U.S. Department of Labor

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

BRB Nos. 18-0287 BLA
and 18-0287 BLA-A

NANCY LOUISE SANTORO (Widow of ANTHONY M. SANTORO) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: 07/17/2019 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and employer cross-appeals, the Decision and Order Denying Benefits (2015-BLA-05750) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Claimant[1] filed this survivor's claim on September 26, 2007. On April 6, 2009, Administrative Law Judge Linda S. Chapman denied benefits because while claimant established that the miner had sixteen years of coal mine employment and pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, she did not establish that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Director's Exhibit 59. Claimant filed two subsequent requests for modification, each of which was denied pursuant to 20 C.F.R. §725.310. Director's Exhibits 65, 95, 96, 103. Claimant timely filed this third request for modification on September 17, 2014. Director's Exhibit 106. Following the district director's denial, the case was referred to the Office of Administrative Law Judges and assigned to Judge Johnson (the administrative law judge).

In a Decision and Order dated February 27, 2018, which is the subject of this appeal, the administrative law judge credited the miner with at least fifteen years of underground coal mine employment and found that he had a totally disabling respiratory or pulmonary impairment at the time of his death. He therefore found claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] He further found employer rebutted the presumption. Consequently, he found

[1] Claimant is the widow of the miner, who died on May 18, 2007. Director's Exhibits 3, 8. The miner filed two claims during his lifetime, both of which were finally denied. Director's Exhibits 1, 2. 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 receive 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 had at least fifteen years of underground coal mine employment, or coal mine employment in conditions

claimant did not establish a basis for modification at 20 C.F.R. §725.310 and denied benefits.

On appeal, the Director argues the administrative law judge applied an incorrect legal standard in considering whether employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. Employer has also filed a cross-appeal, arguing the administrative law judge erred in finding that the miner had a totally disabling respiratory or pulmonary impairment at the time of his death. Claimant responds to both appeals, urging the Board to affirm the administrative law judge's finding that the miner was totally disabled at the time of his death, and to vacate and remand his finding that employer rebutted the Section 411(c)(4) presumption. Employer filed a reply brief, reiterating its contentions.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). The administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). He is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

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substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the miner had at least fifteen years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLA 1-710, 1-711 (1983); Decision and Order at 36.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 23; Decision and Order at 4, 9.

Benefits are payable on survivors' claims when the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner's death is considered to be due to pneumoconiosis if, among other things, the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(4); 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

Invocation of the Section 411(c)(4) Presumption - Total Disability

Employer argues the administrative law judge erred in finding that the miner was totally disabled and, therefore, erred in finding the Section 411(c)(4) presumption invoked. A miner is considered to have been totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable and gainful work.[5] *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by: qualifying[6] pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds that total disability has been established under one or more subsections, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge initially found the sole pulmonary function study of record, while qualifying, is not reliable "due to variable effort on the test."[7] Decision and Order at 37. In addition, he accurately found that the blood gas study evidence is non-qualifying, and the record contains no evidence of cor pulmonale with right-sided

[5] The administrative law judge found the miner's usual coal mine work was as a continuous miner operator. Decision and Order at 7, 34, 36; Director's Exhibit 3.

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] The July 30, 1997 pulmonary function study yielded qualifying values before and after the use of bronchodilators. Director's Exhibit 51. The administrative law judge noted, however, that Dr. Gaziano opined this study was not technically acceptable due to variable effort. Decision and Order at 37, *referencing* Director's Exhibits 51, 52, 53. Drs. Rosenberg and Hippensteel similarly opined this study was not technically acceptable due to incomplete effort. *Id.*

congestive heart failure. *Id*. at 37, 38. Thus he found the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).[8]

The administrative law judge next considered the medical opinions of Drs. Jabour, Perper, Rosenberg, Castle, and Spagnolo pursuant to 20 C.F.R. §718.204(b)(2)(iv). Drs. Jabour[9] and Perper[10] opined the miner had a totally disabling pulmonary impairment prior to his death. Director's Exhibits 53, 100, 114. In contrast, Drs. Rosenberg,[11] Castle[12] and Spagnolo[13] were unable to conclude the miner had a disabling pulmonary or respiratory impairment prior to his death. Director's Exhibit 115; Employer's Exhibits 1, 2. The administrative law judge discredited the opinions of Drs. Jabour, Rosenberg, Castle, and Spagnolo as not well-documented or reasoned.[14] Decision and Order at 40. In contrast, he credited Dr. Perper's opinion to find total disability established at 20 C.F.R. §718.204(b)(2)(iv). *Id.* The administrative law judge also credited the testimony of the

[8] We affirm the administrative law judge's findings that total disability is not established at 20 C.F.R. §718.204(b)(2)(i)-(iii), as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[9] In a report dated July 30, 1997, Dr. Jabour opined the miner had a severe functional impairment and was disabled from performing his previous coal mine job. Director's Exhibit 53.

[10] At depositions dated November 7, 2013 and December 29, 2014, Dr. Perper opined the miner was totally disabled from a respiratory standpoint prior to his death. Director's Exhibits 100 at 25-26; 114 at 8.

[11] In reports dated October 8, 2008 and November 19, 2015, Dr. Rosenberg opined there is no definite evidence the miner was disabled from a pulmonary perspective. Director's Exhibits 48, 51; Employer's Exhibit 1.

[12] In reports dated October 26, 2009 and November 30, 2015, Dr. Castle opined it is impossible to accurately determine whether the miner had any pulmonary disability from any cause during his life. Director's Exhibit 69; Employer's Exhibit 2.

[13] In reports dated November 27, 2014 and February 7, 2015, Dr. Spagnolo opined there is insufficient evidence to conclude the miner had a disabling pulmonary or respiratory impairment prior to his death. Director's Exhibits 110, 115.

[14] We affirm the administrative law judge's determinations to discredit the opinions of Drs. Jabour, Rosenberg, Castle, and Spagnolo, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

miner's daughter, a respiratory therapist and clinical researcher, as supporting Dr. Perper's opinion "that Mr. Santoro's requirement of supplemental oxygen demonstrates he had a totally disabling pulmonary or respiratory impairment prior to his death[.]" *Id.*

We reject employer's assertion that Dr. Perper's opinion could not constitute substantial evidence of total respiratory disability. Employer's Brief at 24-25. Dr. Perper unequivocally opined claimant suffered from disabling hypoxemia prior to his death and was unable to perform his usual coal mine work from a respiratory standpoint. Decision and Order at 13-14; Director's Exhibits 100 at 25-26; 114 at 14. Dr. Perper noted that supplemental oxygen is commonly prescribed to people who are hypoxemic and emphasized that here, the miner's September 25, 2000 blood gas study also demonstrated "clear[] evidence of hypoxemia" as did the February 12, 2007 blood gas study. Director's Exhibit 114 at 15; Claimant's Exhibit 1 at 59-60. He also explained that the fact the miner remained hypoxemic even while he was on supplemental oxygen further supported his conclusion. Decision and Order at 13; Director's Exhibit 100 at 13, 25-26. Finally, as the administrative law judge observed, Dr. Perper acknowledged the miner's oxygen saturation subsequent to the September 2000 study measured 98 percent but explained that did not change his opinion because oxygen saturation does not necessarily indicate whether a person is hypoxemic. Decision and Order at 39; Employer's Brief at 25; Director's Exhibit 114 at 20-21.

To the extent employer asserts Dr. Perper's opinion is unreliable because the September 25, 2000 blood gas study he referenced was performed "during or just prior to acute hospitalizations for [the miner's] severe heart disease,"[15] this contention lacks merit.

[15] The regulations provide that blood gas tests "must not be performed *during or soon after* an acute respiratory or cardiac illness." Appendix C to Part 718 (emphasis added). Because this blood gas study was obtained in conjunction with the miner's treatment, it is not subject to the specific quality standards set forth at 20 C.F.R. §718.105 and Appendix C. *See J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008); 20 C.F.R. §718.101(b); 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000); Decision and Order at 39; Director's Exhibit 114 at 15. Further, even if strictly applied, the September 25, 2000 study does not contravene the quality standards. Contrary to employer's assertion, Dr. Perper did not "admit[]" that it was performed while the miner was hospitalized. Employer's Brief at 24-25. Rather, Dr. Perper explained that on September 25, 2000 the miner underwent pulmonary function and blood gas testing at the respiratory therapy department of Bluefield Regional Medical Center, but was neither hospitalized nor being treated for severe left ventricular dysfunction at that time. Decision and Order at 18; Director's Exhibit 100 at 77; Director's Exhibit 114 at 15-17. He was hospitalized three days later on September 28, 2000 for coronary bypass surgery. Decision and Order at 18; Director's Exhibit 100 at 77; Director's Exhibit 114 at 15-17. As employer concedes, the

Employer's Brief at 24-25; Employer's Reply Brief at 8-9. Dr. Perper did not rely solely on the 2000 study to conclude the miner had disabling hypoxemia at the time of his death but also relied on the February 12, 2007 study, conducted closer to the miner's death. Dr. Perper acknowledged the 2007 study was conducted during a hospitalization and, as set forth above, explained that the fact the study demonstrated hypoxemia despite the miner receiving oxygen *supported* his conclusion that the miner was disabled. Moreover, given Dr. Castle's agreement that logically the miner's supplemental oxygen use was an indication he was hypoxemic, and Dr. Rosenberg's observation that at times the miner's hypoxemia was "significant," employer has not explained how the fact these studies were performed during or prior to a period of hospitalization undermines Dr. Perper's conclusion that the miner was hypoxemic. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."); Director's Exhibit 45 at 7; Employer's Exhibit 4 at 26-27.

Further, the administrative law judge permissibly found Dr. Perper's opinion supported by the miner's medical treatment records and the testimony of the miner's daughter, demonstrating his declining health and reliance on supplemental oxygen.[16] Decision and Order at 7, 40. Contrary to employer's argument, the administrative law judge did not err in considering the daughter's testimony. Employer's Brief at 25-26. The regulation states that in a deceased miner's claim, lay testimony "must be considered sufficient to establish total disability" if no relevant medical evidence exists, but a finding of total disability cannot be based "solely" on the testimony of a person who would be eligible for benefits if the claim were approved. 20 C.F.R. §718.305(b)(4); *see Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); Decision and Order at 7-9, 40. There is no allegation that the miner's daughter would be eligible for benefits if the claim were approved and the regulation does not, as employer suggests, prohibit the administrative law judge from crediting such testimony alongside relevant medical evidence. *See*

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quality standards do not call into question testing performed *before* a period of acute illness. Employer's Brief at 25, *referencing* Appendix C of Part 718.

[16] The administrative law judge noted the treatment records document that on September 28, 2000 the miner remained extremely active, and on July 9, 2002 he was building a house and gardens without problems. Decision and Order at 40; Director's Exhibit 53 at 73-75, 88-89. On January 10, 2005, he reported no more shortness of breath "than usual." By February 12, 2007, however, he reported he could not breathe or relieve his shortness of breath, and on the day he died he was at home wearing oxygen. Decision and Order at 40; Director's Exhibit 10 at 44-46, 48-49, 103-105.

Employer's Brief at 25-26. For the foregoing reasons, we reject employer's assertion that Dr. Perper's opinion cannot constitute credible medical evidence.

We agree with employer and the Director, however, that the administrative law judge's crediting of Dr. Perper's opinion that the miner remained hypoxemic while on supplemental oxygen appears to contradict his subsequent discrediting of Dr. Perper's opinion on death causation because there is no evidence that the miner was hypoxemic while on supplemental oxygen. *See* Decision and Order at 5-6, 18, 39, 44; Director's Brief at 10. As the administrative law judge made inconsistent findings as to the credibility of this evidence, his determination to credit Dr. Perper's opinion for purposes of establishing disability cannot be affirmed. We, therefore, vacate the administrative law judge's finding that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv).

We further agree with employer that the administrative law judge failed to adequately explain his determination that the evidence, when weighed together, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer's Brief at 22. The administrative law judge determined the miner was totally disabled at the time of his death "based on the results of the pulmonary function tests and the unanimous medical opinion[s]." Decision and Order at 41. As previously noted, however, the administrative law judge found the pulmonary function study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), and that "Dr. Perper is the only physician in the record who explicitly opined that [the miner] was totally disabled by a pulmonary or respiratory impairment prior to his death."[17] Decision and Order at 40. Thus, the administrative law judge's analysis does not comport with the Administrative Procedure Act (APA), which requires every adjudicatory decision to 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." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165. We must therefore vacate the administrative law judge's finding that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), and remand the case for further consideration.

Consequently, we further vacate the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4). *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987).

[17] While Dr. Jabour also opined the miner was totally disabled, his opinion is dated July 30, 1997, almost ten years before the miner's death. Director's Exhibit 53.

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

In the interest of judicial economy, we address the Director's contention that the administrative law judge erred in finding employer rebutted the Section 411(c)(4) presumption, in the event the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. Because claimant invoked the presumption of death due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[18] or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Having invoked the Section 411(c)(4) presumption, and having found the parties stipulated to the existence of clinical pneumoconiosis, the administrative law judge determined that rebuttal could not be established at 20 C.F.R. §718.305(d)(2)(i) and, therefore, did not address the issue of legal pneumoconiosis. Decision and Order at 42. This was error. Despite the existence of clinical pneumoconiosis, the administrative law judge must determine whether employer has disproved the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(2)(i)(A). *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). Both determinations are important to satisfy the statutory mandate to consider all relevant evidence pursuant to 30 U.S.C. §923(b), and to provide a framework for the analysis of the credibility of the medical opinions at 20 C.F.R. §718.305(d)(2)(ii), the second rebuttal prong. *Id.*

Further, we agree with the Director that the administrative law judge applied an incorrect burden of proof in finding rebuttal established at 20 C.F.R. §718.305(d)(2)(ii). Director's Brief at 8-11. In adjudicating the issue, the administrative law judge considered the medical opinions of Drs. Perper, Rosenberg, Hippensteel, Castle, and Spagnolo.[19]

[18] "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).

[19] While the administrative law judge summarized the miner's death certificate, and the autopsy opinions of Drs. Jelic, Naeye, and Oesterling, he did not specifically address this evidence relevant to any of the issues in this case. Decision and Order at 28-30, 34; Director's Exhibits 8, 9, 42, 44. On remand, the administrative law judge must address this evidence as it pertains to the existence of legal pneumoconiosis, the severity of the

These physicians agree the primary cause of the miner's death was cardiac in nature; they disagree as to the role, if any, played by pneumoconiosis. Dr. Perper opined that pneumoconiosis substantially contributed to, or hastened, the miner's death by causing hypoxemia which, in turn, triggered or aggravated a cardiac event related to his heart disease. Director's Exhibit 53. In contrast, Drs. Rosenberg, Hippensteel, Castle, and Spagnolo opined that pneumoconiosis played no role in the miner's cardiac death.[20] The administrative law judge discredited Dr. Perper's opinion as unsupported by the evidence of record and, therefore, concluded that employer rebutted the Section 411(c)(4) presumption by establishing that the miner's death was not due to pneumoconiosis. Decision and Order at 42, 43-44.

As the Director asserts, pursuant to 20 C.F.R. §718.305(d)(ii), it is employer's burden to prove that pneumoconiosis played no role in the miner's death. 20 C.F.R. §718.305(d)(1)(ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80 (6th Cir. 2011); Director's Brief at 9. A review of the administrative law judge's findings, however, does not reflect that he considered whether Drs. Rosenberg, Hippensteel, Castle, and Spagnolo provided credible opinions that pneumoconiosis played no role in the miner's death. Director's Brief at 6-11. Instead, he critiqued only Dr. Perper's opinion, finding he "has not established that [the miner] became hypoxemic even while on supplemental oxygen,[21] let alone that he became hypoxemic enough to trigger a fatal cardiac event," and

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miner's clinical pneumoconiosis, and the cause of the miner's death, and explain what weight he accords it.

[20] Dr. Rosenberg opined that the miner had a sudden cardiac death from heart disease that was not caused, contributed to, or hastened by coal dust exposure. Director's Exhibits 45, 48, 50, 51; Employer's Exhibit 1. Dr. Hippensteel opined that smoking was a significant factor in the miner's coronary artery disease, that his heart dysfunction was not caused by lung disease, and that his death was due to a heart attack that had no specific association with coal dust exposure. Director's Exhibits 46, 47, 49, 52. Dr. Castle opined that the miner's sudden death from cardiac arrhythmia was caused by coronary artery disease and complications thereof, including congestive heart failure. Director's Exhibits 69, 91; Employer's Exhibit 2. Dr. Spagnolo opined that the miner's death was not caused, contributed to, or hastened by pneumoconiosis or any chronic lung disease arising out of coal mine employment. Director's Exhibits 110, 115.

[21] As noted above, this finding is inconsistent with the administrative law judge's crediting of Dr. Perper's opinion that the miner has disabling hypoxemia. *See* Decision and Order at 5-6, 18, 39, 44; Director's Brief at 10. Also noted above, Drs. Castle and

that it was "not clear from the evidence in the record whether pneumoconiosis . . . can trigger a cardiac event resulting in death, let alone that such an event occurred here." Decision and Order at 44. The Director correctly notes, however, the connection between the miner's death and pneumoconiosis is presumed; therefore, the burden is on employer to disprove the connection. Director's Brief at 8-9. The Section 411(c)(4) presumption is not rebutted by evidence solely describing the miner's chronic heart condition or sudden fatal arrhythmia. *Id*. at 9-10. We, therefore, vacate the administrative law judge's finding that employer satisfied its burden to rebut the Section 411(c)(4) presumption. Consequently, we must also vacate the administrative law judge's finding that claimant failed to establish a basis for modification of the prior denial of benefits pursuant to 20 C.F.R. §725.310.

Remand Instructions

On remand, the administrative law judge must resolve any conflicts in the medical evidence and weigh all the probative evidence at 20 C.F.R. §718.204(b)(2) to determine whether claimant has established that the miner had a totally disabling respiratory impairment at the time of his death. *See Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 1-198. The administrative law judge must explain the bases for all of his findings of fact and credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-162.

If the administrative law judge determines that claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will have invoked the Section 411(c)(4) presumption in light of the finding that the miner had at least fifteen years of qualifying coal mine employment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1), (c)(2). The administrative law judge must then reconsider whether employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d)(2).

If reached, the administrative law judge must begin his rebuttal analysis by considering whether employer disproved the existence of legal pneumoconiosis by affirmatively establishing that the miner did not have a chronic lung disease or impairment "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)(2)(i)(A); *Griffith v. Terry Eagle Coal Co.*, 25 BLR 1-223, 1-227 (2017); *Minich*, 25 BLR at 1-159. Because employer bears the burden of proof on rebuttal, the administrative law judge must determine whether the opinions of its experts are credible, irrespective of the weight he assigns to the other

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Rosenberg appear to agree that the miner was hypoxemic at times. Director's Exhibit 45 at 7; Employer's Exhibit 4 at 26-27.

medical opinions of record. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980); *see also Morrison*, 644 F.3d at 480.

Regardless of whether employer has rebutted the existence of legal pneumoconiosis, because the administrative law judge found clinical pneumoconiosis established, he must then reconsider whether employer has rebutted the presumed fact of death causation at 20 C.F.R. §718.305(d)(2)(ii) by establishing 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*, 25 BLR at 1-89. Again, the administrative law judge must determine whether the opinions of employer's experts are credible,[22] regardless of the weight he assigns to the opinions of claimant's physicians' opinions. *See Rose*, 614 F.2d at 939; *see also Morrison*, 644 F.3d at 480.

If employer is unable to rebut the Section 411(c)(4) presumption pursuant to either 20 C.F.R. §718.305(d)(2)(i) or (ii), claimant will have established her entitlement to benefits, and a basis for modification pursuant to 20 C.F.R. §725.310. In that event, the administrative law judge must also determine whether granting claimant's request for modification of the denial of her survivor's claim would render justice under the Act.

Alternatively, if the administrative law judge finds that claimant cannot establish that the miner had a totally disabling respiratory or pulmonary impairment at the time of his death, he must determine whether claimant is entitled to survivor's benefits under 20 C.F.R. Part 718 by establishing that the miner's death was due to pneumoconiosis. *Trumbo*, 17 BLR at 1-87-88.

[22] Claimant contends the opinions of employer's experts are not sufficiently credible to establish that the miner's death was not due to pneumoconiosis. Claimant's Response Brief at 9-10. These arguments are for the administrative law judge to consider on remand.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring:

Employer's contention that Dr. Perper's opinion is not credible because the blood gas studies he relied upon were performed "during or just prior to acute hospitalizations for [the miner's] severe heart disease," is raised for the first time on appeal. Employer's Brief at 24-25; Employer's Reply Brief at 8-9. An administrative law judge has a duty to consider the reliability of the documentation underlying an opinion in determining whether that opinion is well reasoned. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997). However, since employer failed to raise this argument before the administrative law judge, I would decline to consider it. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal*

Co., 9 BLR 1-73, 1-75 (1986). Consequently, I do not share in the majority's response to employer's objection, but concur in the result.

I concur in all other respects with the majority's decision.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge