.R. §§725.414 and 725.310(b) establish combined evidentiary limitations that apply when a claim is being considered on modification. *See* 20 C.F.R. §§725.2(c), 725.414, 725.310(b); *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007). Pursuant to 20 C.F.R. §725.414(a), each party may submit, in support of his affirmative case, no more than two chest x-ray interpretations, no more than two pulmonary function studies, no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). The regulation at 20 C.F.R. §725.310(b) further provides that, in a modification proceeding, each party shall be entitled to submit one additional x-ray interpretation, pulmonary function study, blood gas study, and medical report as affirmative case evidence, "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414." 20 C.F.R. §725.310(b). If a party did not submit the full complement of evidence allowed by 20 C.F.R. §725.414, in support of its affirmative case in the underlying claim, that party would be permitted on modification to submit any additional evidence allowed under 20 C.F.R. §725.414, as well as the additional medical evidence allowed by 20 C.F.R. §725.310(b). *Rose*, 23 BLR at 1-227. Additionally, the regulations provide that if any evidence exceeding the limitations is offered by a party, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

[9] Claimant submitted Dr. Dennis's June 23, 2007 report as her affirmative autopsy report, Director's Exhibit 63, while employer designated Dr. Roggli's July 23, 2008

BLR 1-57 (2008), employer contends that it was entitled to cross-examine Dr. Dennis. We agree with the administrative law judge that employer's reliance upon *Preston* is misplaced. November 22, 2010 Order at 2. 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 to admit his testimony into the record. *Preston*, 24 BLR at 1-63. Because the administrative law judge in *Preston* accorded controlling weight to the opinion of the miner's treating physician, the Board held that employer's cross-examination was necessary to "ensure the integrity and fundamental fairness of the adjudication of the survivor's claim and for a full and true disclosure of the facts." *Preston*, 24 BLR at 1-61. The administrative law judge noted accurately that here, Dr. Dennis was not a treating physician, but a physician who prepared an autopsy report. Moreover, in this case, the administrative law judge did not accord controlling weight to Dr. Dennis's autopsy report. In finding that the autopsy evidence established the existence of complicated pneumoconiosis, the administrative law judge relied primarily upon Dr. Perper's report, which she found provided the necessary equivalency determination as to the size of the relevant lesions. Decision and Order at 26-28. Consequently, under the facts of this case, we hold that the administrative law judge did not err in excluding Dr. Dennis's deposition testimony.[10]

The Miner's Claim

Employer next argues that the administrative law judge erred in finding that claimant established that the miner suffered from complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (A) when diagnosed by x-ray, yields one or more 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

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report as its affirmative autopsy report. Employer's Exhibit 1. Employer submitted Dr. Tomashefski's January 6, 2009 report as rebuttal evidence to Dr. Dennis's autopsy report. Employer's Exhibit 5.

[10] As previously noted, we reiterate that the administrative law judge allowed the parties to submit supplemental evidence in this case for the limited purpose of addressing the potential impact of the recent amendments to the Act *on the survivor's claim*. Neither the administrative law judge, nor the parties on appeal, explain why Dr. Dennis's deposition testimony needed to be admitted and considered as supplemental evidence in the miner's claim, which was not affected by those amendments.

massive lesions in the lung; or (C) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.

The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-214, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (*en banc*).

After finding that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered whether the autopsy evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). The administrative law judge considered the autopsy reports of Drs. Dennis, Perper, Roggli, and Tomashefski. Dr. Dennis, the autopsy prosector, found 0.5 to 1.0 cm. macules in the upper and middle lobes of the miner's lungs. Director's Exhibit 63. Dr. Dennis also found the presence of 1.5 cm. fibrotic nodules. *Id.* Dr. Dennis's final pathologic diagnoses included "simple coal workers' pneumoconiosis with focal progressive massive fibrosis." *Id.* Dr. Perper, a Board-certified pathologist, reviewed the miner's autopsy slides and other medical evidence. Dr. Perper identified a 1.2 cm. nodule, which he found supportive of a diagnosis of complicated pneumoconiosis. Director's Exhibit 65 at 15. Dr. Perper explained that pathological lesions of 1.0 cm. or larger are equivalent to radiological lesions of the same size or larger. *Id.* at 17. Dr. Perper further explained that his findings were supported by Dr. Dennis's findings of 1.5 cm. fibrotic nodules. Employer's Exhibit 23 at 22-23.

Drs. Roggli and Tomashefski also reviewed the miner's autopsy slides. Dr. Roggli found, *inter alia*, "simple coal workers' pneumoconiosis with coal dust macules and a few mixed dust lesions." Employer's Exhibit 1. Although Dr. Tomashefski diagnosed simple coal workers' pneumoconiosis, he found "no large nodular lesions of complicated coal workers' pneumoconiosis." Employer's Exhibit 5.

In her consideration of the conflicting autopsy evidence, the administrative law judge accorded the greatest weight to Dr. Perper's opinion, noting that he is a Board-certified pathologist who provided a description of the size of the nodule that he found to be supportive of complicated pneumoconiosis, and who explained that this nodule would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. Decision and Order at 26. The administrative law judge further found that Dr. Perper's opinion was supported by that of Dr. Dennis, who found fibrotic nodules measuring 1.5 cm. in diameter, and diagnosed "progressive massive fibrosis." *Id.*

The administrative law judge accorded less weight to Dr. Roggli's opinion because the doctor did not describe the size of the lesions that he found, and did not explicitly address whether the miner suffered from complicated pneumoconiosis. Decision and Order at 26. Similarly, although Dr. Tomashefski opined that the miner did not suffer from complicated pneumoconiosis, the administrative law judge discounted his opinion, because the doctor did not describe the size of the nodules that he observed, or define what he considered to be a nodule large enough to constitute complicated pneumoconiosis. *Id.* The administrative law judge, therefore, found that the autopsy evidence supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

Employer contends that the administrative law judge erred in failing to provide a proper basis for discrediting the opinions of Drs. Roggli and Tomashefski. Contrary to employer's contention, the administrative law judge permissibly accorded less weight to the opinions of Drs. Roggli and Tomashefski, because neither physician set forth his measurements of the nodules revealed by the autopsy slides, or explained what findings they believed were necessary to constitute a finding of complicated pneumoconiosis. *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).

Employer also argues that the diagnoses of complicated pneumoconiosis rendered by Drs. Dennis and Perper are entitled to less weight, because they are not supported by the x-ray and CT scan evidence. In weighing together all of the relevant evidence regarding complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c), the administrative law judge found that the autopsy evidence was the most probative evidence, and was not refuted by the negative x-ray evidence. Decision and Order at 28. Because the Board has held that autopsy evidence is the most reliable evidence for determining the existence of pneumoconiosis, *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985), we reject employer's contention that the administrative law judge failed to accord proper weight to the x-ray evidence.

In regard to the CT scan evidence, Section 718.107 provides, in pertinent part, that "the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis . . . may be submitted in connection with a claim and shall be given appropriate consideration." 20 C.F.R. §718.107(a). The Board has consistently held that, pursuant to Section 718.107(b), the administrative law judge must determine, on a case-by-case basis, whether the proponent of the "other medical evidence" has established that the test or procedure is "medically acceptable and relevant to entitlement." *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*). In this case, the administrative law judge found that employer submitted no evidence that CT scan evidence is medically acceptable or relevant to a determination of whether a miner suffers from complicated pneumoconiosis. Decision and Order at 17 n.11, 28. Consequently, the administrative law judge permissibly declined to consider the CT scan evidence. *See* 20 C.F.R. §718.107(b); *Webber*, 23 BLR at 1-133.

Finally, employer contends that the administrative law judge erred in her consideration of the medical opinions of Drs. McSharry, Castle, and Hippensteel. We disagree. Dr. McSharry reviewed the medical evidence. Although Dr. McSharry initially opined that the miner did not suffer from complicated pneumoconiosis, Employer's Exhibit 15, the administrative law judge noted that, when later deposed, Dr. McSharry indicated that he would defer to the opinions of the pathologists on whether the miner had pathologic evidence of pneumoconiosis. Employer's Exhibit 21 at 12-13. The administrative law judge, therefore, permissibly found that Dr. McSharry's opinion was not probative on the issue of complicated pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Based upon their review of the evidence, Drs. Castle and Hippensteel also opined that the miner did not suffer from complicated pneumoconiosis. Employer's Exhibits 11, 13, 22. The administrative law judge, however, noted that, unlike Dr. Perper, neither Dr. Castle nor Dr. Hippensteel is a Board-certified pathologist. Decision and Order at 27. The administrative law judge, therefore, recognized that Dr. Perper was better qualified in the field of pathology. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge also noted that both Drs. Castle and Hippensteel opined that the miner did not have complicated pneumoconiosis because the autopsy evidence did not reveal a pathologic lesion that was greater than 2.0 cm. in diameter. Decision and Order at 27. The administrative law judge, however, found that neither doctor provided an explanation as to why Dr. Perper's equivalency determination opinion was in error, as the Act does not mandate the use of a two-centimeter standard for establishing complicated pneumoconiosis. *Id.* The administrative law judge, therefore, reasonably found that the opinions of Drs. Castle and Hippensteel, questioning the autopsy findings of Dr. Perper, a Board-certified pathologist, were not sufficiently reasoned. *See Double B Mining v.*

Blankenship, 177 F.3d 240, 244, 22 BLR 2-554, 2-562 (4th Cir. 1999) (declining "to impose the two-centimeter rule," because the Act "does not mandate use of the medical definition of complicated pneumoconiosis."); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In sum, the administrative law judge's finding of complicated pneumoconiosis was based upon a thorough, integrated consideration of all of the available medical evidence, an approach that was legally proper under *Scarbro*. *See Scarbro*, 220 F.3d at 256, 22 BLR 2-93, 2-101 (explaining that "all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray"). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that all of the relevant evidence, when considered together, established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby enabling the miner to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

Because it is unchallenged on appeal, we also affirm the administrative law judge's finding that employer did not rebut the presumption that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b).[11] *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710 (1983); Decision and Order at 28.

The Survivor's Claim

Employer argues that retroactive application of amended Section 932(*l*) of the Act, 30 U.S.C. §932(*l*), is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 26-35. Employer also contends that the operative date for determining eligibility under 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 36-39. These identical arguments were recently rejected by the Fourth Circuit and, thus lack merit. *W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510, at *3-9 (4th Cir. Dec. 21, 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *see also B&G*

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[11] In light of our affirmance of the administrative law judge's findings pursuant to 20 C.F.R. §§718.304 and 718.203(b), we need not address employer's contentions of error regarding the length of the miner's smoking history, or regarding the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Constr. Co. v. Director, OWCP [*Campbell*], 662 F.3d 233, 254-63 (3d Cir. 2011) (rejecting due process and takings challenges to amended Section 932(*l*)).

Additionally, employer asks that this case be held in abeyance pending the United States Supreme Court's resolution of the legal challenges to Public Law No. 111-148. Employer's Brief at 40-47. Employer's request is denied. *See Stacy*, No. 11-1020, 2011 WL 6396510 at *3 n.2; *see also Stacy*, 24 BLR at 1-215; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

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 at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(*l*) of the Act. 30 U.S.C. §932(*l*).

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge