U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

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BRB Nos. 14-0250 BLA and
14-0263 BLA

QUANG JONES (Widow of and o/b/o CHARLES E. JONES) Claimant-Respondent v. PATRIOT MIDWEST HOLDING, LLC Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/29/2015 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order Awarding Survivor's Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits in a subsequent miner's claim[1] (2010-BLA-05711), and the Decision and Order Awarding Survivor's Benefits (2013-BLA-05113) of Administrative Law Judge Stephen M. Reilly, rendered on claims filed pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act).[2] In the miner's claim, the administrative law judge credited the miner with at least fifteen years of underground coal mine employment and determined that he had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). The administrative law judge concluded, therefore, that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge also concluded that employer did not rebut the presumption and awarded benefits accordingly. In the survivor's claim, the administrative law judge adopted his findings from the miner's claim and concluded that claimant invoked the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4). The administrative law judge further determined that

[1] The miner filed an initial claim for benefits on October 5, 1992, which was ultimately denied by the district director on February 8, 1993, because the evidence did not establish any element of entitlement. Survivor's Claim (SC) Director's Exhibit 1.

[2] The miner filed his current claim for benefits on March 23, 2009, and it was pending when he died on July 13, 2010. Miner's Claim (MC) Director's Exhibits 3, 50. Claimant, who is the widow of the miner, filed her claim for survivor's benefits on July 16, 2012, and is continuing to pursue the miner's claim on her husband's behalf. SC Director's Exhibit 3. The district director consolidated the two claims for the purpose of decision only and they were sent to the administrative law judge for hearing. The administrative law judge conducted a hearing in the miner's claim on April 11, 2012. He subsequently issued a separate Decision and Order in the miner's claim and in the survivor's claim. In the Decision and Order in the survivor's claim, the administrative law judge stated, "[s]ince the [c]laimant's attorney offered no new evidence for [claimant's] survivor's claim, my decision with respect to this claim shall be based upon the evidence of record in [the miner's] claim, the Director's Exhibits in [claimant's] claim, and the arguments of the parties." SC Decision and Order at 2.

[3] Under amended Section 411(c)(4) of the Act, a miner's total disability or death is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(a).

employer did not rebut the presumption. Accordingly, the administrative law judge also awarded benefits in the survivor's claim.

On appeal, employer argues that the administrative law judge erred in finding that the miner was totally disabled under 20 C.F.R. §718.204(b)(2). In addition, employer contends that, in evaluating rebuttal, the administrative law judge did not consider all relevant evidence and did not properly weigh the x-ray and medical opinion evidence, as to whether the miner had pneumoconiosis, and whether the miner's death was due to pneumoconiosis, Employer also asserts that, despite the fact that the miner's claim is a subsequent claim under 20 C.F.R. §725.309, the administrative law judge did not determine whether claimant established a change in an applicable condition of entitlement. Further, employer contends that the award of benefits in the survivor's claim cannot be affirmed, because the administrative law judge decided the case on the record, despite employer's timely request for a hearing. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief, asserting that the administrative law judge did not err in finding that there was no conflict between the pulmonary function study and blood gas study results. The Director also maintains that there was no material error in the administrative law judge's consideration of rebuttal of the presumed existence of legal pneumoconiosis and total disability due to pneumoconiosis.[4]

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, rational, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. The Miner's Claim

In his Decision and Order in the miner's claim, the administrative law judge stated that, at the hearing in the miner's claim on April 11, 2012, he admitted into evidence

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner "worked in coal mines for [twenty-one] years," and had "over" fifteen years of underground coal mine employment. MC Decision and Order at 3-4; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The record indicates that claimant's coal mine employment was in Illinois. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Miner's Claim (MC) Director's Exhibits 1-49,[6] MC Claimant's Exhibits 1-2,[7] and MC Employer's Exhibits 1-17. MC Decision and Order at 2. At the hearing, the record was left open for claimant and the employer to submit additional evidence. April 11, 2012 Hearing Transcript at 25, 29, 31-34.

A. Invocation of the Presumption – Total Disability

The administrative law judge initially found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), based on the newly submitted pulmonary function studies of record, dated September 1, 2009 and December 15, 2009, which produced qualifying values.[8] MC Decision and Order at 6-7. The administrative law judge further found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), as neither of the newly submitted blood gas studies, dated August 21, 2009 and December 15, 2009, was qualifying. *Id*. at 7. The administrative law judge stated, however, that this was not "sufficient contrary evidence" to refute his finding at 20 C.F.R. §718.204(b)(2)(i), as pulmonary function studies and blood gas studies measure different aspects of pulmonary function. *Id*. at 7-8. In evaluating the newly submitted medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv),[9] the administrative law judge noted that all of the physicians diagnosed the miner with a respiratory impairment, and that Dr. Sanjabi indicated that the impairment was severe enough to prevent the miner

[6] The miner's death certificate was subsequently admitted into evidence as MC Director's Exhibit 50.

[7] The administrative law judge's statement is not entirely accurate. At the hearing in the miner's claim, the administrative law judge acknowledged that claimant's counsel did not become her representative until shortly before the hearing, and indicated that the record would be held open for sixty days for submissions of evidence on claimant's behalf. April 11, 2012 Hearing Transcript at 11, 15-16. In addition, Dr. Alexander's interpretation of a December 15, 2009 x-ray, MC Claimant's Exhibit 1, was performed on July 20, 2012, and a biopsy report by Dr. Griggs, MC Claimant's Exhibit 2, is dated August 6, 2012, both of which were after the April 11, 2012 hearing date. *See* MC Claimant's Exhibits 1-2.

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

[9] Because there is no evidence in the record that the miner had right-sided congestive heart failure due to cor pulmonale, claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii).

from performing his previous coal mine employment. *Id*. at 11-13. The administrative law judge concluded that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), based on the newly submitted pulmonary function studies and medical opinions. *Id*. at 18.

Employer argues that, in weighing the evidence as a whole, the administrative law judge "seemed to dismiss the arterial blood gas tests as essentially irrelevant rather than weigh the evidence together." Employer's Brief in Support of Petition for Review at 25. Additionally, employer contends that the administrative law judge did not set forth any findings concerning whether the medical opinions relevant to total disability were reasoned and documented, and did not address these opinions in the context of the exertional requirements of the miner's last coal mine employment.[10] The Director responds, asserting that the administrative law judge properly found that the qualifying pulmonary function study evidence could support a finding of total disability, despite the presence of non-qualifying blood gas studies.

Contrary to employer's contention, and as the administrative law judge noted, because pulmonary function studies and blood gas studies measure different types of impairments, differing results are not necessarily conflicting. *See Sheranko v. Jones and Laughlin Steel Corp*., 6 BLR 1-797, 1-798 (1984); MC Decision and Order at 8. Therefore, the administrative law judge acted rationally in finding that the non-qualifying blood gas studies did not constitute probative evidence contrary to the qualifying pulmonary function studies, when weighing the relevant evidence as a whole. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993).

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[10] In its Closing Argument brief before the administrative law judge, employer stated:

> The medical opinions of Drs. Sanjabi, Repsher, and Tuteur determine a totally disabling pulmonary impairment. As it would appear, [claimant] established total disability and invoked the rebuttal [sic] presumption under [20 C.F.R. §]718.305.

Employer's Closing Argument at 7 (internal citations omitted). Employer's challenges in this appeal on the issues of total disability are questionable, insofar as this statement appears to be a concession that the miner was totally disabled under 20 C.F.R. §718.204(b)(2), and that the amended Section 411(c)(4) presumption was invoked in the miner's claim. However, in light of the ambiguity of this statement in particular, and the fact that neither the administrative law judge, nor the parties, have indicated that employer conceded the issue of total disability, we decline to hold that employer did so.

However, there is merit in employer's assertion concerning the administrative law judge's weighing of the medical opinion evidence. Although the administrative law judge summarized the medical opinion evidence in detail, *see* MC Decision and Order at 11-13, he did not identify the opinions he relied on to find total disability established, and did not render findings as to whether they were reasoned and documented on the issue of total disability. Accordingly, the administrative law judge's finding was not in compliance with the Administrative Procedure Act (APA).[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); MC Decision and Order at 15, 18. In addition, the administrative law judge did not set forth, as required by the APA, the rationale underlying his determination that the medical opinions were sufficient to establish total disability. *See Wojtowicz*, 12 BLR at 1-165. Further, the administrative law judge discussed the exertional requirements of the miner's last coal mine employment as a face boss, and concluded that the miner "performed heavy manual labor," but, as employer argues, he did not consider whether the physicians understood the nature of the miner's job. MC Decision and Order at 3-4; *see Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-260 (7th Cir. 2005). Consequently, we vacate the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, also vacate his finding that the amended Section 411(c)(4) presumption was invoked in the miner's claim. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007).

On remand, the administrative law judge must initially reconsider whether the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge must make a finding as to whether each opinion is adequately reasoned and documented, including a determination of whether each physician had an accurate understanding of the nature of the miner's usual coal mine job as a face boss. *See Killman*, 415 F.3d at 721, 23 BLR at 2-258-59. The administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge must then weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record to determine whether total disability has been established at 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

[11] The Administrative Procedure Act, 5 U.S.C. §500 et seq., as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented." 5 U.S.C. §557(c)(3)(A).

If the administrative law judge determines that claimant is unable to establish total disability, an essential element of entitlement, then the administrative law judge must deny benefits in the miner's claim. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). However, if the administrative law judge finds that the evidence is sufficient to establish total disability, he may reinstate his finding that the miner invoked the rebuttable presumption at 20 C.F.R. §718.305(b).

B. Rebuttal of the Presumption

In the interest of judicial economy, we address employer's remaining arguments concerning rebuttal of the amended Section 411(c)(4) presumption in the miner's claim. Once the administrative law judge determines that claimant has invoked the presumption that the miner was totally disabled due to pneumoconiosis at amended Section 411(c)(4), the burden shifts to employer to affirmatively establish that the miner did not have legal or clinical pneumoconiosis, or that the miner's disability did not arise out of, or in connection with his coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1); *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 134-35, BLR (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

1. The Presumed Existence of Legal Pneumoconiosis

After finding that employer did not affirmatively disprove the existence of clinical pneumoconiosis, the administrative law judge determined that "the weight of the other evidence, treatment records, and medical opinions supports a finding that [the miner] had legal pneumoconiosis in the form of [chronic obstructive pulmonary disease (COPD)] and emphysema." MC Decision and Order at 16. The administrative law judge then concluded that Dr. Istanbouly's finding, that the miner had a severe obstructive defect without a significant response to bronchodilators, was characteristic of legal pneumoconiosis, as it is a latent, progressive and irreversible disease. *Id*. at 17. The administrative law judge gave "great weight" to Dr. Sanjabi's opinion, that the miner had legal pneumoconiosis, "because he considered both coal mine dust and smoking as possible factors causing [the miner's] COPD and emphysema." *Id*. The administrative law judge gave less weight to the contrary opinions of Drs. Tazbaz, Tuteur, and Oesterling because they did not diagnose clinical pneumoconiosis, contrary to his finding. *Id*. The administrative law judge also gave less weight to Dr. Tuteur's opinion because he did not adequately explain why coal dust exposure could not also have contributed to the miner's COPD, even if smoking was the main risk factor. *Id*.

Employer argues that, although the administrative law judge discussed opinions diagnosing COPD, he did not determine whether the physicians concluded that the COPD arose out of coal mine employment, consistent with the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). In support of this argument, employer alleges that the administrative law judge did not consider that Dr. Sanjabi specifically found that the cause of the miner's COPD is unclear. Employer also contends that the administrative law judge substituted his opinion for that of the physicians in concluding that the miner's lack of response to the use of bronchodilators was characteristic of the latent, progressive, and irreversible nature of legal pneumoconiosis. Employer further asserts that the administrative law judge erred in discrediting the opinions of Drs. Tazbaz, Tuteur, and Oesterling concerning legal pneumoconiosis because they did not diagnose clinical pneumoconiosis, as the diseases are different entities.[12]

Employer's allegations of error have merit. When the administrative law judge stated, "[b]ecause pneumoconiosis is a latent, progressive, irreversible disease, [the miner's] lack of response to bronchodilator treatment is characteristic of legal pneumoconiosis," he substituted his opinion for that of a medical expert. MC Decision and Order at 17. Because the significance of a miner's response to the application of a bronchodilator during pulmonary function testing calls for an opinion by a medical expert, the administrative law judge cannot substitute his judgement for that of the expert. Thus, we must vacate the administrative law judge's decision to credit Dr. Istanbouly's opinion as supportive of a finding of legal pneumoconiosis. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

Further, in giving great weight to Dr. Sanjabi's opinion, the administrative law judge did not address Dr. Sanjabi's statement that the "cause of COPD is not clear." MC Director's Exhibit 12; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Employer also asserts correctly that the administrative law judge erred in discrediting the opinions in which Drs. Tazbaz, Tuteur, and Oesterling stated that legal pneumoconiosis was not present, on the ground that they did not diagnose clinical

[12] Employer also maintains that there are other pulmonary function studies in the record, including the one on which Dr. Sanjabi relied, that show a significant response to bronchodilators. However, a review of the pulmonary function studies considered by the administrative law judge also reveals that they remained qualifying after the administration of bronchodilators. MC Decision and Order at 6-7; MC Director's Exhibits 12, 31. Additionally, according to Dr. Tazbaz, the pulmonary function study that employer referenced in its brief also showed a "[s]evere obstructive defect" with "no significant response with bronchodilator." Employer's Exhibit 10; *see* Employer's Brief in Support of Petition for Review at 22.

pneumoconiosis, contrary to the administrative law judge's finding. The regulations define clinical pneumoconiosis and legal pneumoconiosis as diseases that differ in the ways in which they develop and the ways in which they are detected. *See* 20 C.F.R. §718.201(a)(1), (2). Therefore, a physician who erroneously determines that the radiological evidence is negative for clinical pneumoconiosis can still render a reasoned opinion as to whether a miner has a "chronic lung disease or impairment, or its sequelae, arising out of coal mine employment." 20 C.F.R. §718.201(a)(2); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-551-52 (6th Cir. 2002). In addition, employer argues correctly that the administrative law judge did not consider Dr. Tuteur's deposition testimony, which employer alleges specifically addresses why the miner's respiratory impairment was not due, in part, to coal dust exposure. Therefore, we must vacate the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A).

2. The Presumed Existence of Clinical Pneumoconiosis

a. X-ray Evidence

The administrative law judge initially considered interpretations of two x-rays at 20 C.F.R. §718.202(a)(1) and placed the burden on claimant to establish that the miner had pneumoconiosis.[13] MC Decision and Order at 5-6. The September 1, 2009 x-ray was interpreted as positive for pneumoconiosis by Drs. Ahmed and Alexander, who are dually qualified as Board-certified radiologists and B readers, and as negative by Dr. Wiot, who is also dually qualified.[14] MC Director's Exhibits 12, 29, 32. The December 15, 2009 x-ray was interpreted as positive for pneumoconiosis by Dr. Alexander and as negative by Dr. Wiot. MC Director's Exhibit 30; MC Claimant's Exhibit 1. Based on the two positive interpretations of the September 1, 2009 x-ray, versus the one negative interpretation by equally qualified radiologists, the administrative law judge determined that this x-ray was positive for clinical pneumoconiosis. MC Decision and Order at 6. The administrative law judge next determined that the December 15, 2009 x-ray was in equipoise based on the conflicting interpretations by equally qualified radiologists. *Id.*

[13] The administrative law judge also noted that he considered an interpretation by Dr. Fulk of an April 7, 2009 x-ray, indicating scattered irregular nodular densities with interstitial fibrotic changes and suggesting a chest CT scan for further evaluation, but stated that he did not find this interpretation probative because it "was not dispositive on the issue of pneumoconiosis." MC Decision and Order at 5 n.5; MC Director's Exhibit 30 at 77.

[14] This x-ray was also read by Dr. Gaziano, a B reader, for quality purposes only. MC Director's Exhibit 12.

Based on his findings that one x-ray was positive and one x-ray was in equipoise, the administrative law judge determined that the x-ray evidence, as a whole, was sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id*. The administrative law judge reiterated his weighing of the x-ray evidence when considering rebuttal and found that employer could not rebut the presumed existence of clinical pneumoconiosis by the x-ray evidence. *Id*. at 15-16.

Employer argues that the administrative law judge did not consider two x-ray interpretations that it submitted post-hearing, or the majority of the x-ray interpretations contained in the miner's treatment records. Employer also contends that the administrative law judge improperly relied on the notion that "more is better" when analyzing the x-ray evidence and did not consider the notations of film quality, and the comments made on the films dated September 1, 2009 and December 15, 2009, by Drs. Ahmed and Alexander, respectively.[15]

We reject employer's assertion that the administrative law judge relied solely on a quantitative analysis of the x-ray evidence. The administrative law judge separately analyzed each x-ray and acted within his discretion in giving more weight to the readings performed by dually qualified physicians. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27-28 (1987); *Dixon v. North Camp Coal Co*., 8 BLR 1-344, 1-345 (1985). However, employer is correct in asserting that the administrative law judge did not consider the two negative x-ray interpretations of the December 15, 2009 x-ray by Drs. Tarver and Meyer that employer submitted following conference calls held after the formal hearing in the miner's claim. *See* MC Employer's Exhibits 20-21. Employer is also correct in alleging that the administrative law judge did not weigh the x-ray readings contained in the miner's treatment records. We vacate, therefore, the administrative law judge's finding that the preponderance of the x-ray evidence was positive for clinical pneumoconiosis.

b. Biopsy Evidence

[15] Dr. Ahmed indicated that the September 1, 2009 chest x-ray had a quality rating of 3 because "the film is underexposed and very poor contrast." MC Director's Exhibit 12. Dr. Ahmed also stated that "[f]or optimum evaluation, a PA and lateral view could be most useful." *Id*. Dr. Alexander found that the September 1, 2009 x-ray had a quality rating of 3 because it was "too light; decreased contrast." MC Director's Exhibit 32. Dr. Alexander commented that "[h]ealed tuberculosis could also cause a similar appearance." *Id*. Dr. Alexander rated the film quality of the December 5, 2009 x-ray as 2 due to "low contrast; copy of a digital x-ray." MC Claimant's Exhibit 1.

In the administrative law judge's summary of Dr. Griggs's biopsy report, dated August 6, 2012, he indicated that Dr. Griggs diagnosed coal workers' pneumoconiosis and macules associated with emphysema. MC Decision and Order at 8. When addressing the issue of rebuttal of the presumed existence of clinical pneumoconiosis, the administrative law judge gave "great weight" to Dr. Griggs's report, as "it is the most recent medical finding, which is especially probative given the latent, progressive nature of pneumoconiosis." *Id*. at 16.

Employer argues that the administrative law judge erred in omitting Dr. Oesterling's biopsy report from consideration. Dr. Oesterling determined, based on a review of the biopsy slides and Dr. Griggs's report, that the "evidence of coal dust induced changes is very minimal" and is not "adequate to establish a diagnosis of coal workers' pneumoconiosis." MC Employer's Exhibit 13. Dr. Oesterling also commented that Dr. Griggs's findings, that macules surrounded the miner's terminal airways and that the miner had severe centrilobular emphysema, were inaccurate because "the major findings do not include macrophages containing carbon pigment, but macrophages containing the finely stippled pigment associated with tobacco smoke." MC Employer's Exhibit 22. In addition, employer accurately maintains that the administrative law judge did not consider the reports of Drs. Shevlin and Tazelaar, who reviewed the pathology evidence and concluded that the miner does not have coal workers' pneumoconiosis. *See* MC Employer's Exhibits 9, 12.

There is also merit in employer's argument that the administrative law judge erred in according additional weight to Dr. Griggs's biopsy report because it contained "the most recent medical finding." MC Decision and Order at 16. When assessing whether evidence is more recent, it is not the date of the physician's report that is relevant but rather when the information was gathered. *See Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1-1216 (1984). Although Dr. Griggs's biopsy report is dated August 6, 2012, the record indicates that the lung biopsy was performed on August 8, 2001. *See* MC Claimant's Exhibit 2; MC Employer's Exhibits 9, 12, 13, 22. Because the administrative law judge omitted relevant reports from his consideration of the biopsy evidence and misapplied the "later is better" rule, we vacate his finding that Dr. Griggs's report is entitled to greatest weight. *See Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 506-08, 15 BLR 2-116, 2-119-20 (7th Cir. 1991); *Vigil v. Director, OWCP*, 8 BLR 1-99, 1-100-01 (1985).

c. Medical Opinion Evidence

The administrative law judge gave less weight to the opinions of Drs. Tazbaz and Tuteur on the issue of the presumed existence of clinical pneumoconiosis, because they did not "take into account both cigarette smoking and coal mine dust exposure as potential causes of the miner's [COPD]." MC Decision and Order at 16. In contrast, the administrative law judge gave great weight to Dr. Sanjabi's diagnosis of clinical pneumoconiosis because he considered the miner's smoking and coal dust exposure histories, and his opinion was well reasoned and consistent with the administrative law judge's finding that the x-ray evidence established clinical pneumoconiosis. *Id*.

Employer argues that the administrative law judge's discrediting of the opinions of Drs. Tazbaz and Tuteur reflects a misunderstanding of clinical pneumoconiosis and a mischaracterization of their opinions, as both physicians considered the miner's smoking and occupational histories. Employer also contends that, in evaluating the medical opinion evidence relevant to clinical pneumoconiosis, the administrative law judge failed to consider Dr. Repsher's opinion, that the miner did not have clinical pneumoconiosis, and Dr. Tuteur's deposition testimony, which was admitted post-hearing. *See* MC Director's Exhibit 31; MC Employer's Exhibit 18. Employer asserts that the administrative law judge further erred in relying on Dr. Sanjabi's diagnosis of clinical pneumoconiosis without considering whether it is reasoned and documented.

Employer's contentions have merit. As employer observes, when assessing the probative value of the opinions of Drs. Tazbaz and Tuteur concerning clinical pneumoconiosis, the administrative law judge erred in focusing on their statements relevant to a diagnosis of legal pneumoconiosis.[16] *See Westmoreland Coal Co. v. Amick*, 289 F.App'x. 638, 639 (4th Cir. 2008). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201 (a)(1). Legal pneumoconiosis is defined as including "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[16] Dr. Tazbaz evaluated the miner for his chronic obstructive pulmonary disease (COPD) and shortness of breath, and did not address whether the miner had clinical pneumoconiosis. MC Director's Exhibit 30. Dr. Tuteur reported, "[w]ith reasonable medical certainty," that the miner did not have clinical coal workers' pneumoconiosis. MC Employer's Exhibit 7.

In addition, employer accurately states that the administrative law judge did not consider Dr. Repsher's report and Dr. Tuteur's deposition testimony. *See* MC Director's Exhibit 31; MC Employer's Exhibit 18. Furthermore, as explained *supra*, we have vacated the administrative law judge's finding that the preponderance of the x-ray evidence is positive for pneumoconiosis. We cannot affirm, therefore, the administrative law judge's reliance on that ground as a basis for crediting Dr. Sanjabi's opinion. Accordingly, we vacate the administrative law judge's findings regarding the opinions of Drs. Tazbaz, Tuteur, Repsher and Sanjabi.

d. CT Scan Evidence

The administrative law judge considered Dr. Wiot's interpretation of a CT scan dated December 15, 2009, noting the physician's statements that CT scans constitute a medically acceptable technique for diagnosing pneumoconiosis, and that the scan showed "no small nodules or large opacities to suggest coal worker's pneumoconiosis." MC Decision and Order at 8, *citing* MC Director's Exhibit 30. The administrative law judge did not make a finding as to whether Dr. Wiot's CT scan interpretation assisted employer in rebutting the presumed existence of clinical pneumoconiosis, nor did he make a determination as to whether Dr. Wiot's comments satisfied 20 C.F.R. §718.107(b), which requires that the proponent of "other evidence" establish that the test or procedure is medically acceptable and relevant to the diagnosis of pneumoconiosis.

Employer asserts that the administrative law judge's consideration of the CT scan evidence was inadequate, as he omitted chest CT scans contained in the treatment records. Dr. Istanbouly reported in a June 30, 2009 progress note that a CT scan dated April 7, 2009 was read by Dr. Afzalmahmed as "simple normal" with "questionable scattered vague nodular densities."[17] MC Employer's Exhibit 3. Dr. Istanbouly reported in the same progress note that the miner had a CT scan performed on May 28, 2009 which, revealed a "non-calcified irregular[ly] marginated nodule . . . suspicious for malignancy" and "fibrotic changes in the left and right lung."[18] *Id.* The record also contains Dr. Russell's interpretation of a CT scan ordered by Dr. Istanbouly, and performed on July 20, 2009, as showing a "left lower lobe parahilar mass" and "emphysematous change and history of prior lung reduction surgery." MC Employer's

[17] Employer referenced a CT scan, dated July 2, 2007, located at Employer's Exhibit 3-114. Employer's Brief in Support of Petition for Review at 16. However, Employer's Exhibit 3 consists of only ten pages and the CT scans dated April 7, 2009 and May 28, 2009.

[18] The progress note does not identify the radiologist who performed this CT scan or set forth the radiologist's credentials. MC Employer's Exhibit 3.

Exhibit 11 at 179. In light of the omissions in the administrative law judge's consideration of the CT scan evidence, he must consider this evidence on remand and make the necessary findings. *See Webber v. Peabody Coal Co*., 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007) (en banc); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-112 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting).

3. The Presumed Fact of Total Disability Causation

In considering whether employer rebutted the presumed fact that the miner was totally disabled due to pneumoconiosis, the administrative law judge weighed the opinions in which Drs. Tazbaz, Tuteur and Oesterling reported that any respiratory or pulmonary impairment suffered by the miner was not related to coal dust exposure. MC Decision and Order at 19; MC Director's Exhibit 30; MC Employer's Exhibits 7, 13. The administrative law judge discredited these opinions because the physicians did not diagnose clinical or legal pneumoconiosis, contrary to the administrative law judge's findings. MC Decision and Order at 19. The administrative law judge determined, therefore, that employer did not rebut the presumed causal relationship between pneumoconiosis and the miner's totally disabling respiratory impairment under 20 C.F.R. §718.305(d)(1)(i). *Id*. at 20.

Employer contends that the administrative law judge's "belief that proof of legal pneumoconiosis precluded a finding that [the miner's] disability was not due to pneumoconiosis cannot be reconciled with the decision of the United States Court of Appeals for the Sixth Circuit in *Arch On The Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014).[19] The Director responds and asserts that the administrative law judge's analysis was "perfectly reasonable" as "[t]he two rebuttal avenues necessarily involve some overlap, at least where legal pneumoconiosis is concerned." Director's Brief at 2, *citing Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013). The Director also states that

[19] In *Groves*, the court held that the existence of legal pneumoconiosis arising out of coal mine employment can be established by proving, at 20 C.F.R. §§718.202(a) and 718.203, that coal dust exposure contributed, at least in part, to the miner's respiratory or pulmonary impairment. *Arch On The Green, Inc. v. Groves*, 761 F.3d 594, 599-98, 25 BLR 2-615, 2-626 (6th Cir. 2014). The court further ruled that total disability causation is demonstrated by establishing that pneumoconiosis was a substantially contributing cause of the miner's total respiratory or pulmonary disability. *Groves*, 761 F.3d at 601-02, 25 BLR at 2-628.

employer's reliance on *Groves* is erroneous because the court did not address the standards applicable to rebuttal of the amended Section 411(c)(4) presumption.

Based on our holdings vacating the administrative law judge's findings on the presumed existence of clinical and legal pneumoconiosis, we must also vacate his determination that employer did not rebut the presumed causal relationship between the miner's total disability and pneumoconiosis. With respect to the parties' contentions, we agree with the Director that employer's reliance on *Groves* is misplaced. The present case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, thereby making *Groves* non-binding precedent. *See* slip op. at 4 n.5. In addition, the Sixth Circuit's decision is not persuasive precedent, as the court did not address the 20 C.F.R. §718.305 rebuttal standards, but rather addressed the nature of the burden of proof on claimants to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *See Groves*, 761 F.3d at 601-02, 25 BLR at 2-628.

C. Remand Instructions in the Miner's Claim

1. Invocation of the Presumption – Total Disability

On remand, the administrative law judge must initially consider whether claimant has established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) in accordance with the instructions set forth *supra*. If the administrative law judge again finds that claimant has established total disability, claimant will have established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and invoked the amended Section 411(c)(4) presumption. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 731, 25 BLR 2-405, 2-420 (7th Cir. 2013).

2. Rebuttal of the Presumed Existence of Legal Pneumoconiosis

The administrative law judge must consider all relevant evidence, including evidence from the miner's prior claim, to determine whether it is sufficient to establish rebuttal by disproving the existence of both legal and clinical pneumoconiosis, or by establishing that no part of the miner's pulmonary or respiratory disability was caused by pneumoconiosis, as outlined in 20 C.F.R. §718.305(d)(1).

The administrative law judge should begin his analysis at Section 718.305(d)(1)(i)(A) and determine whether all relevant and credible evidence establishes that legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2), is not present. When considering the relevant evidence, including Dr. Tuteur's deposition, the administrative law judge must be mindful that his findings regarding the significance of the miner's response to bronchodilators must be based on the opinion of a medical expert. In

weighing the relevant medical opinions, the administrative law judge must determine whether each opinion is adequately reasoned and documented on the issue of the etiology of the miner's impairment. *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 998-99, 23 BLR 2-301, 2-318 (7th Cir. 2005). The administrative law judge should also be cognizant that clinical pneumoconiosis has a definition that is distinct from the definition of legal pneumoconiosis.

When assessing the documentation underlying the medical opinion evidence, the administrative law judge must consider the smoking and coal dust exposure histories that the physicians relied on, and to what extent, if any, this affected the probative value of their opinions. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Fitch v. Director, OWCP*, 9 BLR 1-45, 1-46 (1986). We have affirmed, as unchallenged on appeal, the administrative law judge's finding that the miner had twenty-one years of coal mine employment and "worked for over [fifteen] years" in underground mines. MC Decision and Order at 3-4; *see* slip op. at 4 n.4. Regarding the miner's smoking history, the administrative law judge noted that Dr. Sanjabi reported that the miner smoked three to four cigarettes per day for one year. MC Decision and Order at 4; MC Director's Exhibits 12, 35. The administrative law judge also observed that the district director stated that, in conjunction with a 1992 examination, Dr. Sanjabi reported a smoking history of thirty-three years. MC Decision and Order at 4; MC Director's Exhibit 36. The administrative law judge further acknowledged that "the doctors agree that [the miner] smoked cigarettes." MC Decision and Order at 5. He concluded that he was "unable to determine [the miner's] exact smoking history" because the evidence "varie[d] widely in terms of intensity and duration," but he assumed a history of three-quarters of a pack per day for thirty-three years. *Id*. On remand, the administrative law judge should determine whether the physicians considered a smoking history consistent with his findings when rendering opinions on the etiology of the miner's respiratory impairment. *See Bobick*, 13 BLR at 1-54.

3. Rebuttal of the Presumed Existence of Clinical Pneumoconiosis

Even if legal pneumoconiosis is found to be present, the administrative law judge must determine whether employer has disproved the existence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B), as both of these determinations are important to satisfy the statutory mandate to consider all relevant evidence pursuant to 30 U.S.C. §923(b), and to provide a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), the second rebuttal prong. *See Minich v. Keystone Coal Mining Corp*., BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring & dissenting). In considering whether employer has disproved that the miner had clinical pneumoconiosis, the administrative law judge must consider all relevant x-rays and determine whether the physicians' ratings of the quality of the films detracts from their probative value, and

evaluate whether the physicians' comments constitute an alternative diagnosis, or merely an additional diagnosis. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999) (en banc); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc). Further, the administrative law judge must consider whether the x-ray interpretations contained in the miner's treatment records are probative on the issue of the presumed existence of clinical pneumoconiosis.[20] *See Church v. E. Associated Coal Corp*., 20 BLR 1-8 (1996), *modified on recon*., 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co*., 7 BLR 1-216, 1-218-19 (1984); MC Employer's Exhibits 1-3, 6, 12, 15. The administrative law judge must also consider all relevant biopsy evidence.[21]

With respect to the medical opinion evidence, the administrative law judge is required to determine the extent to which the opinions of Drs. Tazbaz and Tuteur, who both stated that the miner did not have clinical pneumoconiosis, are reasoned and documented. *See Williams*, 400 F.3d at 998-99, 23 BLR at 2-318.

The administrative law judge must also address the CT scan evidence of record, initially considering whether the party proffering the CT scan evidence has established its medical acceptability, and relevance, under 20 C.F.R. §718.107. *See Webber*, 23 BLR at 1-134-135; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (en banc). Additionally, the administrative law judge must determine whether the readings designated by the parties are admissible under 20 C.F.R. §725.414. Once he has rendered these preliminary findings, the administrative law judge must review the admissible CT scans, including those appearing in the treatment records, and to determine whether this evidence rebuts the presumed existence of clinical pneumoconiosis.

If employer affirmatively disproves the existence of legal and clinical pneumoconiosis, employer has rebutted the amended Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i).

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[20] The administrative law judge observed that the miner's treatment records include a diagnostic chest x-ray regarding his COPD, but the administrative law judge did not determine whether it was probative on the issue of the existence of clinical pneumoconiosis. MC Decision and Order at 10.

[21] The administrative law judge must initially consider whether the biopsy reports of Drs. Shevlin and Tazelaar are treatment records or whether they were prepared for the purpose of litigation. 20 C.F.R. §725.414(a)(4); MC Employer's Exhibits 9, 12. If they were prepared for the purpose of litigation, the administrative law judge must determine whether they are admissible pursuant to 20 C.F.R. §725.414(a)(3). We note that in its prehearing Evidence Summary, employer designated the biopsy reports of Drs. Oesterling and Shevlin as affirmative and rebuttal evidence, respectively.

4. Rebuttal of the Presumed Fact of Total Disability Causation

If employer cannot establish rebuttal under 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at Section 718.305(d)(1)(ii) with credible proof that "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §725.305(d)(1); *see Bender*, 782 F.3d at 134-35; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Minich*, slip op. at 10-11 (To rebut the presumed causal relationship between pneumoconiosis and total disability, employer must establish that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by pneumoconiosis."). Further, on remand, the administrative law judge must explain the bases for his determinations in accordance with the Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz*, 12 BLR at 1-165.

II. The Survivor's Claim

In considering the survivor's claim, the administrative law judge adopted his findings in the miner's claim, and concluded that claimant invoked the presumption that the miner's death was due to pneumoconiosis. Survivor's Claim (SC) Decision and Order at 5-7. The administrative law judge further found that employer did not rebut the presumption. *Id*.

Employer argues that the administrative law judge erred in finding that the record was silent concerning the cause of the miner's death, with "no new evidence . . . admitted into the record rebutting the presumption of death due to pneumoconiosis." SC Decision and Order at 7. Employer asserts that the administrative law judge failed to consider Dr. Tuteur's opinion, that the miner's death was unrelated to his coal dust exposure, and the treatment records confirming this conclusion. Employer also contends that no new evidence was admitted because the administrative law judge failed to conduct a hearing, despite employer's request for one.

Because we have vacated the award of benefits in the miner's claim, and the administrative law judge relied on those findings in the survivor's claim, we must also vacate the award of benefits in the survivor's claim. On remand, should the administrative law judge again award benefits in the miner's claim, claimant is automatically entitled to benefits pursuant to 30 U.S.C. §932(*l*).[22] However, if the

[22] A miner's award of benefits is not required to be final before a survivor qualifies for benefits under 30 U.S.C. §932(*l*). *See Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-146 (2014)

administrative law judge determines that the miner is not entitled to benefits, he must address employer's request for a hearing in the survivor's claim, and employer's request that the case be remanded for the development of evidence concerning death causation.[23]

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Awarding Survivor Benefits are affirmed in part and vacated in part, and the cases are remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has indicated in cases involving the prior version of 20 C.F.R. §718.305, and 20 C.F.R. §727.203(b)(3), that an employer establishes rebuttal at

[23] Because the survivor's claim was not pending when the hearing in the miner's claim was held on April 11, 2012, there was no discussion of the admission of evidence relevant to the cause of the miner's death. Once the survivor's claim was filed on July 16, 2012, and the district director proposed an award of benefits, employer timely requested a hearing, and the case was forwarded to the Office of Administrative Law Judges. Rather than address employer's request for a hearing, the administrative law judge issued a Decision and Order in the survivor's claim on April 1, 2014. The administrative law judge stated, "[s]ince the [c]laimant's attorney offered no new evidence for [claimant's] survivor's claim, my decision with respect to this claim shall be based upon the evidence of record in [the miner's] claim, the Director's Exhibits in [claimant's] claim, and the arguments of the parties." SC Decision and Order at 2.

20 C.F.R. §718.305 by proving that pneumoconiosis does not materially contribute to the miner's totally disabling respiratory impairment. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-204 (7th Cir. 1995). "In order to satisfy its burden [on rebuttal] Amax must prove by a preponderance of the evidence that coal dust exposure was not a contributing cause of [claimant's] disabling pulmonary impairment. . . . We have read the 'contributing cause' language to mean that mining must be a necessary, but need not be a sufficient, condition of the miner's disability." *Id.*; *see also Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992).

Nevertheless, I concur in this decision, because the Seventh Circuit has not ruled on the standard to be applied since the adoption of the revised regulations at 20 C.F.R. §718.305 and the Board has accepted the interpretation of the Director, Office of Workers' Compensation, that rebuttal under the "no part" standard set forth in revised 20 C.F.R. §718.305(d)(1)(ii) requires employer to establish that not even an insignificant part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. *See Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 8 (Apr. 21, 2015) (Boggs, J., concurring & dissenting).

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JUDITH S. BOGGS
Administrative Appeals Judge