BRB Nos. 12-0491 BLA
and 12-0492 BLA

ANITA BENTLEY (o/b/o and Widow of OTIS BENTLEY)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 06/26/2013
KENTUCKY ELKHORN COAL COMPANY	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of William S. Colwell, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2006-BLA-5737 and 2007-BLA-5333) of Administrative Law Judge William S. Colwell (the administrative law

judge) awarding benefits on a miner's duplicate claim and a survivor's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for the fifth time.[2]

In the last appeal, relevant to the miner's duplicate claim, the Board vacated Administrative Law Judge Daniel F. Solomon's findings that the existence of clinical and legal pneumoconiosis, and a material change in conditions, were established pursuant to 20 C.F.R. §§718.202(a)(2),(4), 725.309(d) (2000).[3] Because of errors committed by Judge Solomon in his analysis of the evidence, the Board remanded the case for reconsideration of the medical evidence relevant to the existence of clinical and legal pneumoconiosis. Consequently, the Board also vacated Judge Solomon's finding of total disability due to pneumoconiosis, at 20 C.F.R. §718.204(c), and his finding as to the date from which benefits commence, pursuant to 20 C.F.R. §725.503(b). With respect to the survivor's claim, the Board also vacated Judge Solomon's finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2),(4), and therefore vacated his finding that claimant established that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). Finally, in the interest of justice and judicial economy, the Board granted employer's request to reassign the case to a new administrative law judge on remand.

On remand, the case was reassigned, without objection, to the current administrative law judge, who found that the miner worked for thirteen years and four

[1] Claimant is the surviving spouse of the miner, Otis Bentley, who died on April 29, 2005. Director's Exhibit 133.

[2] The complete procedural history of this case is set forth in the Board's prior decisions. *Bentley v. Ky. Elkhorn Coals, Inc.*, BRB Nos. 09-0635 BLA, 10-0452 BLA and 10-0453 BLA (Mar. 29, 2011) (unpub.); *O.B.* [*Bentley*] *v. Ky. Elkhorn Coals, Inc.*, BRB No. 08-0383 BLA (Feb. 19, 2009) (unpub.); *Bentley v. Ky. Elkhorn Coals, Inc.*, BRB No. 00-0140 BLA (Apr. 6, 2001) (unpub.); *Bentley v. Ky. Elkhorn Coals, Inc.*, BRB No. 98-0140 BLA (May 21, 1999) (unpub.).

[3] The Department of Labor amended the regulations implementing the Black Lung Benefits Act (the Act). These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2010). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations. The revised regulation at 20 C.F.R. §725.309 does not apply to claims, such as the miner's, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

months in coal mine employment,[4] and that the miner had an eight pack-year smoking history. With respect to the miner's claim, the administrative law judge found that the new, qualitatively different medical evidence established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), by establishing the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2),(4), arising out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the miner was totally disabled by a severe obstructive impairment pursuant to 20 C.F.R. §718.204(b)(2), and further found that he was totally disabled due to pneumoconiosis. Accordingly, after determining that the medical evidence did not establish when the miner became totally disabled due to pneumoconiosis, the administrative law judge awarded benefits on the miner's claim from July 1995, the month in which the miner filed his duplicate claim.

Considering the survivor's claim, the administrative law judge found that clinical pneumoconiosis was established by the biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2), and that legal pneumoconiosis was established by the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c).[5] Consequently, the administrative law judge awarded benefits on the survivor's claim.

On appeal, with respect to the miner's claim, employer argues that the administrative law judge erred in finding a material change in conditions established pursuant to 20 C.F.R. §725.309(d) (2000) based on a finding of total disability, when the miner's prior claim was denied for failure to establish the existence of pneumoconiosis. Employer further contends that the administrative law judge erred in finding that the miner suffered from clinical and legal pneumoconiosis, and that the miner was totally

[4] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibits 2, 4. Therefore, the Board 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).

[5] The administrative law judge did not address the impact of recent amendments to the Act, which apply to claims, such as claimant's survivor's claim, that were filed after January 1, 2005, and were pending on or after March 23, 2010. Relevant to this case, amended Section 932(*l*) provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*), *amended by* Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010).

disabled due to pneumoconiosis.[6] Employer also alleges that the administrative law judge erred in his onset determination, and argues that the processing of the miner's claim violated its due process rights, requiring its dismissal from the case and the transfer of liability to the Black Lung Disability Trust Fund. Regarding the survivor's claim, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence in finding that the miner suffered from pneumoconiosis, and that his death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). Claimant urges that these arguments be rejected. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of employer's arguments that the administrative law judge erred in considering the preamble to the revised regulations, and that employer should be dismissed as the responsible operator. The Director further contends that, if the award of benefits in the miner's claim is affirmed, claimant is entitled to receive survivor's benefits pursuant to amended Section 932(*l*).

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).

The Miner's Claim

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the duplicate claim must also be denied unless the administrative law judge finds that there has been a "material change in conditions" since the denial of the previous claim. 20 C.F.R. §725.309(d) (2000). In this case, the miner's prior claim was denied for failure to establish the existence of pneumoconiosis. Director's Exhibit 36. Consequently, claimant was required to submit new evidence establishing that element of entitlement in order to obtain review of the merits of the miner's duplicate claim. *See* 20

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

C.F.R. §725.309(d) (2000); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994).

Employer argues that the administrative law judge erred in finding a material change in conditions established based on total disability, as total disability was established in the miner's prior claim. Employer's Brief at 23. We disagree. In this case, the administrative law judge found that claimant established a material change in conditions based on new evidence demonstrating that the miner suffered from clinical and legal pneumoconiosis. Decision and Order on Remand at 3. Therefore, we reject employer's argument that the administrative law judge misidentified the element of entitlement that was previously adjudicated against the miner in his prior claim.

We next address employer's contention that the administrative law judge erred in finding that the new medical opinion evidence established the existence of legal pneumoconiosis,[7] pursuant to 20 C.F.R. §718.202(a)(4). In determining whether claimant established that the miner had legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Vuskovich, Rosenberg, Fino, Broudy, Hussain, Alam, Tidal, and Forehand, and considered the doctors' qualifications. Drs. Vuskovich, Rosenberg, Fino, Broudy, and Hussain opined that the miner did not suffer from any coal mine dust-related disease of the lung. Employer's Exhibits 1-6; Director's Exhibits 40, 123, 127, 131. In contrast, Dr. Alam diagnosed chronic bronchitis, dyspnea, and cough attributable to the miner's coal mine dust exposure. Director's Exhibits 127, 131. Drs. Tidal and Forehand diagnosed chronic obstructive pulmonary disease (COPD) and coal workers' pneumoconiosis, but neither physician specifically linked the miner's COPD to his coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibits 41, 131.

The administrative law judge discounted all of employer's experts' opinions, Decision and Order on Remand at 40-47, and found that Dr. Alam's opinion was sufficiently documented and reasoned to establish that the miner had legal pneumoconiosis. *Id.* at 47-49.

Dr. Alam's Opinion

Employer contends that the administrative law judge erred in crediting Dr. Alam's opinion. Specifically, employer asserts that Dr. Alam's opinion regarding legal pneumoconiosis is unreasoned because he simply relied on the miner's exposure to coal mine dust to conclude that the miner had legal pneumoconiosis. Employer's Brief at 32.

[7] "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).

Employer further argues that the administrative law judge erred in finding that Dr. Alam's status as the miner's treating physician provided "a superior basis on which to render a diagnosis," and that he failed to "consider the aspects of the actual record that detracted from Dr. Alam's opinion." *Id.* at 33-34. Employer's contentions lack merit.

As the administrative law judge noted, Dr. Alam considered physical findings, objective test results, and the miner's medical history, as well as the miner's history of coal mine employment, which Dr. Alam obtained during the numerous examinations he conducted as the miner's treating physician. Director's Exhibits 127, 131. Therefore, the administrative law judge reasonably found that Dr. Alam did not rely solely on the miner's "occupational exposure coupled with [his] pulmonary impairment" to conclude that the miner's COPD was due to coal mine dust exposure. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Furthermore, the administrative law judge permissibly found Dr. Alam's opinion to be sufficiently reasoned and documented, and bolstered by his treatment of the miner.[8] *See* 20 C.F.R. §718.104(d)(1)-(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2002); Decision and Order on Remand at 52. The administrative law judge noted that Dr. Alam, in his September 2004 report, diagnosed chronic bronchitis, chronic dyspnea, and chronic cough, due to coal mine dust, and permissibly credited this opinion as a well-reasoned and documented diagnosis of legal pneumoconiosis consistent with the preamble to, and the plain language of, the regulations. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Perry*, 9 BLR at 1-2-3; Decision and Order on Remand at 48; Director's Exhibit 131 at 426. Accordingly, we reject employer's contention that the administrative law judge erred in crediting Dr. Alam's

[8] Dr. Alam treated the miner from 2002 until his death in 2005. Director's Exhibits 127, 131. In his 2002 reports, Dr. Alam diagnosed "coal workers' pneumo[coniosis]" due to coal dust, and "chronic bronchitis," cause unlisted, and stated that each condition contributed "80% - 100%" to the miner's TD impairment. Director's Exhibit 127. In a 2004 report, Dr. Alam diagnosed chronic bronchitis, chronic dyspnea, and chronic cough, due to coal mine dust. While this diagnosis is consistent with a diagnosis of legal pneumoconiosis, Dr. Alam checked a box marked "clinical pneumoconiosis" on a form attached to the 2004 report. Director's Exhibit 131 at 432. In its most recent decision, the Board acknowledged these possibly conflicting diagnoses, noting that "a review of Dr. Alam's reports reveals that, while mixed, his diagnoses could support a finding of clinical pneumoconiosis, legal pneumoconiosis, or both." *Bentley v. Ky. Elkhorn Coals, Inc.*, BRB Nos. 09-0635 BLA, 10-0452 BLA and 10-0453 BLA, slip op. at 8 (Mar. 29, 2011) (unpub.). Further, the Board concluded that Judge Solomon permissibly found "Dr. Alam's opinion to be well reasoned, and emphasized that he did not accord his opinion conclusive weight based on his status as a treating physician." *Id.*

opinion as a well-reasoned and documented diagnosis of legal pneumoconiosis.[9] *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

Opinions of Drs. Vuskovich, Rosenberg, Fino, and Broudy

The administrative law judge discounted the opinions of Drs. Vuskovich, Rosenberg, Fino, Broudy, and Hussain,[10] that the miner did not have pneumoconiosis, and instead suffered from COPD and emphysema due to smoking.[11] The administrative law judge found the opinions of these physicians to be insufficiently documented and reasoned, or based on reasoning that was either inconsistent with the regulations or contrary to the Department of Labor's (DOL) position set forth in the preamble to the regulations. Employer challenges the administrative law judge's credibility determinations. As discussed below, employer's contentions lack merit.

Employer generally challenges the administrative law judge's reference to the preamble in discrediting the opinions of its physicians. Employer's Brief at 27-28. Employer's argument is without merit. The preamble to the amended regulations sets forth how DOL chose to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may evaluate expert opinions, therefore, in conjunction with

[9] Employer also contends, with no citation to the record, that the administrative law judge "did not consider that Dr. Alam relied on an inflated work history of twenty-three years." Employer's Brief at 33. However, in his September 2004 report, which the administrative law judge credited as a well-reasoned and documented diagnosis of legal pneumoconiosis, Dr. Alam documented that the miner worked for approximately thirteen years in coal mine employment. Decision and Order on Remand at 35, 48-49; Director's Exhibit 131 at 423. As the administrative law judge found that the miner worked in coal mine employment for thirteen years and four months, employer's contention that Dr. Alam relied on an inflated work history is without merit. Decision and Order on Remand at 8-9.

[10] Because employer does not challenge the administrative law judge's decision to accord less weight to Dr. Hussain's opinion, we affirm this finding. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 47.

[11] In concluding that the miner did not suffer from legal pneumoconiosis, Dr. Vuskovich opined that the miner's COPD was caused by alpha-1 antitrypsin deficiency (AAD), and was aggravated by smoking. Employer's Exhibits 2, 3.

DOL's discussion of sound medical science in the preamble to the amended regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 486, 25 BLR 2-135, 2-147 (6th Cir. 2012). In addition, contrary to employer's suggestion, the administrative law judge did not utilize the preamble as a criterion or legislative rule of which he was required to give notice and an opportunity to respond. *See Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12. Moreover, the administrative law judge relied on the preamble in a limited manner in discrediting employer's doctors and, as will be discussed in more detail below, provided additional affirmable reasons for discrediting their opinions.

Employer next contends that the administrative law judge improperly rejected Dr. Vuskovich's opinion, that the miner had alpha-1 antitrypsin deficiency (AAD) unrelated to coal mine employment. Specifically, employer argues that the administrative law judge inappropriately relied on a "theory" that coal mine dust exposure and a history of cigarette smoking could have combined to cause AAD in the miner. Employer's Brief at 29-30. The administrative law judge accurately acknowledged that Dr. Vuskovich, in concluding that the miner did not suffer from legal pneumoconiosis, diagnosed the miner as having AAD, the diagnosis of which, he opined, could be established by a blood test. Employer's Exhibit 2. In finding Dr. Vuskovich's opinion insufficiently reasoned and documented, and therefore entitled to less weight, the administrative law judge correctly noted that there was no indication that an AAD blood test was ever given to the miner, and permissibly found that, even if the miner had AAD leading to lung destruction and emphysema, Dr. Vuskovich did not explain why the miner's coal mine dust exposure did not also contribute to the emphysema. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Remand at 45, Employer's Exhibits 2, 3. Therefore, the administrative law judge acted within his discretion in discounting Dr. Vuskovich's opinion.

Employer also contends that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Fino, because he inappropriately found their views regarding the reversibility on the miner's pulmonary function studies to be flawed. Employer's Brief at 31. We disagree. The administrative law judge accurately noted that Dr. Rosenberg referred to the miner's improvement with the use of bronchodilators in supporting his conclusion that the miner's lung disease "was not coal mine dust related," but did not sufficiently address the fact that the miner still retained a residual "totally disabling respiratory impairment post bronchodilator." Decision and Order on Remand at 42-43; Employer's Exhibit 1. The administrative law judge also correctly pointed out that Dr. Fino, in ruling out the existence of legal pneumoconiosis, noted the "variability in the [miner's] resting oxygen levels along with the exercise oxygen levels and the improvement with bronchodilators . . . ." Decision and Order on Remand at 27; Director's Exhibit 131 at 405. The administrative law judge permissibly found that neither Dr. Rosenberg nor Dr. Fino adequately explained why partial reversibility in the

results of a portion of the miner's pulmonary function studies necessarily eliminated a diagnosis of legal pneumoconiosis. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483-84; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 42-43, 46. Therefore, we affirm the administrative law judge's decision to discount the opinions of Drs. Rosenberg[12] and Fino in light of their views on the reversibility of the miner's pulmonary function studies.

Employer further argues that the administrative law judge erred in relying "on the progressivity and latency of pneumoconiosis" in discrediting the opinions of Drs. Fino and Broudy. Employer's Brief at 32-33. This argument lacks merit. The administrative law judge accurately noted that Dr. Fino, in opining that the miner did not have legal pneumoconiosis, stated that "[i]t is reasonable to assume that [the worsening degree of obstruction shown on the miner's pulmonary function studies] between 1989 and 2002 is related to cigarette smoking," and that this loss occurred when the miner was out of the mines but continued to smoke. *See* Decision and Order on Remand at 45; Director's Exhibit 131 at 404. The administrative law judge also correctly noted that Dr. Broudy, in supporting his conclusion that the miner's impairment was due to smoking and not coal mine dust exposure, noted that the miner's pulmonary impairment "progressed in spite of cessation of exposure to coal mine dust." *See* Decision and Order on Remand at 47; Director's Exhibit 131 at 414. The administrative law judge therefore permissibly discredited the opinions of Drs. Fino and Broudy, as contrary to the recognition of pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *Banks*, 690 F.3d at 488, 25 BLR at 2-151.

Finally, we note that employer does not challenge the administrative law judge's decision to discount the opinions of Drs. Fino and Broudy for their reliance on an inflated smoking history.[13] Decision and Order on Remand at 45-46. An administrative law judge may properly discredit the opinion of a physician that is based upon an inaccurate or incomplete picture of the miner's health. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). We

[12] Because the administrative law judge provided a valid reason for discounting the opinion of Dr. Rosenberg, we need not address employer's remaining arguments regarding the weight the administrative law judge accorded his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[13] Dr. Fino based his opinion on a smoking history of seventeen pack-years, while Dr. Broudy reported that the miner smoked one-half to one and a half packs of cigarettes for twenty-four years. Director's Exhibit 131 at 405; Director's Exhibit 40 at 16.

therefore affirm the administrative law judge's decision to discredit the opinions of Drs. Fino and Broudy for their reliance on an inaccurate smoking history.

As employer raises no other contentions regarding the administrative law judge's findings on the issue of legal pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of COPD due, in part, to coal mine dust exposure.[14] 20 C.F.R. §718.202(a)(4). Accordingly, we also affirm the administrative law judge's determination that a material change in conditions was established under 20 C.F.R. §725.309(d) (2000).

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

On remand, upon finding the existence of legal pneumoconiosis established and noting that the existence of a totally disabling respiratory impairment was uncontested, the administrative law judge reconsidered the issue of disability causation. The administrative law judge credited the opinion of Dr. Alam, as supported by the opinions and findings of Drs. Tidal and Forehand, to find disability causation established.[15]

In addressing the issue of disability causation at 20 C.F.R. §718.204(c), the administrative law judge declined to address whether pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling respiratory impairment, which is the standard contained in 20 C.F.R. §718.204(c). Instead, the administrative law judge relied on the decisions by the United States Court of Appeals for the Sixth Circuit in *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003) and *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997), and

[14] Because we affirm the administrative law judge's finding that the miner suffered from legal pneumoconiosis, we need not address employer's argument that the administrative law judge failed to weigh all of the relevant evidence together in determining that clinical pneumoconiosis was established by the biopsy evidence, as error, if any, would be harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[15] The administrative law judge accorded little weight to the opinions of Drs. Rosenberg, Broudy, Vuskovich, Fino, and Hussain at disability causation, as none of these physicians diagnosed pneumoconiosis. Decision and Order on Remand at 54; *see Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

applied the "contributing cause" standard that the court applied under the former version of the Part 718 regulations.[16] Decision and Order on Remand at 54.

Employer contends that this case must be remanded to the administrative law judge, because he applied the incorrect disability causation standard. While we agree that the administrative law judge applied the incorrect standard, there is no need to remand this case, because the outcome is foreordained, on this record as weighed by the administrative law judge. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one."). In this case, it is uncontested that the miner was totally disabled due to a severe obstructive pulmonary impairment. Employer's Exhibits 1-6; Director's Exhibits 40, 41, 123, 127, 131. Furthermore, we have affirmed the administrative law judge's finding, based on Dr. Alam's opinion, that this totally disabling obstructive impairment was legal pneumoconiosis. A remand, therefore, would serve no purpose, as Dr. Alam's opinion, which the administrative law judge credited at legal pneumoconiosis and disability causation, could only establish that legal pneumoconiosis was a substantially contributing cause of the miner's total disability. *See* 20 C.F.R. §718.204(c). As the outcome of a remand would be foreordained, we affirm the administrative law judge's finding of total disability due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). *See Webb*, 49 F.3d at 249, 19 BLR at 2-133.

Employer also contends that it should be dismissed from liability, because delays in the adjudication of the miner's claim deprived it of its right to due process. Employer further asserts that it was deprived of the opportunity to develop evidence on the issue of the miner's smoking history, and that it was improper for the administrative law judge to make a finding as to the miner's smoking history, because he did not preside at the hearing at which the miner testified about his smoking habit. The Director responds that employer's contentions lack merit, as it received notice of the present claim and had sufficient opportunity to defend.

[16] The administrative law judge incorrectly stated that, "[b]ecause this claim was filed in 1995, the amended version of 20 C.F.R. §718.204(c)(1) does not apply." Decision and Order on Remand at 54, n.13. Contrary to the administrative law judge's notation, Part 718, as revised effective January 19, 2001, is applicable to the adjudication of all claims filed after March 31, 1980, with the exception of the second sentence in 20 C.F.R. §718.204(a), which concerns the consideration of nonpulmonary or nonrespiratory conditions or diseases causing an independent disability, in determining whether a miner is totally disabled due to pneumoconiosis. 20 C.F.R. §718.2. Therefore, the "substantially contributing cause" standard at 20 C.F.R. §718.204(c) applies to claims filed before January 19, 2001 and after March 31, 1980, such as the miner's claim in this case.

Employer's argument that it should be dismissed from liability is without merit. The delay in these proceedings has not prejudiced employer; in fact, employer's own motions and appeals have contributed to the delay in the adjudication of these claims. Moreover, the record reflects that employer participated in those instances in which the miner and claimant testified as to the miner's smoking history, and that it was given "a fair opportunity to mount a meaningful defense."[17] *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807, 21 BLR 2-302, 2-320 (4th Cir. 1998); *see Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); Director's Exhibits 21, 41, 148. Consequently, we reject employer's argument that it must be dismissed as a party.

Finally, employer argues that the administrative law judge erred in finding that claimant is entitled to benefits as of July 1995, the month in which the miner filed his duplicate claim. If the evidence does not establish when the miner first became totally disabled due to pneumoconiosis, benefits may be awarded as of the month of filing, unless credited medical evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). Upon review of the record, we conclude that the administrative law judge did not err in determining that the record does not establish the month of onset of total disability due to pneumoconiosis. Decision and Order on Remand at 78-79. Therefore, we affirm the administrative law judge's determination that the miner was entitled to benefits as of July 1995, the month in which he filed his duplicate claim.

As claimant has established each element of entitlement, we affirm the award of benefits in the miner's claim.

The Survivor's Claim

The Director contends that claimant is entitled to survivor's benefits under amended Section 932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to

[17] As the Director correctly notes, the only testimony provided by the miner in the present claim concerning his smoking history was by deposition, at which no administrative law judge was present. Director's Exhibit 21. Thus, as the Director points out, any administrative law judge adjudicating this claim would have to decide the miner's smoking history based solely on the documentary evidence in the record. Furthermore, employer did not object to the reassignment of this case to the present administrative law judge. Director's Brief at 5.

pneumoconiosis. 30 U.S.C. §932(*l*), *amended by* Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010); Director's Brief at 1, n.1. We agree. Claimant filed her survivor's claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. Therefore, claimant is automatically entitled to receive benefits pursuant to amended Section 932(*l*).[18] 30 U.S.C. §932(*l*); *Vision Processing, LLC v. Groves*, 705 F.3d 551 (6th Cir. 2013).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[18] In light of our disposition of claimant's survivor's claim pursuant to amended Section 932(*l*), we need not address the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4), 718.205(c).