BRB Nos. 09-0546 BLA,
09-0546 BLA-A, 09-0547 BLA
and 09-0547 BLA-A

PEGGY RUTH WARD (o/b/o and Widow of JOHN C. WARD)	)	
Claimant- Petitioner/Respondent Cross-Petitioner/Respondent	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 06/23/2010
Employer- Petitioner/Respondent Cross-Petitioner/Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and cross-appeals, and claimant[1] appeals and cross-appeals the Decision and Order (07-BLA-6500) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) awarding benefits on a subsequent miner's claim and denying benefits on modification of a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public L. No. 111-148, §1556, 124 Sat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] The administrative law judge credited the miner with at least 16 years of coal mine employment based on the parties' stipulation, and adjudicated both the miner's and the survivor's claims pursuant to the regulations contained in 20 C.F.R. Part 718. In considering the miner's claim, the administrative law judge found that the new evidence established the existence of clinical pneumoconiosis[3] pursuant to 20 C.F.R.

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[1] Claimant is the widow of the miner. The miner filed his first claim on September 27, 1995. Director's Exhibit 1. On July 28, 1997, Administrative Law Judge Thomas F. Phalen, Jr. issued a Decision and Order denying benefits because the miner failed to establish the existence of pneumoconiosis. *Id*. The Board affirmed Judge Phalen's denial of benefits. *Ward v. Peabody Coal Co.,* BRB No. 97-1573 BLA (Aug. 5, 1998)(unpub.). The miner filed his second claim (a subsequent claim) on November 20, 2002. Director's Exhibit 3. However, he died on December 14, 2004, while his claim was pending before the Office of Administrative Law Judges (OALJs). Director's Exhibit 41. Administrative Law Judge Daniel F. Solomon (the administrative law judge) remanded the miner's claim to the district director. Director's Exhibit 33. Claimant filed her survivor's claim on January 5, 2005. Director's Exhibit 35. The district director denied survivor's benefits on October 27, 2005, because claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 51. Claimant filed a request for modification on December 19, 2005. Director's Exhibit 56. The district director granted claimant's request for modification and awarded survivor's benefits on June 27, 2006, as he found that the new evidence established that the miner's death was due to pneumoconiosis. Director's Exhibit 60. On June 28, 2006, the district director returned the miner's claim to the OALJs for a hearing. Director's Exhibit 55. Following employer's request for a hearing in the survivor's claim, the administrative law judge consolidated the miner's claim with the survivor's claim.

[2] The Department of Labor has amended the regulations implementing the Black Lung Benefits Act. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] "Clinical pneumoconiosis" consists of those diseases recognized by the medical

§718.202(a)(1), (4). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). The administrative law judge also found that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(a). In addition, the administrative law judge found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b). The administrative law judge also found that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(a). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge found that claimant did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's award of benefits in the miner's claim. Specifically, employer challenges the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Employer also challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer additionally challenges the administrative law judge's

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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. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

finding that the miner's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Further, employer challenges the administrative law judge's finding that the miner's legal pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(a). In addition, employer challenges the administrative law judge's finding that the evidence established that the miner was totally disabled at 20 C.F.R. §718.204(b)(2)(iii). Lastly, employer challenges the administrative law judge's finding that the evidence established that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging the Board to affirm the administrative law judge's award of benefits in the miner's claim. Employer filed a brief in reply to claimant's response brief, reiterating its contentions.

Additionally, claimant appeals the administrative law judge's denial of benefits in the survivor's claim.[4] Specifically, claimant challenges the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging the Board to affirm the administrative law judge's denial of benefits in the survivor's claim. On cross-appeal, employer challenges the administrative law judge's findings that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1) and 718.203(b). Employer also challenges the administrative law judge's findings that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(a). Further, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Caffrey and Fino, that pneumoconiosis did not cause, contribute to, or hasten the miner's death at 20 C.F.R. §718.205(c), because the doctors opined that the miner did not have pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in the appeals of the miner's and the survivor's claims.[5]

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[4] While claimant appealed only the administrative law judge's Decision and Order denying benefits in the survivor's claim, by its Order dated May 8, 2009, the Board assigned claimant's cross-appeal two claim numbers, BRB No. 09-0946 BLA-A and BRB No. 09-0947 BLA-A. *Ward v. Peabody Coal Co.*, BRB Nos. 09-0546 BLA/A and 09-0547 BLA/A (May 8, 2009)(unpub. Order).

[5] Because the administrative law judge's findings, in the miner's claim, that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, that the evidence established clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) on merits, and that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv) on the merits, as well as his findings, in the survivor's claim, that the evidence established clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), are not challenged on appeal, we affirm these findings.

Subsequent to the issuance of the administrative law judge's Decision and Order, amendments to the Act, which became effective on March 23, 2010, were enacted, affecting claims filed after January 1, 2005. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a presumption of total disability due to pneumoconiosis or, relevant to survivor's claims, death due to pneumoconiosis in cases where the claimant has established that the miner had fifteen or more years of coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which holds that an eligible survivor of a miner who filed a successful claim for benefits is automatically entitled to survivor's benefits without the burden of reestablishing entitlement. 30 U.S.C. §932(*l*).

By Order dated March 30, 2010, the Board permitted the parties to submit supplemental briefing in both the miner's claim and the survivor's claim to address the impact, if any, of the 2010 amendments in this case. In response, employer states that the miner's claim was not affected by the recent amendments because it was filed before January 1, 2005. Employer also states that the recent amendments do not affect the disposition of the survivor's claim, even though it was filed after January 1, 2005, because the administrative law judge's finding that the miner's black lung disease had nothing to do with his death rebuts any presumption of entitlement under 30 U.S.C. §921(c)(4). The Director notes that while the recent amendments do not affect the miner's claim,[6] they affect the survivor's claim. The Director, therefore, urges the Board to vacate the administrative law judge's denial of survivor's benefits and to remand the case to the administrative law judge for consideration of the evidence pursuant to the recent amendments to the Act at Section 411(c)(4). Claimant asserts that she is automatically entitled to an award of survivor's benefits pursuant to the recent amendments to the Act because the miner was receiving benefits at the time of his death.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated into the

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Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

[6] The Director, Office of Workers' Compensation Programs, declined to take a position in the miner's claim unless requested to do so by the Board.

[7] The record indicates that the miner was employed in the coal mining industry in Kentucky. Director's Exhibit 4. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I.
MINER'S CLAIM

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

A.
Section 725.414

Initially, we will address employer's contention that the administrative law judge erred in relying on Dr. Baker's opinion in the "Conclusion" section of his decision, as the administrative law judge had previously declined to consider the opinion because it was outside the evidentiary limitations.[8] In the evidence summary form for the miner's claim, claimant listed Dr. Westerfield's September 21, 2004 report and Dr. Simpao's June 7, 2007 deposition as the two medical reports in support of the affirmative case of the miner. Claimant also listed Dr. Zachek's May 1, 2003 report as the medical report that the Director was required to provide the miner as part of his complete pulmonary evaluation. While the administrative law judge did not address the admissibility of medical opinion evidence in the "Evidentiary Determinations" section of his decision, he noted that only the reports and opinions of Drs. Westerfield, Zachek, Simpao, and O'Bryan were considered by him at Section 718.202(a)(4) and Section 718.204(c). Decision and Order at 19, 25. However, in the "Conclusion" section of his decision, the administrative law judge indicated that he relied on Dr. Baker's July 31, 2004 report. Director's Exhibit 33. The administrative law judge stated:

> In reviewing the entire record, I note that Dr. Baker's report also supports this finding as he opined that both cigarette smoking and coal dust exposure caused the [m]iner's chronic bronchitis, COPD, and hypoxemia. DX 33-31. I accept Dr. Baker's opinion, because a doctor's opinion stating that

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[8] Employer's contention that the administrative law judge exceeded the evidentiary limitations at 20 C.F.R. §725.414 by relying on Dr. Baker's July 31, 2004 report was raised with respect to the administrative law judge's consideration of the disability causation issue at 20 C.F.R. §718.204(c).

> pneumoconiosis was one of two causes of a [miner's] totally disabling respiratory condition is sufficient to establish that pneumoconiosis is a substantially contributing cause of the [miner's] total respiratory disability.

Decision and Order at 25. Although Dr. Baker's March 27, 1997 report was previously submitted into the record in the miner's first claim, Director's Exhibit 1, Dr. Baker's July 31, 2004 report was not admitted into the record in the miner's subsequent claim, Director's Exhibit 33. Thus, because claimant did not specifically designate Dr. Baker's July 31, 2004 report, which is contained in Director's Exhibit 33, as evidence pursuant to 20 C.F.R. §725.414 for consideration in the miner's subsequent claim, and because the administrative law judge did not render a finding that claimant established "good cause" for the admission of Dr. Baker's July 31, 2004 report into the record of the miner's subsequent claim, we hold that the administrative law judge erred in considering this report in his decision. The evidentiary limitations are mandatory and may not be waived. *Smith v. Martin County Coal Co.*, 23 BLR 1-69, 1-74 (2004). On remand, the administrative law judge must consider the medical evidence in accordance with the requirements of the evidentiary limitations set forth at 20 C.F.R. §725.414.

B.
Section 718.202(a)(1)

Next, we address employer's contention that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record consists of seven interpretations of three x-rays dated May 1, 2003, September 16, 2003, and July 31, 2004. Dr. Wilkelber, a Board-certified radiologist, Dr. Rasmussen, a B reader, and Dr. Ahmed, a B reader and a Board-certified radiologist, read the May 1, 2003 x-ray as positive for pneumoconiosis, Director's Exhibit 10; Living Miner's Exhibits 1, 4, while Dr. Spitz, a B Reader and a Board-certified radiologist, read this x-ray as negative,[9] Director's Exhibit 12; Employer's Exhibit 2. Dr. O'Bryan, whose credentials are not contained in the record, and Dr. Wiot, a B reader and a Board-certified radiologist, read the September 16, 2003 x-ray as

[9] Dr. Spitz read the May 1, 2003 x-ray as negative for pneumoconiosis on both September 17, 2003 and June 14, 2008. Director's Exhibit 12; Employer's Exhibit 2. The administrative law judge stated: "Of the eight readings, there are four positive and four negative interpretations for pneumoconiosis. However, I note that two of the negative interpretations consist of Dr. Spitz's reading of the same [x-ray]. For purposes of a numerical evaluation, I find that these two interpretations only retain the probative value of one negative interpretation. Accordingly, I find that there are four positive and three negative x-ray interpretations." Decision and Order at 17.

negative for pneumoconiosis. Director's Exhibit 12; Employer's Exhibit 1. Dr. Baker, a B reader, read the July 31, 2004 x-ray as positive for pneumoconiosis. Director's Exhibit 33. The administrative law judge gave greater weight to Dr. Baker's positive reading of the July 31, 2004 x-ray because this x-ray was the most recent x-ray of record.[10] The administrative law judge stated, "[a]ccordingly, after careful consideration of all the x-rays, the qualifications of the readers, and the most recent x-ray, I find that the [c]laimant has satisfied [her] burden of establishing pneumoconiosis by a preponderance of x-ray evidence." Decision and Order at 18.

Employer argues that the administrative law judge erred in according greater weight to Dr. Baker's positive reading of the July 31, 2004 x-ray because it was the most recent film of record.[11] Specifically, employer asserts that the administrative law judge erred in automatically giving greater weight to the most recent x-ray because "there is no presumption of progressivity or latency." Employer's Brief at 9. Employer also asserts that substantial evidence does not support the administrative law judge's reliance on "logic" to find that the most recent x-ray was entitled to greater weight. Employer further asserts that the administrative law judge erred in failing to explain why his reliance on the most recent x-ray makes sense where there was no proof to support his assumption that newer evidence would establish the disease more clearly than the older evidence, as the x-rays do not show progression. Employer maintains that the administrative law judge failed to resolve the conflicts in the interpretations of the x-rays in accordance with the Administrative Procedure Act (APA).

In considering the x-ray evidence, the administrative law judge stated, "[w]hile I find that the slight majority of x-rays are positive, I note that a party does not automatically prevail on the issue of pneumoconiosis simply by demonstrating numerical superiority of x-ray evidence." Decision and Order at 17. The administrative law judge also stated, "I find that a definitive determination cannot be made simply by evaluating the most qualified interpretations." *Id*. at 18. The administrative law judge then gave greater weight to Dr. Baker's positive reading of the July 31, 2004 x-ray because this was the most recent x-ray of record. *Id*.

The APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an

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[10] The administrative law judge also found that "two of the three x-rays being considered favor a positive interpretation for pneumoconiosis." Decision and Order at 18.

[11] Dr. Baker's positive reading is the only reading of the July 31, 2004 x-ray.

administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, contrary to employer's assertion, the administrative law judge did not rely on a presumption that pneumoconiosis is latent or progressive. Rather, the administrative law judge explained why he found that the x-ray evidence established that the miner's pneumoconiosis was latent and progressive. The administrative law judge stated:

> The most recent x-ray in this case was taken on July 31, 2004. This x-ray was taken about ten months after the [m]iner's previous September 16, 2003 x-ray. I find this to be a sufficient amount of time to show the latent and progressive nature of pneumoconiosis. Dr. Baker was the only physician to interpret the July 31, 2004 x-ray. He interpreted the x-ray to be positive for pneumoconiosis. I find Dr. Baker's positive interpretation of the most recent x-ray to be supported by the fact that a majority of x-rays were interpreted as positive.

Decision and Order at 18 (footnote omitted). The administrative law judge further stated:

> Since pneumoconiosis is a latent and progressive disease, it is logical to assume that the most recent x-ray would establish clearer evidence of a disease that was not as easily identified earlier. This is most evident when considering all of the x-rays in the record as there was a minority of x-rays in the [m]iner's initial claim that were interpreted as positive.

Id.

As the administrative law judge properly explained that he gave greater weight to Dr. Baker's positive reading of the July 31, 2004 x-ray because it was the most recent x-ray of record, *Wojtowicz*, 12 BLR 1-165, we reject employer's assertion that the administrative law judge erred in failing to resolve the conflicts in the interpretations of the x-ray evidence in accordance with the APA. Furthermore, as the administrative law judge considered both the qualifications of the physicians and the quantity of the positive and negative readings, as discussed *supra*, p. 8, we reject employer's assertion that the administrative law judge erred in failing to consider both the quality and quantity of the x-ray evidence. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Employer also argues that the administrative law judge mischaracterized the x-ray evidence by finding that an overwhelming number of physicians read the May 1, 2003 x-ray as positive for pneumoconiosis. Specifically, employer asserts that the May 1, 2003 x-ray was not positive for pneumoconiosis because two conflicting readings are by

physicians who are dually-qualified as B readers and Board-certified radiologists, while two positive readings are by physicians who are less qualified. As noted above, Dr. Wilkelber, a Board-certified radiologist, Dr. Rasmussen, a B reader, and Dr. Ahmed, a B reader and a Board-certified radiologist, read the May 1, 2003 x-ray as positive for pneumoconiosis, while Dr. Spitz, a B reader and a Board-certified radiologist, read this x-ray as negative. The administrative law judge noted that Dr. Spitz was the only physician to read the May 1, 2003 x-ray as negative for pneumoconiosis. In considering the readings of x-rays dated May 1, 2003 and September 16, 2003 by Drs. Ahmed, Spitz, and Wiot, who are dually-qualified radiologists, the administrative law judge stated:

> Simply looking at the most qualified readings alone, I find that the negative interpretations are slightly favored. However, I find Dr. Spitz's negative interpretation of the May 1, 2003 x-ray loses some probative value in the face of the three positive interpretations of that x-ray. Therefore, I find that a definitive determination cannot be made simply by evaluating the most qualified interpretations. I find all three of these radiologists to be highly qualified and any further distinctions based on their resumes to be arbitrary.

Decision and Order at 18.

As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In this case, the administrative law judge properly explained why he found that Dr. Spitz's negative reading of the May 1, 2003 x-ray lost some of its probative value and, thus, why he found that a definitive determination could not be made by evaluating the readings of the most qualified physicians. *Wojtowicz*, 12 BLR 1-165; *see also Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Further, because three of the four readings of the May 1, 2003 x-ray are positive for pneumoconiosis, we reject employer's assertion that the administrative law judge mischaracterized the x-ray evidence by finding that an overwhelming number of physicians read the May 1, 2003 x-ray as positive for pneumoconiosis. *Tackett v. Director, OWCP*, 6 BLR 1-703, 1-706 (1984).

Employer further argues that the administrative law judge's explanation for weighing the x-ray evidence ignores the relevance of the unanimous negative readings of the September 16, 2003 x-ray. Contrary to employer's assertion, the administrative law judge properly found that the September 16, 2003 x-ray was negative for pneumoconiosis. Decision and Order at 18; *cf. McCune Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984) (recognizing that an administrative law judge must consider all of the relevant evidence). Nevertheless, the administrative law judge properly gave greater weight to Dr. Baker's positive reading of the July 31, 2004 x-ray because this x-

ray was the most recent x-ray of record. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Thus, we reject employer's assertion that the administrative law judge erred by ignoring the relevance of the unanimous negative readings of the September 16, 2003 x-ray.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).

C.
Section 718.202(a)(4)
(Legal Pneumoconiosis)

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record consists of the reports of Drs. Zachek, Westerfield, Simpao, and O'Bryan. In a May 22, 2003 report, Dr. Zachek opined that the miner had interstitial changes/coal workers' pneumoconiosis related to coal dust exposure and marked obstructive lung disease, including asthma related to possible allergic triggers and chronic obstructive pulmonary disease (COPD) related to cigarette smoking. Director's Exhibit 10. In a September 21, 2004 report, Dr. Westerfield opined that the miner had coal workers' pneumoconiosis related to the inhalation of coal dust and COPD related to cigarette smoking. Director's Exhibit 33. In a November 28, 1995 report, Dr. Simpao opined that the miner had "CWP 1/1" and that the miner's "[m]ultiple years of coal dust exposure [was] medically significant in his pulmonary impairment." Director's Exhibit 1. In a February 27, 1996 report, Dr. Simpao opined that it was likely that the miner had pneumoconiosis and that the miner's "[s]moking history may contribute to his pulmonary impairment along with his many years of coal dust exposure." *Id*. In a November 8, 2005 report, Dr. Simpao opined that the miner had a moderate degree of restrictive airway disease, a severe degree of obstructive airway disease, and coal workers' pneumoconiosis. Director's Exhibit 56. In a January 16, 2004 hospital discharge summary and a June 7, 2007 deposition, Dr. Simpao opined that the miner had COPD with congestive heart failure. Director's Exhibit 44; Living Miner's Exhibit 3. In a September 16, 2003 report, Dr. O'Bryan noted that the miner had a Category 0 chest x-ray and opined that the miner had a severe obstructive ventilatory impairment with an emphysematous component related to chronic smoking. Director's Exhibit 12. Further, in an attached letter dated September 18, 2003, Dr. O'Bryan opined that the miner had no pneumoconiosis, but that he had a severe obstructive lung disease with an emphysematous component most likely related to cigarette smoking. *Id*.

In addressing the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge considered the reports of Drs. Zachek, Westerfield, Simpao, and

O'Bryan.[12] After noting that all the physicians diagnosed the miner with an obstructive airway disease, the administrative law judge stated that "Dr. O'Bryan is the only physician to specifically exclude coal workers' pneumoconiosis and coal dust inhalation as a cause or aggravate (sic) of the [m]iner's obstructive airway disease or hypoxemia." Decision and Order at 20. The administrative law judge discredited Dr. O'Bryan's opinion that the miner's obstructive airway disease was related to cigarette smoking because he found that it did not reflect Dr. O'Bryan's consideration of the miner's 16 years of coal mine employment. *Id*. Further, although the administrative law judge found that Dr. Simpao's November 8, 2005 letter and June 7, 2007 deposition were not probative in assessing whether the miner had legal pneumoconiosis, he gave greater weight to Dr. Simpao's 1995 opinion that the miner had legal pneumoconiosis because he found that it was well-reasoned and well-documented. *Id*. at 20-21. The administrative law judge also found that Dr. Simpao's 1995 opinion was supported by the opinions of Drs. Zachek and Westerfield. *Id*. at 21. However, while the administrative law judge found that Dr. Westerfield's opinion was well-reasoned, he gave less weight to Dr. Zachek's opinion because he found that it was not well-reasoned and well-documented. *Id*. Nevertheless, based on the opinions of Drs. Simpao and Westerfield, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis. *Id*.

Employer argues that the administrative law judge did not apply a regulatory standard of legal pneumoconiosis when he analyzed the medical opinion evidence. Specifically, employer asserts that the administrative law judge erred in accepting the physicians' conclusions that the miner had legal pneumoconiosis at face value. Employer also asserts that the administrative law judge mischaracterized Dr. Westerfield's opinion by finding that Dr. Westerfield diagnosed legal pneumoconiosis.

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[12] With regard to the issue of clinical pneumoconiosis at Section 718.202(a)(4), the administrative law judge considered the reports of Drs. Zachek, Westerfield, Simpao, and O'Bryan. The administrative law judge noted that "the majority of the physicians support the diagnosis of clinical pneumoconiosis as shown by x-ray." Decision and Order at 20. After noting that Dr. O'Bryan was the only physician who did not find that the miner had pneumoconiosis by x-ray, the administrative law judge gave less weight to Dr. O'Bryan's opinion because "[Dr. O'Bryan] is the least qualified reader in the record and he considered an earlier x-ray." *Id*. The administrative law judge also stated that "Dr. O'Bryan's radiological findings were contrary to the weight of the x-ray evidence." *Id*. Hence, the administrative law judge found that the preponderance of the medical opinion evidence supported a finding that the miner had clinical pneumoconiosis.

The administrative law judge found that Drs. Zachek, Westerfield, and Simpao opined that the miner had legal pneumoconiosis. Decision and Order at 21. As noted above, in a May 22, 2003 report, Dr. Zachek opined that the miner had interstitial changes/coal workers' pneumoconiosis related to coal dust exposure and marked obstructive lung disease, including asthma related to possible allergic triggers and COPD related to cigarette smoking. Director's Exhibit 10. In a September 21, 2004 report, Dr. Westerfield opined that the miner had coal workers' pneumoconiosis related to the inhalation of coal dust and COPD related to cigarette smoking. Director's Exhibit 33. In a November 28, 1995 report, Dr. Simpao opined that the miner had coal workers' pneumoconiosis and that coal dust exposure was medically significant in his pulmonary impairment. Director's Exhibit 1. In a subsequent report dated February 27, 1996, Dr. Simpao opined that it was likely that the miner had pneumoconiosis and that the miner's smoking history and coal dust exposure may have contributed to his pulmonary impairment. *Id*. In a November 8, 2005 report, Dr. Simpao opined that the miner had a moderate degree of restrictive airway disease, a severe degree of obstructive airway disease, and coal workers' pneumoconiosis. Director's Exhibit 56.

Unlike the definition of pneumoconiosis in the prior regulations, 20 C.F.R. §718.201 (2000); *cf. Martin v. Ligon Preparation Co*., 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005), *rehearing en banc denied* (6th Cir. 2005) (holding that "an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis as well"), the amended regulations specifically define clinical and legal pneumoconiosis as subsets under a broad definition of pneumoconiosis, 20 C.F.R. §718.201(a)(1), (2). Consequently, the amended regulations provide that clinical and legal pneumoconiosis are mutually exclusive diseases. In this case, Drs. Zachek, Westerfield, and Simpao opined that the miner had clinical pneumoconiosis, as they diagnosed coal workers' pneumoconiosis related to coal dust exposure. 20 C.F.R. §718.201(a)(1). With respect to the issue of legal pneumoconiosis, Dr. Simpao opined that the miner's cigarette smoking history and coal dust exposure contributed to his respiratory impairment. Further, although Dr. Westerfield opined that the miner had COPD related to cigarette smoking, the doctor opined that the miner's respiratory impairment was related to the inhalation of coal dust. By contrast, Dr. Zachek did not opine that the miner's respiratory impairment was related to coal dust exposure. Rather, Dr. Zachek opined that the miner had COPD related to cigarette smoking, and asthma related to possible allergic triggers. Thus, the administrative law judge erred in finding that Dr. Zachek opined that the miner had legal pneumoconiosis. *Wojtowicz*, 12 BLR 1-165.

Employer also argues that the administrative law judge impermissibly relied on Dr. Simpao's 1995 opinion to establish legal pneumoconiosis because it was rejected in the prior claim. Specifically, employer argues that the administrative law judge erred in finding that Dr. Simpao's 1995 opinion was well-reasoned and well-documented because the new x-ray evidence established a change in conditions. Employer maintains that the

administrative law judge's reliance on Dr. Simpao's 1995 opinion violates ordinary principles of finality, as the administrative law judge must accept the correctness of the prior decision.[13]

In the November 21, 1995 report, Dr. Simpao diagnosed "CWP 1/1" and opined that multiple years of coal dust exposure was medically significant in the miner's pulmonary impairment. Director's Exhibit 1.

In his Decision and Order dated July 28, 1997, Judge Phalen considered Dr. Simpao's November 21, 1995 opinion that the miner had clinical pneumoconiosis at Section 718.202(a)(4). Judge Phalen gave less weight to Dr. Simpao's opinion because it was not clear what information Dr. Simpao relied on in forming his opinion, as the doctor merely listed "CWP 1/1" without providing any further explanation. Judge Phalen also found that Dr. Simpao appeared to rely, at least in part, on a positive x-ray that he found was outweighed by negative readings by more qualified B readers. Hence, Judge Phalen concluded that Dr. Simpao's opinion that the miner had clinical pneumoconiosis was not well-documented or well-reasoned.

In his Decision and Order, the administrative law judge considered both the new and old opinions of Dr. Simpao at Section 718.202(a)(4).[14] The administrative law judge stated:

> I do not find the new evidence submitted by Dr. Simpao to be probative in assessing whether the [m]iner ha[d] established legal pneumoconiosis.

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[13] Employer additionally asserts the administrative law judge substituted his opinion for that of Dr. Simpao, as the only reason that the administrative law judge provided for crediting Dr. Simpao's 1995 opinion was that he agreed with it. Employer's Brief at 16. Contrary to employer's assertion, the administrative law judge weighed the medical evidence relevant to Dr. Simpao's 1995 opinion, and did not interpret the medical data. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Specifically, the administrative law judge found that Dr. Simpao's 1995 opinion was supported by the underlying documentation and evidence in the record. Decision and Order at 21. Thus, we reject employer's assertion that the administrative law judge substituted his opinion for that of Dr. Simpao.

[14] In considering the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge stated, "[i]n the interest of justice, and since I have already found a change of condition by way of clinical pneumoconiosis, I find it necessary to consider Dr. Simpao's 1995 report." Decision and Order at 20.

> Neither Dr. Simpao's letter nor his deposition testimony addresses the etiology of his diagnosis of hypoxemia and a restrictive and obstructive airway disease. In his letter, Dr. Simpao states that the [m]iner's death was "hastened by his lung disease [c]oal [w]orkers' pneumoconiosis," but he does not specifically implicate hypoxemia, restrictive airway disease, or obstructive airway disease. However, I find that Dr. Simpao's [November 21, 1995] medical report from the [m]iner's initial claim does provide a well-reasoned opinion as to legal pneumoconiosis.

Decision and Order at 20. The administrative law judge further stated:

> I note that Dr. Simpao's [November 21, 1995] opinion was afforded less weight in the [m]iner's initial claim because it was determined that his opinion relied on a positive x-ray reading, which was contrary to the weight of the x-ray evidence. DX 1-52. I find Dr. Simpao's opinion to be probative in evaluating the [m]iner's subsequent claim as the weight of the x-ray evidence now favors the [m]iner and is indicative of the progressive nature of pneumoconiosis. In fact, I find all of Dr. Simpao's test results from the initial claim when considered with the new evidence in the subsequent claim to be indicative of the latent and progressive nature of pneumoconiosis. *See* DX 1-270 to 290. Not only is pneumoconiosis more identifiable by x-ray, as most physicians in the subsequent claim have demonstrated, but the [m]iner's pulmonary function (including his post-bronchodilator response) and arterial blood gas studies have worsened significantly. *See id*.

Id. at 21.

As discussed, *supra*, the APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz*, 12 BLR at 1-165. In this case, the administrative law judge gave greater weight to Dr. Simpao's 1995 opinion because he found that it was well-reasoned and well-documented. The administrative law judge stated:

> I find Dr. Simpao's [1995] opinion to be supported by the underlying documentation and evidence in the record. Dr. Simpao's [1995] diagnosis is based on his objective clinical findings of pneumoconiosis found on x-ray, abnormal pulmonary function and arterial blood gas studies, and the [m]iner's extensive history of smoking and coal mining. Additionally, Dr. Simpao's [1995] opinion is supported by his physical observations of the

> [m]iner's lips and nails being slightly cyanotic, his face being slightly dusky, and his complaints of shortness of breath after walking only 105 feet or climbing 19 steps.

Decision and Order at 21. However, in the prior claim, Judge Phalen did not address the issue of legal pneumoconiosis when he considered Dr. Simpao's 1995 opinion. Rather, Judge Phalen addressed the issue of clinical pneumoconiosis when he considered Dr. Simpao's 1995 opinion. Specifically, Judge Phalen discounted Dr. Simpao's 1995 opinion that the miner had clinical pneumoconiosis because it was based on a positive x-ray that was contrary to the weight of the x-ray evidence. Judge Phalen therefore found that the Dr. Simpao's opinion regarding the existence of clinical pneumoconiosis was not well-reasoned or well-documented. The Board affirmed Judge Phalen's weighing of the medical opinion evidence at Section 718.202(a)(4). *Ward*, BRB No. 97-1573 BLA, slip op. at 2. Thus, because Judge Phalen properly found that Dr. Simpao's 1995 opinion that the miner had clinical pneumoconiosis was not well-reasoned or well-documented, the administrative law judge failed to adequately explain why he found that Dr. Simpao's 1995 opinion that the miner had legal pneumoconiosis was supported by the underlying documentation. *Wojtowicz*, 12 BLR at 1-165. Furthermore, the administrative law judge failed to adequately explain why he found that Dr. Simpao's 1995 opinion was probative in the miner's subsequent claim because the weight of the x-ray evidence now favors the miner and is indicative of the progressive nature of pneumoconiosis. *Id*. Consequently, the administrative law judge erred in failing to provide a valid basis for giving greater weight to Dr. Simpao's 1995 opinion regarding the issue of legal pneumoconiosis.

Employer further argues that the administrative law judge impermissibly shifted the burden of proof to employer by rejecting Dr. O'Bryan's opinion on the basis that Dr. O'Bryan did not explain how coal dust was eliminated as a factor in the miner's lung disease. Employer maintains that "[c]ontrary to the [administrative law judge's] suggestion, the employer does not bear the burden of ruling out the role of coal dust exposure, let alone ruling out coal dust as a potential factor." Employer's Brief at 13. Employer also argues that the administrative law judge impermissibly substituted his opinion for that of Dr. O'Bryan, as the administrative law judge's decision rests on his disagreement with the doctor's opinion.

In considering Dr. O'Bryan's opinion that the miner had a severe obstructive ventilatory impairment with an emphysematous component related to chronic smoking (a finding that legal pneumoconiosis is not present), the administrative law judge stated:

> Dr. O'Bryan is the only physician to specifically exclude coal workers' pneumoconiosis and coal dust inhalation as a cause or aggravate (sic) of the [m]iner's obstructive airway disease or hypoxemia. Dr. O'Bryan opined that the etiology of these impairments was most likely cigarette smoking.

> However, I find that Dr. O'Bryan's medical report and opinion does not reflect consideration of the [m]iner's sixteen years of coal mine employment. Additionally, I note that Dr. O'Bryan diagnosed the [m]iner with COPD as a result of his pulmonary function test results, which revealed no response post-bronchodilator. I find it particularly troubling to Dr. O'Bryan's diagnosis that he did not address how he excluded 16 years of coal mine employment as a cause of the [m]iner's COPD in light of the fact that the [m]iner had no post-bronchodilator response.

Decision and Order at 20.

Contrary to employer's assertion, the administrative law judge did not require Dr. O'Bryan to "rule out" coal dust exposure as a contributing factor to the miner's COPD at Section 718.202(a)(4). *Hutson v. Freeman United Coal Mining*, 12 BLR 1-72 (1988) (*en banc*). However, to the extent that the administrative law judge discounted Dr. O'Bryan's opinion because he found that the fact that the miner had no post-bronchodilator response required Dr. O'Bryan to address the miner's history of 16 years of coal dust exposure as a cause of his lung disease, we hold that the administrative law judge impermissibly discounted Dr. O'Bryan's opinion because it did not comply with his own medical conclusion that the miner's history of 16 years of coal dust exposure should not have been excluded as a cause of his COPD since he had no post-bronchodilator response. *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984).

In view of the forgoing, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration of the medical opinion evidence in accordance with the APA. On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Furthermore, because we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established that the miner's legal pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(a). If reached on remand, the administrative law judge must reweigh all of the medical opinion evidence regarding the cause of the miner's legal pneumoconiosis at Section 718.203(a) in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

D.
Section 718.203(b)

Employer further contends that the administrative law judge erred in finding that the evidence established that the miner's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Specifically, employer argues that the administrative law judge erred in summarily concluding that Dr. O'Bryan's opinion that the miner had no clinical pneumoconiosis did not establish rebuttal of the presumption that the miner's clinical pneumoconiosis arose out of coal mine employment. Employer maintains that the administrative law judge merely discounted Dr. O'Bryan's opinion that the miner had no clinical pneumoconiosis because it was in the minority of the medical opinions of record regarding the cause of the miner's clinical pneumoconiosis.

After noting that the miner worked at least 16 years in coal mine employment, the administrative law judge found that claimant was entitled to the presumption that the miner's clinical pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b). The administrative law judge then found that employer failed to rebut the presumption of causality at Section 718.203(b). However, in so doing, the administrative law judge did not consider medical opinions regarding the cause of the miner's clinical pneumoconiosis. Rather, the administrative law judge considered medical opinions regarding the cause of the miner's legal pneumoconiosis, by stating:

> Despite recording 18 years of coal mine employment, Dr. O'Bryan excludes coal dust inhalation as a possible cause or aggravate (sic) of the [m]iner's respiratory condition. Dr. O'Bryan's opinion conflicts with Dr. Simpao's and Dr. Westerfield's opinion that the [m]iner's respiratory impairment is attributed to both smoking and coal mine dust exposure. The [e]mployer has not sufficiently demonstrated that coal mine employment could be ruled out as a contributing cause of the [m]iner's pneumoconiosis, and thus, has failed to rebut the presumption.

Decision and Order at 22.

Because the administrative law judge failed to explain why he gave less weight to Dr. O'Bryan's opinion than to the opinions of Drs. Westerfield and Simpao regarding the cause of the miner's clinical pneumoconiosis, *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987), we vacate the administrative law judge's finding that the evidence established that the miner's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). On remand, the administrative law judge must reweigh all of the medical opinion evidence regarding the cause of the miner's clinical pneumoconiosis at Section 718.203(b) in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

E.
Section 718.204(b)(2)(iii)

Employer additionally contends that the administrative law judge erred in finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iii). Specifically, employer argues that the administrative law judge substituted his opinion for that of the physicians by finding that evidence of congestive heart failure constituted a diagnosis of cor pulmonale. Employer's Brief at 18-19.

At Section 718.204(b)(2)(iii), the administrative law judge considered the hospital report and deposition of Dr. Simpao, as well as the hospital reports of Drs. Taha, Al-Okk, and Sobel. In his December 6, 2003 discharge summary and deposition, Dr. Simpao opined that the miner had COPD with congestive heart failure. Director's Exhibit 44; Living Miner's Exhibit 3. In his December 8, 2004 history and physical and December 14, 2004 discharge summary, Dr. Taha diagnosed COPD and congestive heart failure. Living Miner's Exhibit 2. In his December 9, 2004 consultation report, Dr. Al-Okk diagnosed COPD and history of congestive heart failure. *Id*. In his December 9, 2004 consultation report, Dr. Sobel diagnosed COPD and congestive heart failure. *Id*. The administrative law judge found that the medical evidence established total disability at Section 718.104(b)(2)(iii), by stating:

> The [e]mployer did not submit any evidence that would refute the [m]iner's diagnosis of COPD with congestive heart failure. Therefore, I credit the [m]iner's December 2003 and December 2004 hospital treatment records and Dr. Simpao's deposition testimony in finding that he suffered from COPD with congestive heart failure consistent with cor pulmonale.

Decision and Order at 23.

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). In this case, the record does not contain medical evidence diagnosing cor pulmonale with right-sided congestive heart failure. *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989). Consequently, we reverse the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iii). Nevertheless, we hold that the administrative law judge's error in finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iii) was harmless, *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because we affirm the administrative law judge's finding that the evidence established total disability at 20

C.F.R. §718.204(b)(2)(i), (ii), and (iv),[15] and because his disability causation finding at Section 718.204(c) was not based on the evidence that he considered at Section 718.204(b)(2)(iii).

F.
Section 718.204(c)

Employer also contends that the administrative law judge erred in finding that the evidence established that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Westerfield, Zachek, Simpao, and O'Bryan. Dr. Zachek opined that the miner's hypoxemic, hypercarbic respiratory failure due to COPD and asthma were the causes of his totally disabling respiratory impairment. Director's Exhibit 10. Dr. Zachek also opined that the miner's coal workers' pneumoconiosis may be partially responsible for his hypoxemia. *Id*. Dr. Westerfield opined that at least part of the miner's respiratory impairment was due to coal workers' pneumoconiosis and the inhalation of coal dust. Director's Exhibit 33. In a report dated November 28, 1995, Dr. Simpao opined that coal dust exposure was medically significant in the miner's pulmonary impairment. Director's Exhibit 1. Similarly, in a report dated February 27, 1996, Dr. Simpao opined that pneumoconiosis and coal dust exposure contributed to the miner's respiratory impairment. *Id*. In the November 8, 2005 report and the June 7, 2007 deposition, Dr. Simpao did not render an opinion regarding the issue of disability causation. Director's Exhibit 56; Living Miner's Exhibit 3. Lastly, in a report dated September 16, 2003, Dr. O'Bryan did not render an opinion regarding the issue of disability causation. Director's Exhibit 10.

The administrative law judge gave greater weight to Dr. Westerfield's disability causation opinion because it was well-reasoned and persuasive. Decision and Order at 25. The administrative law judge also found that Dr. Westerfield's disability causation opinion was supported by Dr. Zachek's disability causation opinion. *Id*. The administrative law judge also found that Dr. Simpao did not address the issue of disability causation in his new reports. Further, the administrative law judge gave less weight to Dr. O'Bryan's opinion "as he does not address whether the [m]iner's coal mine employment, which is the basis of his legal pneumoconiosis, could be more than a *de minimus* factor of his disability." *Id*. In addition, the administrative law judge gave less weight to Dr. O'Bryan's opinion because the doctor's opinion that the miner did not have

[15] As noted *supra*, p. 4, n.5, no party challenges the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), and (iv).

pneumoconiosis was contrary to the weight of the evidence. *Id*. Hence, based on the opinions of Drs. Westerfield and Zachek, the administrative law judge found that the evidence established that pneumoconiosis was a substantial contributing cause of the miner's total disability. However, the administrative law judge did not specifically state whether clinical pneumoconiosis, legal pneumoconiosis, or both, contributed to the miner's total disability.

Because we vacate the administrative law judge's findings that the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Nevertheless, in the interest of judicial economy, we address employer's contentions with respect to the administrative law judge's findings at Section 718.204(c).

Employer argues that the administrative law judge erred in relying on the causation opinions of Drs. Westerfield and Zachek because they did not conduct a differential diagnosis. Employer asserts that "no doctor conducted a differential diagnosis that 'ruled in' coal dust exposure." Employer's Brief at 20. Employer maintains that in *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171 (6th Cir. 2009), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, adopted a "differential diagnosis test" for evaluating medical expert opinions on the issue of disability causation. Contrary to employer's assertions, the Board has held that the decision in *Best* does not present a new standard for evaluating disability causation opinions in black lung cases, as the Sixth Circuit court's holding pertained to the admissibility of an expert's differential diagnosis under Rule 702 of the Federal Rules, which do not apply to administrative proceedings unless provided by statute or regulation. *Stover v. Peabody Coal Co.*, BLR , BRB No. 08-0549 BLA (Jan. 27, 2010)(*en banc* Decision and Order on Recon.). Thus, we reject employer's assertion that the administrative law judge erred in relying on the causation opinions of Drs. Westerfield and Zachek because they did not conduct a differential diagnosis.

Employer also argues that the administrative law judge's bare conclusion that the opinions of Drs. Westerfield and Zachek established total disability due to pneumoconiosis does not satisfy his duty of explanation under the APA. In crediting Dr. Westerfield's opinion that the miner's pneumoconiosis was more than a *de minimus* factor of his total disability, the administrative law judge stated that "Dr. Westerfield found that the [m]iner's respiratory impairment was at least in part due to coal workers' pneumoconiosis and the inhalation of coal dust." Decision and Order at 25. The administrative law judge also stated that "Dr. Westerfield's opinion is supported by Dr. Zachek's opinion that the [m]iner's respiratory impairment was mostly due to COPD and asthma and maybe partially due to coal workers' pneumoconiosis." *Id*. However, as discussed *supra*, the administrative law judge did not specifically consider whether the

medical opinions established that clinical pneumoconiosis, legal pneumoconiosis, or both, contributed to the miner's total disability. Further, as employer asserts, the administrative law judge did not explain why he found that Dr. Westerfield's disability causation opinion was well-reasoned and persuasive. *Wojtowicz*, 12 BLR at 1-165. Furthermore, the administrative law judge did not explain why he concluded that Dr. Zachek's disability causation opinion supported Dr. Westerfield's disability causation opinion, even though he found that Dr. Zachek's opinion was not as definitive as Dr. Westerfield's opinion. *Wojtowicz*, 12 BLR at 1-165; *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, if reached, on remand, the administrative law judge must consider whether the medical opinion evidence establishes that clinical pneumoconiosis, legal pneumoconiosis, or both, contributed to the miner's total disability, and explain his findings in accordance with the requirements of the APA.

Employer further asserts that Dr. Westerfield's opinion could not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) because it was speculative. Contrary to employer's assertion, Dr. Westerfield unequivocally stated, "[i]t is my opinion that at least part of [the miner's] respiratory impairment is due to [c]oal [w]orkers' [p]neumoconiosis and inhalation of coal and rock dust." Director's Exhibit 33. Further, Dr. Westerfield referenced his own examination of the miner, as well as his experience as a pulmonary specialist, as the bases for his disability causation opinion. *Id*. Thus, we reject employer's assertion that Dr. Westerfield's opinion could not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) because it was speculative. *Cf. U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999)(noting that physician with no information about the circumstances of the miner's death was reduced to speculating that it was *possible* that the miner's death could have occurred due to pneumonia superimposed upon his pneumoconiosis); *see also Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19. However, as noted above, the administrative law judge must determine whether Dr. Westerfield's opinion establishes that clinical pneumoconiosis, legal pneumoconiosis, or both, contributed to the miner's total disability, if reached.

Employer additionally asserts that the administrative law judge erred in discounting Dr. O'Bryan's opinion at Section 718.204(c). Dr. O'Bryan opined that the miner's respiratory impairment was severe and would have precluded him from returning to coal mine employment. Director's Exhibit 12. As discussed, *supra*, the administrative law judge gave less weight to Dr. O'Bryan's opinion because he did not address whether the miner's coal mine employment could have been more than a *de minimus* factor of his disability.[16] The administrative law judge also gave less weight to Dr. O'Bryan's opinion

[16] The administrative law judge stated, "[g]iven [the miner's] extensive history of

because the doctor's opinion that the miner did not have pneumoconiosis was contrary to the weight of the evidence. The administrative law judge further stated, "I find that Dr. O'Bryan's opinion does not sufficiently address the etiology of the [m]iner's total disability." Decision and Order at 25. Because Dr. O'Bryan did not render an opinion with regard to the issue of total disability due to pneumoconiosis, Director's Exhibit 12, we hold that any error by the administrative law judge in discounting Dr. O'Bryan's opinion at Section 718.204(c) was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

If reached, on remand, the administrative law judge must consider all of the medical opinion evidence to determine whether or not claimant has met her burden of establishing that the miner's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). The administrative law judge must specifically consider whether clinical pneumoconiosis, legal pneumoconiosis, or both, contributed to the miner's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).

II.
SURVIVOR'S CLAIM

Turning to the survivor's claim, we address claimant's contention that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and thus, that he erred in finding that the evidence did not establish a mistake in a determination of fact at 20 C.F.R. §725.310. We also address employer's contentions, on cross-appeal, that the administrative law judge erred in finding the miner had clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), and that he erred in finding that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in discrediting the death causation opinions of Drs. Caffrey and Fino at 20 C.F.R. §718.205(c).

To establish entitlement to survivor's benefits, 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(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

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coal mine employment, I find an opinion that fails to address this issue to be incomplete and not well-reasoned." Decision and Order at 25.

A.
Section 718.202(a)(1)

Initially, we will address employer assertions, on cross-appeal, that the administrative law judge erred in finding that the x-ray evidence established that the miner had clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, employer argues that the administrative law judge violated the APA by announcing, without discussion, that the additional medical opinion evidence submitted in the survivor's claim did not disturb his findings regarding the existence of clinical pneumoconiosis in the miner's claim. Employer asserts that the administrative law judge did not consider the two additional x-ray readings that it submitted in the survivor's claim. Employer maintains that the administrative law judge was required to identify the conflict in the x-ray evidence and explain how and why he resolved it.

In considering the issue of pneumoconiosis at Section 718.202(a) in the survivor's claim, the administrative law judge stated:

> I hereby restate by reference the discussion above as to pneumoconiosis in the living miner's claim. However, I note that the [e]mployer has designated two additional reports by Drs. Caffrey and Fino in the survivor's claim. After considering the evidence, I find that [claimant] has also established both clinical and legal pneumoconiosis. None of the new evidence submitted by the [e]mployer disturbs my findings in the living miner's claim that the [m]iner suffered from both clinical and legal pneumoconiosis caused by his coal mine employment.

Decision and Order at 26. In the miner's claim, as discussed, *supra*, the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). While the administrative law judge noted that employer submitted two additional reports by Drs. Caffrey and Fino into the record of the survivor's claim, he did not indicate that employer submitted additional x-ray evidence into the record of the survivor's claim. Furthermore, although employer asserts that the survivor's claim consists of two additional negative x-ray readings by dually-qualified radiologists that the administrative law judge did not consider at Section 718.202(a)(1), employer does not specifically point to or identify any additional x-ray evidence that was submitted in the survivor's claim. Employer's Brief at 12. Thus, because we affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(1) in the miner's claim, and because the x-ray evidence that the administrative law judge relied on in the survivor's claim is the same x-ray evidence that he relied on in the miner's claim, we reject employer's assertion that the administrative law judge violated the APA by reinstating his findings regarding the x-ray evidence in the miner's claim to his findings

regarding the x-ray evidence in the survivor's claim. *Wojtowicz*, 12 BLR at 1-165. Furthermore, because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) in the survivor's claim.

Nevertheless, because we vacate the administrative law judge's finding that the evidence established that the miner's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) in the miner's claim, we also vacate his causality finding at 20 C.F.R. §718.203(b) in the survivor's claim.

B.
Section 718.202(a)(4)
(Legal Pneumoconiosis)

Employer also asserts that the administrative law judge erred in finding that the medical opinion evidence established that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, employer argues that the administrative law judge mischaracterized the opinions of Drs. Caffrey and Fino by finding that they were not given the miner's length of coal mine employment to consider. Employer maintains that "[a]lthough neither doctor [Dr. Caffrey nor Dr. Fino] explicitly noted the length of [the miner's] employment, both considered the entire record, including evidence of that employment." Employer's Response Brief at 13.

In considering the miner's claim, the administrative law judge found that the medical opinion evidence established that the miner had both clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). In considering the survivor's claim, as noted above, the administrative law judge found that the new medical opinion evidence submitted by employer did not disturb his findings in the miner's claim that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). In so finding, the administrative law judge gave less weight to the opinions of Drs. Caffrey and Fino that the miner did not have legal pneumoconiosis because he found that "neither physician was given the [m]iner's length of coal mine employment to consider." Decision and Order at 26. Further, the administrative law judge stated, "for the same reasons discussed in the living miner's claim, I credit Drs. Simpao's and Westerfield's opinions in finding that the [m]iner established legal pneumoconiosis through well-reasoned and well-documented medical opinion [evidence]." *Id*.

Because we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) in the miner's claim, we also vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) in the survivor's claim. On remand, the administrative law judge must

consider the medical opinion evidence at Section 718.202(a)(4) in accordance with the APA.

Furthermore, the administrative law judge must consider whether the medical opinion evidence establishes that the miner's legal pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(a), if reached.

C.
Section 718.205(c)

Next, we address claimant's assertion that the administrative law judge erred in finding that the medical opinion evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[17] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes, *inter alia*, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). 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); *see Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

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[17] Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) 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).

At Section 718.205(c), the administrative law judge considered the death certificate signed by Dr. Taha, and the opinions of Drs. Simpao, Caffrey, and Fino. In the death certificate, Dr. Taha listed acute myelocytic leukemia as an immediate cause of the miner's death. Director's Exhibit 41. Dr. Taha also listed chronic myelocytic leukemia and lung cancer with metastasis as underlying causes of the miner's death. *Id*. In the November 8, 2005 letter, Dr. Simpao opined that coal workers' pneumoconiosis contributed to and/or hastened the miner's death. Director's Exhibit 56. During the June 7, 2007 deposition, Dr. Simpao indicated that the miner had a conglomeration of problems that could have hastened his death. Dr. Simpao also stated, "[w]ell, I'm not familiar what he died of, so I don't - - He might have died from - - ." Employer's Exhibit 2 (Dr. Simpao's Deposition at 11-12). In the May 12, 2007 report, Dr. Caffrey opined that clinical pneumoconiosis, assuming that the miner had it, did not cause, contribute to, or hasten his death. Employer's Exhibit 1. In the July 26, 2007 report, Dr. Fino opined that the miner's inhalation of coal mine dust did not cause, contribute to, or hasten his death. Employer's Exhibit 3. Dr. Fino stated that his conclusion regarding the miner's death would not change even if he assumed that the miner had disabling coal workers' pneumoconiosis. *Id*.

The administrative law judge gave less weight to Dr. Simpao's opinion that clinical pneumoconiosis contributed to the miner's death because he found that it was not well-reasoned, as it was incomplete and inconsistent. Decision and Order at 28. The administrative law judge also gave less weight to the opinions of Drs. Caffrey and Fino because they were not well-reasoned. *Id*. The administrative law judge then determined that "the record does not contain probative evidence that pneumoconiosis substantially contributed to the miner's death." *Id*. Consequently, the administrative law judge found that claimant did not establish that the miner's death was due to pneumoconiosis at Section 718.205(c).

Claimant asserts that the administrative law judge erred in finding that Dr. Simpao's deposition testimony was incomplete and inconsistent. In considering Dr. Simpao's opinion, the administrative law judge stated:

> I afford less weight to Dr. Simpao's opinion as to the [m]iner's cause of death as I find it to be inconsistent and incomplete. In his deposition, Dr. Simpao admitted to submitting his opinion on whether pneumoconiosis hastened the [m]iner's death without ever reviewing the [m]iner's death certificate or receiving the facts and circumstances of his death. Dr. Simpao specifically said, "I don't have any idea what he died of at that time because he's [sic] not my patient anymore when he died." *Id*. at 9. He made if (sic) clear that he did not know anything about how the [m]iner died. *Id*. at 10-11. I find knowledge of the circumstances of the [m]iner's

> death to be crucial in determining whether the [m]iner's death was caused or hastened by pneumoconiosis.

Decision and Order at 28. The administrative law judge therefore found that Dr. Simpao's opinion was not well-reasoned.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In this case, the administrative law judge properly found that the opinion of Dr. Simpao regarding the cause of the miner's death was not well-reasoned, as Dr. Simpao's November 8, 2005 letter and June 7, 2007 deposition were inconsistent with regard to this issue, *Mabe*, 9 BLR at 1-68, and as Dr. Simpao testified that he did not have a complete understanding of the circumstances of the miner's death, *DeBusk v. Pittsburg & Midway Coal Co*., 12 BLR 1-15, 1-17 (1988); *Campbell v. North American Coal Corp*., 6 BLR 1-244, 1-249 (1983). Thus, we reject claimant's assertion that the administrative law judge erred in finding that Dr. Simpao's deposition testimony was incomplete and inconsistent. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Claimant also asserts that the administrative law judge should have given greater weight to Dr. Simpao's opinion based on his status as the miner's treating physician. The Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.[18] *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate treating physicians just as they consider other experts. *Id.* As discussed *supra*, the administrative law judge properly found that Dr. Simpao's opinion was not well-reasoned. *Fife v.*

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[18] Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

Director, OWCP, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, we reject claimant's assertion that the administrative law judge erred in failing to credit Dr. Simpao's opinion based upon his status as the miner's treating physician.[19]

Because administrative law judge properly discounted the only medical opinion of record that could establish that pneumoconiosis caused, contributed to, or hastened the miner's death, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

D.
30 U.S.C. §§921(c)(4) and 932(*l*)

Finally, we address the impact of the recent amendments to the Act in the survivor's claim.[20] Because the miner was not in payment status pursuant to a final award of benefits at the time of his death, inasmuch as the miner's claim is still pending, claimant is not entitled to derivative benefits. 30 U.S.C. §932(*l*). Nevertheless, because this survivor's claim was filed after January 1, 2005 and the parties stipulated to at least 16 years of coal mine employment, the administrative law judge must initially consider the survivor's claim under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). He must allow both parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

III.
CONCLUSION

In sum, with regard to the miner's claim, we affirm the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. On the merits, we affirm the administrative law judge's findings that the evidence established the existence of clinical pneumoconiosis at

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[19] In view of our disposition of the case at 20 C.F.R. §718.205(c), we decline to address employer's contentions, on cross-appeal, that the administrative law judge erred in discrediting the death causation opinions of Drs. Caffrey and Fino at Section 718.205(c). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[20] The recent amendments to the Black Lung Benefits Act do not apply in the miner's claim, as the miner's initial and subsequent claims were filed before January 1, 2005. Director's Exhibits 1, 3.

20 C.F.R. §718.202(a)(1) and (4). We also affirm the administrative law judge's findings that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(i), (ii) and (iv). However, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). We also vacate the administrative law judge's finding that the evidence established that the miner's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Further, we reverse the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iii). Moreover, we vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). We, therefore, vacate the administrative law judge's award of benefits in the miner's claim and remand the case for further consideration of the evidence.

With respect to the survivor's claim, we affirm the administrative law judge's findings that the evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4). However, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). We additionally vacate the administrative law judge's finding that the evidence established that the miner's clinical pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Further, we affirm the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Lastly, we vacate the administrative law judge's denial of benefits in the survivor's claim, and remand the case to the administrative law judge to consider the survivor's claim under Section 411(c)(4).

Accordingly, the administrative law judge's Decision and Order awarding benefits in the miner's claim and denying benefits in the survivor's claim is affirmed in part, reversed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge