BRB No. 08-0685 BLA

W.D. (Widow of and on behalf of S.D.) Claimant-Petitioner v. ACECO, INCORPORATED and JAMES RIVER COAL COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/23/2009 DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (06-BLA-6042, 06-BLA-6043) of Administrative Law Judge Joseph E. Kane (the administrative law judge) with respect to a miner's subsequent claim[1] and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with at least thirty-eight years of coal mine employment,[2] and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718. In the miner's claim, the administrative law judge found that the new biopsy evidence established the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(2), and that claimant therefore established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits of entitlement, the administrative law judge determined that claimant did not establish that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). He further found that, although claimant established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), she did not establish that the miner's total disability was due to pneumoconiosis under 20 C.F.R. §718.204(c). In the survivor's claim, the administrative law judge found that the biopsy evidence established clinical pneumoconiosis, but that claimant did not establish that the miner had legal pneumoconiosis. *See* 20 C.F.R. §718.202(a)(2),(4). The administrative law judge also found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in both the miner's claim and the survivor's claim.

On appeal, claimant contends that the administrative law judge erred in his consideration of Dr. Oesterling's biopsy report that was submitted by employer, which

[1] The miner's initial claim, filed on January 23, 1991, was denied by an administrative law judge on August 27, 1993, for failure to establish any element of entitlement. Director's Exhibit 1-42. The record does not reflect that the miner took any further action until filing the instant claim for benefits on April 4, 2003. Director's Exhibit 2. The miner died on September 11, 2004, while his claim was pending before the Office of Administrative Law Judges (OALJ). Director's Exhibit 50.

Claimant filed a claim for survivor's benefits on July 20, 2005. Director's Exhibit 45. On July 25, 2005, the miner's claim was remanded to the District Director to be consolidated with the survivor's claim. A proposed decision and order awarding benefits was issued in the survivor's claim on May 23, 2006. Director's Exhibit 70. Employer requested a hearing, and both claims were forwarded to the OALJ.

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

claimant alleges is a medical opinion and is in excess of the evidentiary limitations at 20 C.F.R. §725.414. Claimant additionally asserts that the administrative law judge erred in his consideration of the relevant evidence in both claims under 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), 718.204(c), and 718.205(c). Employer responds, urging the Board to affirm the denial of benefits in both the miner's claim and the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge properly found that Dr. Oesterling's report was admissible as a biopsy report.[3]

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).

20 C.F.R. §725.414: Evidentiary Limitations and Dr. Oesterling's Biopsy Report

Claimant argues that the administrative law judge erred in considering Dr. Oesterling's conclusions as to whether the miner's totally disabling impairment and death were due to pneumoconiosis. Claimant contends that, although employer designated Dr. Oesterling's report as its affirmative biopsy report, because Dr. Oesterling's report contains, in addition to the pathology results, his opinion that the pneumoconiosis present was too mild to cause the miner's disability and death, Dr. Oesterling's report must be considered both a biopsy report and a separate medical opinion. Claimant further asserts

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least thirty-eight years of coal mine employment and suffered from clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and, therefore, that claimant established this element of entitlement in both claims, and also established a change in an applicable condition of entitlement in the miner's claim pursuant to 20 C.F.R. §725.309(d). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Further, although claimant asserts that the administrative law judge erred in finding that the relevant evidence under 20 C.F.R. §718.204(b)(2)(i)-(iii) did not establish total disability, both claimant and employer agree that the administrative law judge properly determined that the miner was totally disabled based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), rendering any error by the administrative law judge harmless. Claimant's Brief at 17; Employer's Brief at 20. We therefore affirm the administrative law judge's finding that claimant established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

that, because employer designated the opinions of Drs. Repsher and Jarboe as its medical opinion evidence in the miner's claim, and the opinions of Drs. Repsher and Rosenberg as its medical opinion evidence in the survivor's claim, Dr. Oesterling's report exceeds the evidentiary limitations at 20 C.F.R. §725.414. Claimant's Brief at 10-13. The Director and employer respond that the administrative law judge properly concluded that Dr. Oesterling's report was fully admissible as a biopsy report. Director's Response at 2; Employer's Brief at 16-17.

We agree with the Director and employer. Although a biopsy report in which a physician renders an opinion that is based on the physician's review of evidence beyond the scope of the biopsy would constitute both a biopsy and a medical report, *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240 (2007)(*en banc*), here, Dr. Oesterling provided an opinion based solely on his review of the biopsy slides.[4] Employer's Exhibit 3. As the Director explains, nothing in 20 C.F.R. §718.106, which specifies the content of autopsy and biopsy reports, precludes the inclusion of any opinion the pathologist may draw from the results of a biopsy. Director's Response at 2; *see* 20 C.F.R. §718.106. The Director notes further that the administrative law judge remains free to "consider whether the pathologist's conclusions reasonably flow from" the tissue sample reviewed. Director's Brief at 2 n.1. Claimant cites no authority for her argument that a biopsy report "cannot contain an opinion on whether or not the miner was disabled or died due to pneumoconiosis." Claimant's Brief at 10. Consequently, we conclude that, on the facts of this case, the administrative law judge did not abuse his discretion in determining that, "[b]ecause Dr. Oesterling based his opinion solely on a review of the slides, his conclusions are admissible as a biopsy report." Decision and Order at 11 n.6; *see* 20 C.F.R. §718.106; *Keener*, 23 BLR at 1-240.

The Miner's Claim for Benefits

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

20 C.F.R. §718.202(a)(4): The existence of legal pneumoconiosis

[4] Dr. Oesterling concluded that the changes in the miner's lung revealed mild to moderate coal workers' pneumoconiosis that was insufficient to have altered the lung structure enough to have produced any functional impairment, or to have caused or hastened death. Employer's Exhibit 3 at 3.

Claimant contends that the administrative law judge erred in addressing the issue of legal pneumoconiosis[5] because employer had stipulated to the existence of simple coal workers' pneumoconiosis. Claimant alleges that a stipulation to the existence of clinical pneumoconiosis necessarily includes a stipulation to legal pneumoconiosis and, therefore, the administrative law judge was barred from addressing the issue. Claimant's Brief at 13.

We disagree. The record reflects that employer withdrew its stipulation to the existence of simple pneumoconiosis at the hearing. Hearing Transcript at 20, 23. Moreover, the record does not reflect that the administrative law judge accepted any stipulation as to the existence of pneumoconiosis. Decision and Order at 3; Hearing Transcript at 20. Contrary to claimant's assertion, therefore, the administrative law judge did not err in considering the evidence relevant to the existence of legal pneumoconiosis. 30 U.S.C. §923(b); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-102 (6th Cir. 1983).

Relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered in the miner's claim the medical opinions of Drs. Baker, Williams, Wright, Koura, Gilbert, Jarboe, and Repsher.[6] Drs. Baker, Williams, Koura, and Gilbert diagnosed the miner with an obstructive impairment due to coal dust exposure, while Drs. Jarboe and Repsher opined that the miner did not have legal pneumoconiosis.[7] Director's Exhibits 1-93, 1-110, 43; Claimant's Exhibits 1-2; Employer's Exhibits 1-2.

Although the administrative law judge acknowledged that Dr. Jarboe's reasons for excluding legal pneumoconiosis as a diagnosis of the miner were "not completely clear," the administrative law judge found that Dr. Jarboe's opinion was "at least as well-reasoned as the contrary opinions;" accordingly, he determined that claimant did not

[5] "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).

[6] The opinions of Drs. Baker, Williams, and Wright were submitted in conjunction with the miner's 1991 claim for benefits. Director's Exhibit 1.

[7] Although the administrative law judge evaluated Dr. Wright's opinion "to the extent that [it could] be construed as diagnosing legal pneumoconiosis," Decision and Order at 15, the record reflects that Dr. Wright did not diagnose the miner with a respiratory impairment due to coal mine dust exposure. Rather, Dr. Wright opined that the restrictive impairment seen on the miner's pulmonary function tests was the result of poor effort and obesity. Director's Exhibit 1-101.

establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[8] Decision and Order at 16, 18. In so finding, the administrative law judge determined that, to the extent the opinions of Drs. Baker, Williams, and Wright could be construed as diagnosing legal pneumoconiosis, they were not well-reasoned or documented because none of the physicians explained his rationale for attributing the miner's chronic obstructive pulmonary disease (COPD) to coal mine dust. Decision and Order at 15. Further, the administrative law judge found that the opinions of Drs. Koura and Gilbert were based on the miner's symptoms and test results and, therefore, "may [have been] adequate to establish legal pneumoconiosis in the absence of a contrary opinion." *Id.* at 17. However, the administrative law judge went on to find that their opinions were outweighed by Dr. Jarboe's contrary opinion, because Dr. Jarboe adequately explained that the miner did not develop a disabling respiratory impairment until after his pneumonectomy in 1999, and that the fluctuation seen in the miner's pre-pneumonectomy pulmonary function studies was "not consistent with coal dust-induced disease." *Id*. at 17-18. By contrast, the administrative law judge found that Drs. Koura and Gilbert did not address the fluctuation seen in the miner's pre-pneumonectomy pulmonary function studies or address the relationship between the miner's 1999 pneumonectomy and the timing of the onset of his total respiratory disability. *Id*. at 18. The administrative law judge therefore concluded that "even if I were to find that Dr. Koura and Dr. Gilbert rendered well-reasoned and well-documented opinions on legal pneumoconiosis, I would find their opinions outweighed by [that of] Dr. Jarboe, who provided slightly more explanation." *Id*.

Claimant asserts that the administrative law judge failed to adequately explain his basis for crediting Dr. Jarboe's opinion over the opinions of Drs. Koura and Gilbert. Claimant's Brief at 14. We agree. Accordingly, we vacate the administrative law judge's weighing of the medical opinion evidence and remand both claims for reconsideration of the relevant evidence.

Specifically, the administrative law judge has not adequately assessed the specific bases for the doctors' conflicting opinions, or adequately explained his resolution of the opinions. Contrary to the administrative law judge's finding, Dr. Jarboe did not state that the variation seen in the miner's pulmonary function studies that pre-dated his left pneumonectomy was inconsistent with legal pneumoconiosis. Dr. Jarboe stated in his June 10, 2007 medical report that clinical "coal workers' pneumoconiosis" would not cause the variation seen in the pulmonary function studies that pre-dated the miner's pneumonectomy. Employer's Exhibit 1 at 11-13. Regarding legal pneumoconiosis, in

[8] The administrative law judge discounted Dr. Repsher's opinion as not well-reasoned with respect to either the existence of clinical or legal pneumoconiosis. Decision and Order at 16.

his August 9, 2007 deposition, Dr. Jarboe explained that the miner's significant pulmonary impairment was unrelated to coal dust exposure because a 1991 pulmonary function study was performed by Dr. Williams after the miner left coal mine employment, and it showed normal pulmonary function. Dr. Jarboe opined that the miner's severe impairment did not develop until 1999, when he was diagnosed with cancer. Employer's Exhibit 2 at 11, 15-16. Although pulmonary function studies performed after 1991, but before the miner was diagnosed with cancer, reflected an impairment, Dr. Jarboe stated that he was "inclined to take Dr. Williams' results at face value," since "you can't produce a falsely high pulmonary function result. . . ." Employer's Exhibit 2 at 19. On cross-examination, Dr. Jarboe was asked whether his opinion as to legal pneumoconiosis would change if he were to disregard the earliest pulmonary function study, and he stated that "it would be more in favor of a diagnosis of legal pneumoconiosis since the numbers show an impairment, and the type of impairment you could see in legal pneumoconiosis with restriction of the vital capacity and mild airflow obstruction as well." Employer's Exhibit 2 at 22. However, on redirect examination, the doctor opined that the miner had no evidence of legal pneumoconiosis. Employer's Exhibit 2 at 22-23. In finding that Dr. Jarboe's opinion was reasoned, the administrative law judge did not reconcile the doctor's reliance on the earliest pulmonary function study to exclude coal mine employment as a cause of the miner's significant impairment with the doctor's acknowledgment that the remaining pulmonary function studies between 1991 and 1993 would favor a diagnosis of legal pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-102.

Further, contrary to the administrative law judge's finding that Dr. Koura failed to address the timing of the miner's impairment with relation to the 1999 pneumonectomy, the record reflects that Dr. Koura opined that the miner suffered from legal pneumoconiosis prior to his lung resection in 1999, and that he based his opinion on the miner's 1991 and 1993 pulmonary function studies showing a "progressive deterioration in lung function."[9] Therefore, as it was Dr. Koura's opinion that the miner suffered from

[9] Dr. Koura stated:

> As for Dr. Jarboe's report dated June 10, 2007, I agree with his diagnosis of simple coal workers' pneumoconiosis, but as for the presence of significant respiratory impairment prior to lung resection in 1999, it is my opinion that [the miner] had progressive deterioration of his lung function starting with a [FEV]1 of 81% of predicted on 2-6-1991 and worsening to 65% of predicted on 3-17-1993.
>
> Based on the above, it is my opinion that [the miner] had legal pneumoconiosis based on his history of exposure to coal dust, and the presence of chronic obstructive pulmonary disease, and he also had . . .

legal pneumoconiosis prior to his pneumonectomy, the significance of the administrative law judge's finding that the miner was not totally disabled before having a lung removed in 1999 is unclear. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). As claimant asserts, "[l]egal pneumoconiosis is not defined as a totally disabling respiratory impairment, but [is] defined as: 'any chronic lung disease or impairment and its sequelae arising out of coal mine employment.'" Claimant's Brief at 14; quoting 20 C.F.R. §718.201(a)(2).

In light of the foregoing, we vacate the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), and remand this case for further consideration. *See Rowe,* 710 F.2d at 255, 5 BLR at 2-103. On remand, the administrative law judge must reconsider whether the opinions of Drs. Jarboe, Koura, and Gilbert are reasoned and documented as to the presence or absence of legal pneumoconiosis, and explain his credibility determinations. *Wojtowicz*, 12 BLR at 1-165. In so doing, the administrative law judge must consider the entirety of Dr. Koura's opinion[10] and Dr. Jarboe's opinion, bearing in mind that the absence of a totally disabling impairment does not preclude a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Further, the administrative law judge must again consider whether the status of Drs. Gilbert and Koura as the miner's treating physicians merits according their opinions greater weight in light of the criteria outlined at 20 C.F.R. §718.104(d). *See* 20 C.F.R. §718.104(d); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003).

Claimant additionally asserts that the administrative law judge erred in failing to consider the opinions of Drs. Baker, Williams, and Wright pursuant to 20 C.F.R. §718.202(a)(4). Contrary to claimant's assertion, however, the administrative law judge considered and rejected these physicians' opinions, finding that they were not well-reasoned or documented because "[n]one of the doctors explained [his] rationale for

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> documented impairment on the pulmonary function tests done prior to his left lung resection in 1999.

Claimant's Exhibit 1.

[10] As claimant asserts, it is unclear whether the administrative law judge considered Dr. Koura's September 29, 2003 letter, Director's Exhibit 12-241, which claimant designated as affirmative evidence on her evidence summary form. Claimant's Brief at 10, 18. The administrative law judge did not include Dr. Koura's letter in his summary of the evidence or assess its probative value.

attributing the [m]iner's COPD . . . to coal mine dust." Decision and Order at 15. Claimant does not challenge this finding. It is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Citing *Martin v. Ligon Preparation* Co., 400 F.3d 302, 305, 23 BLR 2-279, 2-285 (6th Cir. 2005) for the proposition that "an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis," claimant asserts that "the opinions of [Drs.] Baker, Williams and Wright, [diagnosing clinical pneumoconiosis based on x-ray evidence,] are sufficient to establish legal pneumoconiosis." Claimant's Brief at 15. We disagree. *Martin* does not stand for the proposition that, once a claimant establishes the existence of a disease recognized by the medical community as pneumoconiosis, he or she necessarily has also established the existence of a respiratory impairment arising out of coal mine employment. To the contrary, the United States Court of Appeals for the Sixth Circuit specifically stated, in *Martin*, that "[c]linical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act." 400 F.3d at 306, 23 BLR at 2-285. Moreover, the administrative law judge determined that the opinions of Drs. Baker, Williams, and Wright were not well-reasoned or documented as to the existence of either clinical or legal pneumoconiosis, and claimant has not challenged that determination. Decision and Order at 15; *see Skrack*, 6 BLR at 1-711.

20 C.F.R. §718.204(c): Disability Causation

Claimant contends that the administrative law judge erred in finding that clinical pneumoconiosis did not contribute to the miner's totally disabling impairment. Specifically, claimant asserts that the administrative law judge erred in crediting Dr. Oesterling's opinion over the contrary opinions of Drs. Koura and Gilbert, because Dr. Oesterling's conclusion constitutes a medical opinion and, as such, it exceeds the evidentiary limitations under 20 C.F.R. §725.414. Claimant's Brief at 17. As discussed above, the administrative law judge permissibly determined that Dr. Oesterling's conclusions are admissible as a biopsy report. We therefore reject claimant's assertion that the administrative law judge erred in considering Dr. Oesterling's opinion. 30 U.S.C. §923(b); *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Although claimant additionally asserts that the opinions of Drs. Koura and Gilbert, that the miner was totally disabled due to clinical pneumoconiosis, are reasoned and documented, the administrative law judge found their opinions less persuasive than the contrary opinions of Drs. Oesterling and Jarboe. Decision and Order at 21. In so finding, the administrative law judge determined that the opinions of Drs. Oesterling and Jarboe were well-reasoned and documented because they explained that the clinical pneumoconiosis seen on the miner's biopsy was too mild to have affected his lung

function. *Id*. Further, the administrative law judge found that, even if the opinions of Drs. Koura and Gilbert were sufficiently reasoned, their opinions were entitled to less weight than the opinions of Drs. Oesterling and Jarboe, because Drs. Koura and Gilbert did not address whether the pneumoconiosis seen on biopsy was sufficient to affect lung function, and because their qualifications are inferior to those of Drs. Oesterling and Jarboe.[11] *Id*. Substantial evidence supports these permissible findings. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415, 21 BLR 2-192, 2-196 (6th Cir. 1997). Therefore, the administrative law judge rationally concluded that claimant did not establish that clinical pneumoconiosis contributed to the miner's totally disabling respiratory impairment.

However, in light of our determination to vacate the administrative law judge's findings as to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), if reached on remand, he should consider whether the miner's totally disabling respiratory impairment was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

The Widow's Claim

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

The administrative law judge found that the biopsy evidence established clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Relevant to the existence of legal

[11] As the administrative law judge observed, Dr. Oesterling is Board-certified in anatomic pathology, clinical pathology, and nuclear medicine, and Dr. Jarboe is Board-certified in internal medicine, with a subspecialty in pulmonary disease. Employer's Exhibits 1-3. By contrast, Dr. Koura is Board-certified in internal medicine and Board-eligible for a subspecialty in pulmonary disease, and Dr. Gilbert holds no Board-certifications, and practices in the area of family medicine. Decision and Order at 7-11; Claimant's Exhibits 1-3; Employer's Exhibits 1-3.

pneumoconiosis, the record in the survivor's claim contains the opinions of Drs. Koura, Gilbert, Repsher, and Rosenberg. Director's Exhibits 43, 54; Claimant's Exhibits 1, 3; Employer's Exhibits 1, 2. Drs. Koura and Gilbert diagnosed legal pneumoconiosis, while Drs. Repsher and Rosenberg opined that the miner did not have legal pneumoconiosis. Incorporating his finding from the miner's claim, that the opinions of Drs. Koura and Gilbert did not establish legal pneumoconiosis, the administrative law judge credited Dr. Rosenberg's opinion, finding it to be "well-reasoned and well-documented, in part."[12] The administrative law judge stated:

> Turning to Dr. Rosenberg's legal pneumoconiosis assessment, I find that it is well-reasoned and well-documented, in part. Although he acknowledged that legal pneumoconiosis may be latent and progressive in certain cases, he opined that the Miner could not develop chronic bronchitis many years after leaving the mines. He also considered the most recent pulmonary function tests. Although the tests are invalid, he gleaned from them that the Miner had severe restriction, but that significant obstruction was not present. In the absence of a contrary opinion, I find this explanation to be well-reasoned and well-documented.
>
> Accordingly, I give some weight to Dr. Rosenberg's legal pneumoconiosis assessment. I have found the evidence insufficient to establish legal pneumoconiosis.

Decision and Order at 23.

Claimant asserts that the administrative law judge committed the same errors in weighing the opinions of Drs. Koura and Gilbert[13] under 20 C.F.R. §718.202(a)(4) in the survivor's claim as he did in the miner's claim. Claimant therefore further alleges that these errors call into question the administrative law judge's basis for crediting Dr. Rosenberg's opinion. Claimant's Brief at 20.

Because the administrative law judge incorporated his findings from the miner's claim with respect to the opinions of Drs. Koura and Gilbert, which we have vacated, we

[12] The administrative law judge did not state what weight he assigned to Dr. Repsher's opinion in this claim.

[13] Although claimant asserts that the administrative law judge also erred in weighing Dr. Oesterling's opinion at 20 C.F.R. §718.202(a)(4), the record reflects that Dr. Oesterling did not state an opinion as to the presence or absence of legal pneumoconiosis, Employer's Exhibit 3, nor did the administrative law judge consider Dr. Oesterling's opinion as having addressed the issue.

find merit in claimant's assertion of error. As discussed above, the administrative law judge did not adequately explain his determination to discount the opinions of Drs. Koura and Gilbert as to the existence of legal pneumoconiosis. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283. Thus, the administrative law judge has not adequately explained his determination to credit Dr. Rosenberg's opinion "in the absence of a contrary opinion." *Id*. Consequently, we vacate the administrative law judge findings under 20 C.F.R. §718.202(a)(4) in the survivor's claim and remand this case for further consideration. On remand, the administrative law judge must reconsider whether the medical opinion evidence establishes the existence of legal pneumoconiosis, and explain his credibility determinations. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129. In so doing, the administrative law judge must consider Dr. Koura's entire opinion, including his supplemental report at Director's Exhibit 54-2. *See also Wojtowicz*, 12 BLR at 1-165. Further, the administrative law judge must address whether the opinions of Drs. Koura and Gilbert are entitled to additional weight in light of their status as the miner's treating physicians under 20 C.F.R. §718.104(d). *See Williams*, 338 F.3d at 513, 22 BLR at 2-646.

20 C.F.R. §718.305(c): Death Causation

Since the administrative law judge found only clinical pneumoconiosis established, he examined whether clinical pneumoconiosis was a substantially contributing cause of the miner's death from COPD. Finding the opinions of Drs. Oesterling and Rosenberg to be most persuasive, the administrative law judge determined that claimant did not establish that the miner's death was due to clinical pneumoconiosis.

Claimant asserts that the administrative law judge committed the same error in finding that claimant did not establish that the miner's death was due to clinical pneumoconiosis as he did in failing to find total disability due to clinical pneumoconiosis established in the miner's claim, namely, that he erroneously considered Dr. Oesterling's biopsy report. Claimant's Brief at 20.

Contrary to claimant's assertion, the administrative law judge properly admitted Dr. Oesterling's conclusions as a biopsy report because they were based solely on his review of the biopsy slides. Consequently, the administrative law judge did not err in considering Dr. Oesterling's conclusions as to death causation.

Further, although claimant asserts that the opinions of Drs. Koura and Gilbert, that the miner's death was due to clinical pneumoconiosis, are reasoned and documented, the administrative law judge found their opinions less persuasive than the contrary opinions of Drs. Oesterling and Rosenberg. Decision and Order at 24. In so finding, the administrative law judge determined that the opinions of Drs. Oesterling and Rosenberg were well-reasoned and documented because they explained that the pneumoconiosis

seen on the miner's biopsy was too mild to affect lung function and, therefore, did not cause or hasten the miner's death. *Id*. By contrast, the administrative law judge found that, even if the opinions of Drs. Koura and Gilbert were sufficiently reasoned, their opinions were entitled to less weight than the opinions of Drs. Oesterling and Rosenberg because Drs. Koura and Gilbert did not address whether the degree of pneumoconiosis seen on biopsy was too mild to affect the miner's lung function, and because their qualifications are inferior to those of Drs. Oesterling and Rosenberg.[14] *Id*. Substantial evidence supports these findings. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Hill*, 123 F.3d at 415, 21 BLR at 2-196. Therefore, the administrative law judge rationally concluded that claimant did not establish that the miner's death was due to clinical pneumoconiosis.

However, in light of our determination to vacate the administrative law judge's findings as to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we instruct the administrative law judge that, if reached on remand, he should reconsider whether the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

[14] As the administrative law judge noted, Dr. Rosenberg is Board-certified in occupational medicine and internal medicine, with a subspecialty in pulmonary disease. Decision and Order at 9; Employer's Exhibits 1-2.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge