

U.S. Department of Labor

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



BRB No. 17-0360 BLA

FLORENCE HAGY)	
(Widow of TROY L. HAGY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 07/26/2018
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2013-BLA-05367) of Administrative Law Judge Richard A. Morgan rendered on a claim filed pursuant to 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 15, 2011¹ and is before the Board for the second time.

In his initial decision, the administrative law judge credited the miner with forty-two years of coal mine employment, of which at least fifteen years were underground, but found that claimant did not establish that the miner had a totally disabling respiratory or pulmonary impairment at the time of his death pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). 20 C.F.R. §718.305(b)(1)(iii). The administrative law judge therefore found that claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act,² 30 U.S.C. §921(c)(4) (2012). Considering whether claimant established entitlement without the presumption, the administrative law judge found that the miner had legal and clinical pneumoconiosis, 20 C.F.R. §§718.202(a)(2), (4),³ but that his death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's unchallenged findings that the miner had at least forty-two years of coal mine employment, including at least fifteen years in underground mines, and that his previous coal mine employment required heavy manual labor. *Hagy v. Westmoreland Coal Co.*, BRB No. 15-0181 BLA, slip op. at 3 (Feb. 26, 2016) (unpub.). The Board vacated, however, the

¹ Claimant is the widow of the miner, who died on May 14, 2010. Director's Exhibit 9. The miner filed seven claims during his lifetime, all of which were denied. Decision and Order on Remand at 2 n.1. Accordingly, claimant cannot establish entitlement to benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), which provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

³ The administrative law judge also found that the evidence did not establish complicated pneumoconiosis under 20 C.F.R. §718.304, and thus claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order on Remand at 20.

administrative law judge's denial of claimant's motion to submit additional evidence, and remanded the case for reconsideration of whether claimant was entitled to submit supplemental medical reports from Drs. Rasmussen and Abraham under the evidentiary limitations at 20 C.F.R. §725.414. *Hagy*, BRB No. 15-0181 BLA, slip op. at 3-7. Because the evidence could change on remand, the Board vacated the findings that the miner was not totally disabled under 20 C.F.R. §718.204(b)(2) and, therefore, that claimant did not invoke the Section 411(c)(4) presumption. The Board also vacated the administrative law judge's finding that the miner's death was not due to pneumoconiosis under 20 C.F.R. §718.205(c). *Id.* at 7.

The administrative law judge was instructed to reconsider whether claimant established that the miner had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) and, thus, could invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. In that case, the Board instructed the administrative law judge to consider whether employer rebutted the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis, or that no part of the miner's death was caused by pneumoconiosis. If claimant was not entitled to the presumption, however, the Board stated that the administrative law judge was required to reconsider whether claimant established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), taking into consideration any additional evidence that was admitted on remand. *Hagy*, BRB No. 15-0181 BLA, slip op. at 12-13.

On remand, the administrative law judge allowed claimant to submit a supplemental medical report in the form of Dr. Cohen's December 13, 2016 deposition testimony,⁴ and permitted employer to submit the rehabilitative reports of Drs. Zaldivar and Rosenberg, in accordance with the evidentiary limitations at 20 C.F.R. §725.414. Decision and On Remand Order at 3-4, 7; Claimant's Exhibit 15; Employer's Exhibits 8, 9. On the merits, the administrative law judge found that the miner had a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) and, therefore, claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge further found that while employer failed to disprove that the miner had legal and clinical pneumoconiosis, employer established rebuttal by proving that no part of the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge again denied benefits.

⁴ Dr. Cohen's deposition testimony was admitted as a rehabilitative opinion and as a substitute for a supplemental opinion from Dr. Rasmussen, who was deceased. Decision and Order on Remand at 6.

In the present appeal, claimant contends that the administrative law judge erred in weighing the medical opinions relevant to the existence of legal pneumoconiosis and in finding that employer established that no part of the miner's death was due to pneumoconiosis. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), did not file a response brief in this appeal.

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.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,⁶ or that "no part of the miner's death was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii).

On remand, the administrative law judge confirmed his prior findings that the evidence establishes that the miner had mild clinical pneumoconiosis and legal pneumoconiosis in the form of mild emphysema related to coal dust exposure. He therefore found that employer did not rebut the presumption pursuant to 20 C.F.R. §718.305(d)(2)(i). The administrative law judge further found, however, that the miner's diffusing capacity impairment, pulmonary hypertension, and exercise gas exchange abnormalities were unrelated to coal mine dust exposure and, thus, did not constitute legal pneumoconiosis. Decision and Order on Remand at 20-21. With regard to the second method of rebuttal under 20 C.F.R. §718.305(d)(2)(ii), the administrative law judge found that employer established that no part of the miner's death was caused by his mild clinical or mild legal pneumoconiosis.

⁵ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

⁶ "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Presumed Existence of Legal Pneumoconiosis

To disprove that the miner had legal pneumoconiosis, employer must demonstrate that he did not have a chronic lung disease or impairment that was “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); see *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). While the administrative law judge previously found that the miner had legal pneumoconiosis in the form of mild coal mine dust-related emphysema, on remand he considered the opinions of Drs. Rasmussen, Cohen, Rosenberg, and Zaldivar as to whether any of the miner’s other respiratory conditions were due to coal mine dust exposure.⁷ Drs. Rasmussen⁸ and Cohen⁹ attributed the miner’s pulmonary hypertension, diffusing capacity impairment, and exercise gas exchange abnormalities to coal dust exposure and opined that his cardiac condition played a lesser, or no, role in these conditions. Decision and Order on Remand at 21; Claimant’s Exhibit 15 at 10-11, 14-15, 20. In contrast, the administrative law judge found that Drs. Rosenberg and Zaldivar attributed these conditions entirely to the miner’s severe heart disease. Decision and Order on Remand at 21; Employer’s Exhibits 12 at 12, 44-46; 13 at 17-18.

⁷ Employer’s failure to disprove the existence of clinical pneumoconiosis and legal pneumoconiosis, in the form of emphysema, ordinarily would obviate the need to further consider the administrative law judge’s findings on the issue of legal pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i). We must address claimant’s arguments on this issue, however, as the administrative law judge’s additional legal pneumoconiosis findings affected his death causation findings.

⁸ Dr. Rasmussen opined that the combination of coal mine dust-related emphysema and coal mine dust-related interstitial fibrosis contributed to the miner’s gas exchange abnormalities. Claimant’s Exhibit 2 at 3. He further stated that the miner’s heart disease was not the cause of his gas exchange impairment. *Id.* at 4.

⁹ Dr. Cohen opined that the miner’s diffusion and gas exchange impairments were caused by emphysema, coal mine dust-related interstitial scarring, and simple clinical pneumoconiosis. Claimant’s Exhibit 15 at 14-15, 25. He explained that because the miner did not have pulmonary edema or other overt signs of congestive heart failure in 2005 when Dr. Rasmussen examined him, the cardiac component was probably a less important cause of the miner’s diffusion impairment and exercise gas exchange abnormality than his coal mine dust exposure. *Id.* at 12-15. Dr. Cohen stated that the miner’s cardiac condition “certainly wasn’t . . . the only contributor or the major contributor.” *Id.* at 14.

The administrative law judge discredited the opinions of Drs. Rasmussen and Cohen because they lacked a thorough understanding of the severity of the miner's heart condition and failed to adequately explain their opinions with reference to objective testing. Decision and Order on Remand at 21. He credited the contrary opinions of Drs. Rosenberg and Zaldivar, stating:

I do not attribute the abnormal exercise blood gas testing or the reduction in diffusing capacity to the miner's mild emphysema based on the well-reasoned and documented opinions of Dr. Rosenberg and Dr. Zaldivar who thoroughly discussed this issue and concluded that the abnormal exercise blood gas testing and diffusion study were related to the miner's severe heart disease which included mitral regurgitation, severe tricuspid regurgitation and left ventricular hypertrophy which caused pulmonary hypertension and congestive heart failure. The miner's progressive heart disease is well documented in the treatment records, which include multiple EKGs and other cardiac testing. I find there is no credible or persuasive objective evidence, attributing the miner's pulmonary hypertension or congestive heart failure to his mild clinical pneumoconiosis or mild emphysema [which constitutes legal pneumoconiosis].

Decision and Order on Remand at 21.

Claimant asserts that the administrative law judge erred in crediting the opinions of Drs. Rosenberg and Zaldivar and thus erred in finding that the miner's gas exchange and diffusing capacity impairments were not related to coal mine dust exposure. Claimant's Brief at 9-12. We agree.

In our prior decision, we vacated the administrative law judge's crediting of Dr. Rosenberg's opinion in part because the administrative law judge failed to address whether Dr. Rosenberg equivocated in his assessment of the cause of the miner's diffusing capacity impairment.¹⁰ *Hagy*, BRB No. 15-0181 BLA, slip op. at 12. In crediting Dr. Rosenberg's opinion on remand, the administrative law judge failed to address this aspect of Dr. Rosenberg's opinion and whether it affected its credibility. *See* Decision and Order on Remand at 5, 11-12, 21. Thus, his analysis does not comply with the Board's prior

¹⁰ The Director, Office of Workers' Compensation Programs, argued that Dr. Rosenberg's opinion that the miner's diffusing capacity impairment was "probably" related to his heart disease, "'leaves open the question' of whether the combination of the miner's simple clinical pneumoconiosis and emphysema could have caused the miner's reduced diffusing capacity." *Id.* at 10, 12, *see* Employer's Exhibit 13 at 17-18.

instruction or 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) (every adjudicatory decision must be accompanied by a statement of “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record”); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Further, in finding that Dr. Zaldivar attributed the miner’s diffusing capacity impairment and exercise gas exchange abnormalities *solely* to his severe heart disease, the administrative law judge failed to resolve an apparent conflict in Dr. Zaldivar’s opinion. Decision and Order on Remand at 21. At his 2014 deposition, Dr. Zaldivar testified that the miner’s diffusing capacity impairment was not due to his *clinical* pneumoconiosis, but was due to the “the cardiac disease . . . and the centrilobular emphysema . . . and [the] widespread destruction caused by smoking.” Employer’s Exhibit 12 at 12. In his 2017 supplemental report, however, Dr. Zaldivar stated that the “diffusion capacity reduction in this case is explained by the pathological findings of some pulmonary fibrosis, as well as pulmonary vascular congestion from the cardiac disease[,]” neither of which are related to the miner’s emphysema. Employer’s Exhibit 8 at 3. Because the administrative law judge did not address this conflict, his crediting of Dr. Zaldivar’s opinion on the cause of the miner’s diffusing capacity impairment cannot be affirmed.¹¹ *See Wojtowicz*, 12 BLR at 1-165.

In light of the administrative law judge’s errors in the consideration of the opinions of Drs. Rosenberg and Zaldivar, we vacate his finding that employer established that the miner’s diffusing capacity impairment was not caused by coal mine dust exposure and, therefore, did not constitute legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Wojtowicz*, 12 BLR at 1-165.

We further find merit in claimant’s contention that the administrative law judge did not address whether employer established that the miner’s interstitial fibrosis was not due to coal mine dust exposure. Claimant’s Brief at 13-16. Because interstitial fibrosis was

¹¹ Furthermore, as the administrative law judge found that the miner’s emphysema was due to coal mine dust exposure, Dr. Zaldivar’s testimony that emphysema contributed to the miner’s diffusing capacity impairment, if credited, equates to an opinion that coal mine dust contributed to the diffusing capacity impairment. The same is true of Dr. Zaldivar’s statement that the miner’s pulmonary fibrosis contributed to his diffusion capacity impairment, if the administrative law judge concludes on remand that the pulmonary fibrosis is legal pneumoconiosis.

also implicated in the miner's death, the question of whether it constitutes an additional form of legal pneumoconiosis must be resolved.¹²

On remand, because employer bears the burden of proof on rebuttal, the administrative law judge must determine whether the opinions of Drs. Rosenberg and Zaldivar are credible and affirmatively establish that the miner's diffusing capacity impairment and interstitial fibrosis did not constitute legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge must then resolve any conflicts among the medical opinions and explain his findings. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Wojtowicz*, 12 BLR at 1-165.

Death Due to Pneumoconiosis

The administrative law judge considered the miner's death certificate, the autopsy reports of Drs. Abraham and Caffrey, and the medical opinions of Drs. Rosenberg,

¹² Dr. Abraham stated that the slides he reviewed showed some interstitial fibrosis and subpleural fibrosis with accumulation of dust consistent with coal mine origin. Claimant's Exhibit 12. Dr. Cohen reviewed Dr. Abraham's report and explained that, based on his description of accumulated dust in the areas of scarring, Dr. Abraham was relating the miner's pulmonary fibrosis to coal mine dust exposure. Claimant's Exhibit 15 at 24-25. Dr. Rasmussen also explained that coal mine dust produces interstitial pulmonary fibrosis, and that emphysema and fibrosis often occur together in impaired coal miners. He cited to medical literature in support of his opinion that this combination frequently results in a pattern of significant gas exchange impairment absent ventilatory impairment and independent of radiographic changes without, such as seen in the miner. Claimant's Exhibit 2 at 3. Dr. Caffrey diagnosed "Centrilobular emphysema, moderate with focal interstitial fibrosis" and Dr. Rosenberg noted that while there was no pathological evidence that coal dust was associated with the fibrosis, he assumed the miner's pulmonary fibrosis could be related to dust exposure. Employer's Exhibits 9; 10; 13 at 22-23. Dr. Zaldivar opined that chronic aspiration, such as evidenced by the miner's diagnosed aspiration pneumonia, is a well-documented cause of pulmonary fibrosis. Employer's Exhibit 12 at 27-29. He opined that coal dust, however, only causes fibrosis in the presence of progressive massive fibrosis, which the miner did not have. *Id.* at 37-38, 46. Finally, Dr. Oesterling opined that the miner's fibrosis is not due to coal mine dust, but is due to pneumonia. Employer's Exhibit 11 at 5.

Zaldivar, and Cohen¹³ in determining whether employer established that “no part of the miner’s death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); see also *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); Decision and Order on Remand at 22-28. He noted that Drs. Rosenberg, Zaldivar, and Cohen agreed that the immediate cause of the miner’s death was ischemic bowel disease,¹⁴ but that the opinions of record are mixed as to the contribution, if any, from pneumoconiosis. Decision and Order on Remand at 23-28. The miner’s death certificate and the opinions of Drs. Abraham and Cohen attributed the miner’s death, in part, to pneumoconiosis. Decision and Order on Remand at 23-24, 27-28; Director’s Exhibit 9; Claimant’s Exhibits 12, 15. Dr. Caffrey opined that clinical pneumoconiosis played no role in the miner’s death but acknowledged that his emphysema, which the administrative law judge found to be legal pneumoconiosis, may have contributed. Decision and Order on Remand at 26; Employer’s Exhibit 10. In contrast, Drs. Rosenberg and Zaldivar opined that the miner’s death was not related to his pneumoconiosis. Decision and Order on Remand at 26-28; Employer’s Exhibits 8, 9, 12, 13.

The administrative law judge discredited the death certificate because it was prepared without the benefit of the autopsy results and, thus, is not well-documented or reasoned.¹⁵ Decision and Order on Remand at 23; Director’s Exhibit 9. The administrative

¹³ The administrative law judge also considered the pathology opinions of Dr. Oesterling and Dr. Dennis, the autopsy prosector, and correctly noted that neither physician explicitly addressed the cause of the miner’s death. Director’s Exhibit 11; Employer’s Exhibit 11.

¹⁴ During a deposition dated December 1, 2014, Dr. Rosenberg opined that the cause of the miner’s death was ischemic bowel disease in which the miner basically lost blood supply to his intestines. Employer’s Exhibit 13 at 21. In a supplemental report dated January 31, 2017, Dr. Zaldivar opined that the miner’s death was due to ischemic bowel disease unrelated to his occupation. Employer’s Exhibit 8. Dr. Zaldivar opined that the miner also died as a result of pulmonary emboli and pneumonia, which very likely were due to aspiration. *Id.* During a deposition dated December 13, 2016, Dr. Cohen opined that the miner’s lung disease contributed to the cascading events that weakened him after he developed ischemic bowel disease, and thus hastened his death. Claimant’s Exhibit 15 at 29.

¹⁵ The death certificate, completed by Dr. Harvey, lists the immediate causes of the miner’s death as end-stage chronic obstructive pulmonary disease/pulmonary fibrosis due to coal workers’ pneumoconiosis, by history. Director’s Exhibit 9.

law judge also discounted Dr. Caffrey's opinion because it is based, in part, on the premise that the miner had moderate emphysema, contrary to the administrative law judge's finding that the emphysema was mild.¹⁶ *Id.* at 26.

The administrative law judge also discredited Dr. Abraham's opinion for several reasons.¹⁷ He found that Dr. Abraham "apparently" did not know that the miner died from ischemic bowel disease and was also unaware of his significant cardiac problems. Decision and Order on Remand at 24. In addition, the administrative law judge noted that Dr. Abraham appeared to assume that the miner's pulmonary hypertension was related to his lung disease, contrary to the administrative law judge's finding that it was due to the miner's severe heart disease. *Id.* at 25. Finally, the administrative law judge found Dr. Abraham's opinion to be poorly reasoned and documented because, in concluding that coal dust contributed to the miner's pulmonary disease and pulmonary impairment and thus to his death, Dr. Abraham failed to document the existence of a pulmonary or respiratory impairment. *Id.* Noting that "the only objective clinical support for respiratory impairment is the reduced diffusing capacity and exercise blood gas test which I have determined . . . were caused by the miner's severe cardiac problems, which caused congestive heart failure and pulmonary hypertension," the administrative law judge accorded Dr. Abraham's opinion little weight. *Id.*

The administrative law judge discredited Dr. Cohen's opinion for similar reasons. Decision and Order on Remand at 27. He noted that Dr. Cohen opined that coal dust-related scarring and emphysema damaged the miner's lungs and contributed to his pulmonary hypertension and gas exchange impairment which, in turn, hastened his death.¹⁸

¹⁶ In a report dated August 6, 2014, Dr. Caffrey opined that the immediate cause of the miner's death appeared to be bilateral acute bronchopneumonia in an individual who also had bilateral focal thromboemboli, with no contribution from the miner's minimal coal workers' pneumoconiosis. Employer's Exhibit 10. He added, however, that the miner's death "may well be a combination of cardiopulmonary disease in a patient who has significant centrilobular emphysema . . ." *Id.*

¹⁷ Dr. Abraham opined that the miner's coal mine dust-related conditions, including coal dust-related interstitial and subpleural pulmonary fibrosis, contributed to his pulmonary disease and respiratory impairment and thus his death. Claimant's Exhibit 12. Dr. Abraham stated that the miner's pulmonary hypertension also contributed to his pulmonary impairment and death. *Id.*

¹⁸ Dr. Cohen opined that pneumoconiosis contributed to the miner's death in several ways. First, his dust-related emphysema damaged his lungs and impaired his ability to transfer oxygen to the tissues. Claimant's Exhibit 15 at 26. Also, dust-related interstitial

The administrative law judge found, however, that Dr. Cohen's opinion is based on the mistaken premise that the miner's impairment in oxygen transfer shown by the reduced diffusing capacity and exercise gas exchange abnormalities were related to clinical and legal pneumoconiosis. Decision and Order on Remand at 27-28. The administrative law judge therefore found that Dr. Cohen's opinion is not persuasive.

In contrast, the administrative law judge found that Drs. Rosenberg¹⁹ and Zaldivar²⁰ credibly opined that the miner's death was not related to his mild clinical pneumoconiosis or mild legal pneumoconiosis, as they did not cause any impairment in lung function. Decision and Order on Remand at 28. He found their opinions well-reasoned and well-documented and supported by the evidence which established that the only impairments from which the miner suffered were diffusing capacity and blood gas exchange impairments which, in turn, were unrelated to coal dust exposure. *Id.* Thus, the

scarring and emphysema contributed to the miner's pulmonary hypertension and the ability of the heart to pump blood through the lungs normally. *Id.* Emphysema further contributed to the lack of forward blood-flow by reducing the number of pulmonary capillaries. *Id.* at 27. Dr. Cohen opined that these circulatory and gas exchange impairments contributed to the miner's inability to survive the complications of ischemic colitis. He explained that "once you develop ischemic bowel, which is caused by vascular disease in the blood vessels that supply the intestines but also caused by gas exchange limitations and circulatory limitations, then a whole [terminal] cascade of events takes place, which included the thromboembolic disease, the sepsis, and . . . his death." *Id.* at 28. By this mechanism, Dr. Cohen opined, pneumoconiosis hastened the miner's death. *Id.* at 28-29. Finally, Dr. Cohen stated that as a result of his pulmonary condition overall, including his gas exchange impairments, the miner was not a candidate for surgery to remove his ischemic bowel. *Id.* at 34-36.

¹⁹ At deposition, Dr. Rosenberg opined that even if he assumed that the minimal degree of emphysema that the miner had was a result of his time in the coal mine industry, the miner's emphysema did not cause, contribute to, or hasten his death in any way. Employer's Exhibit 13 at 20-21.

²⁰ During a deposition dated November 3, 2014, Dr. Zaldivar opined that coal mine dust did not cause, contribute to, or aggravate the progression of the miner's ischemic bowel disease. Employer's Exhibit 12 at 35-36. Dr. Zaldivar opined that coal mine dust did not have any contribution whatsoever to the miner's death. Employer's Exhibit 12 at 36.

administrative law judge found that the opinions of Drs. Rosenberg and Zaldivar establish that no part of the miner's death was caused by pneumoconiosis. *Id.* at 28.

Because we have vacated the administrative law judge's finding that the miner's diffusing capacity impairment does not constitute legal pneumoconiosis, we must also vacate the administrative law judge's related finding that legal pneumoconiosis played no role in the miner's death. Here, both Drs. Rosenberg and Cohen attributed the miner's death, in part, to his diffusing capacity impairment.²¹ Dr. Abraham attributed the miner's death, in part, to pulmonary hypertension which, as Dr. Rosenberg explained, was a cause of the miner's reduced diffusing capacity impairment. Claimant's Exhibit 12; Employer's Exhibit 13 at 17-18. Thus, the administrative law judge's determination on remand as to whether the miner's diffusing capacity impairment is legal pneumoconiosis is also relevant to whether pneumoconiosis played no role in the miner's death.

Similarly, whether the administrative law judge finds on remand that employer established that the miner's interstitial fibrosis is not legal pneumoconiosis could impact his findings at death causation. The miner's death certificate attributed his death to pulmonary fibrosis. Director's Exhibit 9. Dr. Abraham opined that interstitial fibrosis contributed to the miner's pulmonary impairment and thus to his death. Claimant's Exhibit 12. Dr. Cohen opined that interstitial scarring contributed to the miner's diffusing capacity impairment and thus to his death. Claimant's Exhibit 15 at 14-15, 20-21, 25-26. Dr. Zaldivar similarly opined that interstitial fibrosis was a cause of the miner's diffusing capacity impairment which was, in turn, a cause of his death. Employer's Exhibits 8 (2014) at 9; 8 (2017) at 3. Thus, if the administrative law judge finds that employer failed to establish that either the miner's diffusing capacity impairment or his interstitial fibrosis was not legal pneumoconiosis, the administrative law judge must consider whether employer established that the condition or conditions played no role in his death.

²¹ Dr. Zaldivar did not specifically attribute the miner's death to his diffusing capacity impairment, nor did he opine that it played no role. Further, to the extent the administrative law judge has found that the miner's emphysema is legal pneumoconiosis and his diffusing capacity impairment contributed to his death, Dr. Zaldivar's statement that the miner's emphysema contributed to his diffusing capacity impairment, if credited, supports the conclusion that pneumoconiosis contributed to his death. Decision and Order at 29-30; Employer's Exhibit 12 at 12. The same is true of Dr. Zaldivar's statement that the miner's pulmonary fibrosis contributed to his diffusion capacity impairment, if the administrative law judge finds on remand that the pulmonary fibrosis is legal pneumoconiosis. Employer's Exhibit 8 at 3.

Moreover, as claimant correctly asserts, even if the administrative law judge again finds that only the miner's emphysema, and not his diffusing capacity impairment or interstitial fibrosis, constituted legal pneumoconiosis, he must reconsider whether Dr. Rosenberg's opinion rules out any contribution by legal pneumoconiosis to the miner's death. Claimant's Brief at 9-10, 19. Dr. Rosenberg testified that the miner's heart disease, with associated pulmonary hypertension, diffusing capacity impairment, and lack of forward blood flow, all contributed to his death from ischemic bowel disease, and that his emphysema did not contribute in any way. Employer's Exhibit 13 at 17-18, 20-21. In his supplemental report dated January 30, 2017, however, Dr. Rosenberg stated that the miner's emphysema would not have contributed "in any *significant* fashion" to his marked hypertension.²² Employer's Exhibit 9 at 2 (emphasis added). Claimant asserts that as Dr. Rosenberg's opinion leaves open the possibility that claimant's emphysema, which the administrative law judge found to be legal pneumoconiosis, contributed to the miner's pulmonary hypertension and, thus, to his death, it is insufficient to meet employer's burden at 20 C.F.R. §718.305(d)(2)(ii). On remand the administrative law judge should consider the entirety of Dr. Rosenberg's opinion in light of claimant's argument and explain his findings.

Claimant also asserts that the administrative law judge did not adequately explain his crediting of Dr. Zaldivar's opinion that pneumoconiosis played no role in the miner's death. Claimant's Brief at 9, 10, 19. In his supplemental report dated January 31, 2017, Dr. Zaldivar addressed Dr. Cohen's statement that the miner's gas exchange impairment prevented him from receiving potentially life-save surgery for his ischemic bowel disease. Employer's Exhibit 8. Dr. Zaldivar stated that it was not the miner's pulmonary condition that prevented him from undergoing surgery, but his "general physical condition [that] was so poor." Employer's Exhibit 8 at 5. Claimant asserts that because the miner's general physical condition includes any lung disease, i.e. his clinical and legal pneumoconiosis, the administrative law judge erred in failing to consider this portion of Dr. Zaldivar's opinion in determining whether it ruled out pneumoconiosis as a cause of death. Claimant's Brief at 19. On remand the administrative law judge should consider claimant's argument, and explain his findings.

In view of the foregoing, we vacate the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption by establishing that no part of the miner's death was caused by pneumoconiosis and remand the case for further consideration. The administrative law judge must reconsider all of the medical opinion evidence of record and set forth his "findings and conclusions and the reasons or basis

²² In his deposition, Dr. Rosenberg explained that pulmonary hypertension was a cause of the miner's diffusing capacity impairment. Employer's Exhibit 13 at 17-18.

therefor, on all material issues of fact, law, or discretion presented on the record,” in accordance with the APA.²³ See *Wojtowicz*, 12 BLR at 1-165. Moreover, the administrative law judge should address whether Dr. Rosenberg’s and Dr. Zaldivar’s failure to diagnose legal pneumoconiosis, contrary to the administrative law judge’s finding, impacted the credibility of their opinions as to whether the miner’s death was caused by legal pneumoconiosis. See *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Employer’s Exhibits 9 at 2; 12 at 23.

²³ We reject, however, claimant’s assertion that the administrative law judge should have given greater weight to the opinions of Drs. Cohen and Abraham based on their superior qualifications. Claimant’s Brief at 20. The administrative law judge determined that Drs. Rosenberg, Zaldivar, and Cohen are equally qualified, based in part on their expertise and Board-certifications in pulmonary diseases. Decision and Order on Remand at 15. Similarly, the administrative law judge determined that Drs. Abraham, Oesterling, and Caffrey are equally qualified, based in part on their Board-certifications in pathology. *Id.* at 15-16. While the administrative law judge has discretion to give greater weight to the opinions of physicians based on additional qualifications such as professorships and publications, he is not required to do so. See *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc). Nor is there merit to claimant’s assertion that the administrative law judge should have given greatest weight to Dr. Abraham’s opinion because he is the only pathologist who had an opportunity to review the complete clinical record as well as the autopsy slides. Claimant’s Brief at 20. While Dr. Abraham reviewed autopsy slides and medical records, he stated, “I will limit my comments to the pathology material.” Claimant’s Exhibit 12.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge