BRB Nos. 09-0635 BLA,
10-0452 BLA and 10-0453 BLA

ANITA BENTLEY (Widow of OTIS BENTLEY)	)	
Claimant-Respondent	)	
v.	)	
KENTUCKY ELKHORN COAL COMPANY	)	DATE ISSUED: 03/29/2011
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 Award of Benefits, the Supplemental Decision and Order, and the Order Denying Reconsideration of Daniel F. Solomon, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits, the Supplemental Decision and Order awarding attorney's fees, and the Order Denying Reconsideration of the fee award (06-BLA-5737, 07-BLA-5333) of Administrative Law Judge Daniel F. Solomon rendered on a miner's duplicate claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case has been before the Board previously. The complete procedural history of this case is set forth in the Board's prior decisions. *O.B.* [*Bentley*] *v. Ky. Elkhorn Coals, Inc.*, BRB No. 08-0383 (Feb. 19, 2009)(unpub.); *Bentley v. Ky. Elkhorn Coals, Inc.*, BRB No. 00-0140 (Apr. 6, 2001)(unpub.); *Bentley v. Ky. Elkhorn Coals, Inc.*, BRB No. 98-0140 (May 21, 1999)(unpub.).

In the last appeal, relevant to the miner's duplicate claim, the Board vacated the administrative law judge's findings that legal pneumoconiosis and a material change in conditions were established pursuant to 20 C.F.R. §§718.202(a)(4), 725.309(d) (2000).[1] The Board instructed the administrative law judge that, on remand, in considering whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R §725.309(d) (2000), he must determine whether the new evidence differs qualitatively from the evidence submitted with the previously denied claim, in accordance with the holding in *Sharondale Corp. v. Ross*, 42 F.3d 993, 999, 19 BLR 2-10, 2-21 (6th Cir. 1994). Additionally, because of errors by the administrative law judge in his analysis of the evidence, the Board instructed him to reconsider the medical opinion evidence relevant to the existence of pneumoconiosis. Consequently, the Board also vacated the administrative law judge'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 the administrative law judge's finding that legal pneumoconiosis was established pursuant to Section 718.202(a)(4), and, consequently, vacated the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c).

On remand, with respect to the miner's claim, the administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R.

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. 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 edition of the Code of Federal Regulations.

§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 total disability due to pneumoconiosis was established pursuant to 20 C.F.R. §718.204(c). Accordingly, after determining, on remand, 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 on remand, the administrative law judge found that clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2),[2] and that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge awarded benefits on the survivor's claim.

On appeal, employer challenges the administrative law judge's findings pursuant to Sections 725.309(d) (2000), 718.202(a)(4), 718.204(c), and 718.205(c). Additionally, employer challenges the administrative law judge's determination as to the date from which benefits commence in the miner's claim. Employer also challenges the administrative law judge's award of attorney fees, and the denial of employer's request for reconsideration of the attorney fee award. Employer further contends that the administrative law judge's decision reflects bias, and that, therefore, the award of benefits must be vacated and the case remanded with instructions that it be assigned to a new administrative law judge "for a fresh look." Employer's Brief at 38-40. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief, but urges affirmance of the administrative law judge's finding as to the date from which benefits commence, if the award of benefits in the miner's claim is affirmed.

Claimant's counsel has filed a fee petition for work performed before the Board, in this appeal and the prior appeal, together with a motion for interest and a motion for fees incurred in defense of his fee petition. Employer has filed objections to the fee petition and the motions.

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,

[2] Because the survivor's claim is subject to the evidentiary limitations of 20 C.F.R. §725.414, the administrative law judge made separate findings on all the elements of entitlement in the survivor's claim. Thus, the administrative law judge considered the existence of pneumoconiosis again.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[3] The parties have responded.

The Director asserts, correctly, that Section 1556 is not applicable to the miner's claim because it was filed before January 1, 2005. However, the Director notes, Section 1556 may affect the survivor's claim because it was filed after January 1, 2005, claimant testified that the miner worked in the coal mines for about fifteen years, and employer does not contest that the miner had a totally disabling respiratory impairment at the time of his death. Director's Brief at 4. In response, claimant states that "there is a good possibility that [claimant's] claim is affected by" the amendments, and she moves that "an automatic entitlement" be granted. Claimant's Motion at 2. Employer responds, agreeing with the Director that Section 1556 is not applicable to the miner's claim. Employer's Brief at 2 n.1. Employer further asserts that, even if the award of benefits in the miner's claim is affirmed, claimant will not be automatically entitled to survivor's benefits based on the recent amendment to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), because the operative date for determining eligibility for survivor's benefits is the date the miner's claim was filed, not the date the survivor's claim was filed. Thus, employer contends that, because the miner filed his claim before January 1, 2005, the automatic entitlement provisions of Section 932(*l*) do not apply to the survivor's claim. Employer further contends that, in any event, the record does not reflect that claimant has been credited with the requisite fifteen years of coal mine employment. Employer's Brief at 2 n.1.

[3] Section 1556 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time his death, he was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was 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 pneumoconiosis. 30 U.S.C. §932(*l*).

Based upon the parties' responses, and our review, we conclude that Section 1556 may affect the survivor's claim. As will be discussed below, we cannot affirm the administrative law judge's award of benefits in the survivor's claim. Because we must remand this case for the administrative law judge to reconsider the merits of entitlement in the survivor's claim, we will also instruct the administrative law judge, on remand, to consider this case in light of the amendments to the Act.

We first address employer's challenge to the administrative law judge's award of benefits in the miner's claim. To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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 because he failed 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 C.F.R. §725.309(d) (2000); *Ross*, 42 F.3d at 997, 19 BLR at 2-18.

Employer challenges the administrative law judge's finding that the new biopsy evidence establishes the existence of clinical pneumoconiosis, pursuant to Section 718.202(a)(2).[4] The administrative law judge reiterated that, in his prior decision, he found that the biopsy evidence was in equipoise, because Drs. Dennis and Delara diagnosed pneumoconiosis, while Drs. Caffrey and Naeye opined that the miner did not have the disease, and all four pathologists were "eminently qualified." Decision and Order on Remand at 9; Administrative Law Judge's 2008 Decision and Order at 25. Therefore, the administrative law judge noted, he previously concluded that claimant did

[4] Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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." *Id.*

not meet her burden to establish the existence of clinical pneumoconiosis. Decision and Order on Remand at 9; Administrative Law Judge's 2008 Decision and Order at 25. The Board did not address this finding in the prior appeal.

On remand, the administrative law judge concluded that, contrary to his earlier finding, "Dr. Caffrey did not actually comment on the existence of simple pneumoconiosis." Therefore, the ALJ concluded that "the majority of the [biopsy evidence] support[s] a diagnosis of at least simple pneumoconiosis." Decision and Order on Remand at 10.

Initially, we reject employer's contention that the administrative law judge erred in revisiting the existence of clinical pneumoconiosis on remand. Employer asserts that, because the Board did not disturb the administrative law judge's prior finding that claimant failed to establish the existence of the disease, the issue was the law of the case. Employer's Brief at 25-26. Contrary to employer's argument, as the Board did not specifically affirm the previous finding that the existence of clinical pneumoconiosis was not established, and ultimately vacated the award of benefits, the administrative law judge did not err in revisiting his prior finding. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985).

Employer also contends that, assuming the administrative law judge could revisit the existence of clinical pneumoconiosis, the administrative law judge erred in relying solely on the numerical superiority of the biopsy opinions, and mischaracterized the opinion of Dr. Caffrey, in finding that clinical pneumoconiosis was established by biopsy evidence pursuant to Section 718.202(a)(2). Employer's arguments have merit, in part.

As the administrative law judge previously found that all of the pathologists are eminently qualified, there is no merit to employer's contention that the administrative law judge failed to consider both the quality and the quantity of the biopsy evidence in finding the existence of clinical pneumoconiosis established. We agree, however, that in weighing the biopsy opinions, the administrative law judge mischaracterized the opinion of Dr. Caffrey as not commenting on the existence of pneumoconiosis.

Dr. Caffrey reviewed the biopsy slides taken from five needle biopsies, as well as the biopsy report of Dr. Chan, the hospital pathologist.[5] In his written biopsy report, Dr. Caffrey concluded:

[5] Dr. Chan opined that the five needle biopsy specimens taken on March 15, 2002 revealed "fragments of bronchial mucosa and alveoli tissue with mild deposition of anthracotic pigment," with no evidence of malignancy, fungus or PCP organisms. Director's Exhibit 131 at 226.

> There is a mild to moderate amount of anthracotic pigment noted focally in these biopsies. There are no nodules, and there are no granulomas. There is no evidence of fibrosis and there is no evidence of malignancy. The lesion of simple coal workers' pneumoconiosis, namely anthracotic pigment with reticulin or collagen and focal emphysema, is not seen on these biopsies. There is definitely no evidence of complicated pneumoconiosis or diffuse fibrosis.

Director's Exhibit 131 at 311. The regulations specifically define clinical pneumoconiosis as requiring a "fibrotic reaction of the lung tissue," and provide that anthracotic pigment alone is not sufficient to diagnose the disease. 20 C.F.R. §718.202(a)(1), (2). As employer asserts, Dr. Caffrey stated that the biopsy sample did not reveal fibrosis, only anthracotic pigment. Further, Dr. Caffrey stated clearly that "the lesion of simple coal workers' pneumoconiosis . . . is not seen on these biopsies." Moreover, Dr. Caffrey testified by deposition that the biopsy results revealed that the miner did not have simple or complicated pneumoconiosis.[6] Director's Exhibit 131 at 244, 247. Thus, substantial evidence does not support the administrative law judge's finding that Dr. Caffrey did not comment on the existence of clinical pneumoconiosis. Consequently, we must vacate the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2), and, therefore, established a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), and remand this case for further consideration of the evidence, in accordance with *Ross*.

Employer next contends that, in finding legal pneumoconiosis[7] established at Section 718.202(a)(4), the administrative law judge erred in crediting Dr. Alam's opinion, and in discrediting the opinions of Drs. Rosenberg, Vuskovich, Branscomb, Fritzhand, Dahhan, Broudy, Fino, and Hussain. Employer's Brief at 27-36. Some of employer's arguments have merit.

Employer asserts that, in relying on Dr. Alam's opinion to find legal pneumoconiosis established, the administrative law judge mechanically credited Dr. Alam's opinion as that of the treating doctor. Employer's Brief at 27. Employer further argues that Dr. Alam did not specify that he was diagnosing legal pneumoconiosis, and

[6] Dr. Caffrey's deposition was admitted into the record in the miner's claim, without objection, as part of the Director's Exhibits. March 13, 2007 Hearing Tr. at 6.

[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).

that his pre-printed form reports provided no rationale for his opinion. Finally, employer contends that the administrative law judge erred in crediting Dr. Alam's opinion as "more consistent with the regulations" than those of employer's physicians. Employer's Brief at 27-29.

Contrary to employer's assertions, the administrative law judge acted within his discretion in finding 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. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); *Bray v. Director, OWCP*, 6 BLR 1-400 (1983); *Crosson v. Director, OWCP*, 6 BLR 1-809 (1984); Decision and Order on Remand at 3, 9-10. Moreover, a review of Dr. Alam's reports reveals that, while mixed, his diagnoses could support a finding of clinical pneumoconiosis, legal pneumoconiosis, or both.[8]

We agree with employer, however, that the administrative law judge erred in finding Dr. Alam's opinion to be better supported by the regulations than were the opinions of employer's physicians. Employer's Brief at 29. Specifically, as employer asserts, in crediting Dr. Alam's opinion, and discrediting employer's physicians' opinions, the administrative law judge appears to have misapplied the regulations and shifted the burden of proof to employer. Employer's Brief at 29-31. In crediting Dr. Alam's opinion, the administrative law judge stated:

> I must note that I find that the employer has not produced any well reasoned opinions to justify a rejection of Dr. Alam's rationale. That is because every one of employer's experts [] note significant [chronic obstructive pulmonary disease] with a preoccupation of Miner's smoking history, without considering that the effects from smoking and mining are indistinguishable.

Decision and Order on Remand at 4.

[8] In his 2002 report, Dr. Alam diagnosed "coal workers' pneumo[coniosis]" due to coal dust, which is consistent with a diagnosis of clinical pneumoconiosis. Director's Exhibit 127. In his 2004 report, Dr. Alam diagnosed chronic bronchitis, chronic dyspnea, and chronic cough, due to coal dust, which is consistent with a diagnosis of legal pneumoconiosis. Director's Exhibit 131 at 426. However, we note that, on a form attached to his 2004 report, Dr. Alam indicated by checkmark that he was diagnosing "clinical pneumoconiosis." Director's Exhibit 131 at 425.

The administrative law judge similarly discredited employer's physicians' opinions, both individually,[9] and as a group, finding that "all of employer's experts opine that smoking led to the [miner's] respiratory impairment, whereas, there is no way to differentiate among mining or smoking." Decision and Order on Remand at 8. The administrative law judge further found that employer's physicians "rendered opinions that are fundamentally flawed, as none of them [is] consistent with legislative facts established in 65 Federal Register, No. 245, 79940 (December 20, 2000), especially that emphysema or [chronic obstructive pulmonary disease] is 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" Decision and Order on Remand at 8-9, *citing* 20 C.F.R. §718.201(b).

Employer correctly argues that, contrary to the administrative law judge's finding, it is not a legislative fact that chronic obstructive pulmonary disease (COPD) *is* significantly related to coal mine dust in any individual case. Employer's Brief at 31. Rather, this is an element that claimant must prove. 20 C.F.R. §§718.201(a)(2); 718.203(a). Employer also correctly argues that, in discrediting all of employer's physicians because they opined that claimant's COPD is due to cigarette smoke, the administrative law judge appears to have misapplied the regulation at 20 C.F.R. §718.201(b). Employer's Brief at 30-31, *citing Nat'l Mining Ass'n v. Dep't of Labor* [*NMA*], 292 F.3d 849, 863, 23 BLR 2-124, 2-162 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001) and 68 Fed. Reg. 69932 (Dec. 15, 2003). As the Department of Labor has recognized, the United States Court of Appeals for the District of Columbia Circuit held in *NMA*, that "the regulation's plain text in no way indicates that medical reports will be excluded if they conclude that a particular miner's obstructive disease was caused by smoking, rather than mining." Employer's Brief at 30-31, quoting *NMA*, 292 F.3d at 863, 23 BLR at 2-162. Moreover, such a finding impermissibly shifts the burden of proof to employers to disprove the relationship between a miner's respiratory impairment and his coal dust exposure. *See NMA*, 292 F.3d at 862-63, 23 BLR at 2-161-62; *Williams*, 338 F.3d at 515, 22 BLR at 2-651.

[9] The administrative law judge discredited Dr. Vuskovich's opinion, that the miner's smoking habit combined with his alpha-1-antitrypsin deficiency to produce a deadly combination that exacerbated the miner's chronic obstructive pulmonary disease (COPD) and destroyed the miner's lung tissue, because "if COPD is exacerbated, there is no way to distinguish the effects from mining and smoking." Decision and Order on Remand at 7. The administrative law judge discredited Dr. Branscomb's opinion, that the miner's COPD was due to smoking and asthma, because "again, there is no way to differentiate the effects from smoking and from mining." Decision and Order on Remand at 7. The administrative law judge similarly noted that Dr. Dahhan also "rendered an opinion that Miner was compromised by smoking." Decision and Order on Remand at 7.

In light of the foregoing, we vacate the administrative law judge's finding that legal pneumoconiosis was established in the miner's claim pursuant to Section 718.202(a)(4), and we remand this case for reconsideration. In reweighing the medical opinions of record, the administrative law judge must take into account the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Moreover, the administrative law judge must be mindful that claimant bears the burden of proof.

Pursuant to Section 718.204(c), employer contends that the administrative law judge erred in crediting the opinions of Drs. Forehand, Sundaram, and Fritzhand, to find that disability causation was established. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, we also vacate his finding pursuant to Section 718.204(c). In light of our holding that the administrative law judge must reconsider the medical opinion evidence at Section 718.202(a)(4), we also instruct him to reconsider the medical opinions as to the cause of the miner's disability at Section 718.204(c), in light of the proper legal standard. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989). In addition, in considering Dr. Forehand's opinion on remand, the administrative law judge must consider that Dr. Forehand diagnosed total disability due to complicated pneumoconiosis, while the record does not contain a finding of complicated pneumoconiosis. Similarly, the administrative law judge must resolve the conflicting opinions of Dr. Alam in determining whether his opinion supports a finding of total disability due to clinical or legal pneumoconiosis, or both.[10] Finally, as employer asserts, Dr. Fritzhand diagnosed COPD due to smoking, and "pneumoconiosis" due to coal mine dust exposure, but did not indicate the extent to which each diagnosed condition contributes to the impairment. Director's Exhibit 11. Thus, as we have previously held, Dr. Fritzhand's opinion is not sufficient to establish disability causation. *See* [2001] *Bentley*, slip op. at 14 n.14; [1999] *Bentley*, slip op. at 4 n.3. As employer asserts, despite our specific remand instruction,

[10] As with his diagnoses of pneumoconiosis, Dr. Alam's opinions are unclear as to whether he diagnosed total disability due to clinical or legal pneumoconiosis. In his 2002 reports, Dr. Alam opined that "coal workers' pneumo[coniosis]" due to coal dust, and "chronic bronchitis," of unspecified cause, each contributed "80% – 100%" to claimant's disabling impairment. Director's Exhibit 127. In his 2004 report, Dr. Alam diagnosed chronic bronchitis, chronic dyspnea, and chronic cough, due to coal dust, which is consistent with a diagnosis of legal pneumoconiosis, but indicated on an attached form that he was diagnosing "clinical pneumoconiosis," and stated only that claimant's disabling impairment was due to "coal dust." Director's Exhibits 131 at 423, 425, 426.

the administrative law judge repeated his prior error at 20 C.F.R. §718.204(c) by crediting Dr. Fritzhand's opinion to find that the miner's totally disabling respiratory impairment is due, in part, to pneumoconiosis. Decision and Order on Remand at 11; Employer's Brief at 36.

Because we vacate the administrative law judge's finding of entitlement to benefits in the miner's claim, we also vacate the administrative law judge's finding as to the date from which benefits commence, pursuant to Section 725.503(b), and we remand this case to the administrative law judge for further consideration. If, on remand, the administrative law judge finds that claimant establishes entitlement to benefits, the administrative law judge must again determine the date from which benefits commence. *See* 20 C.F.R. §725.503(b). 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).

Next, we address employer's challenge regarding the administrative law judge's award of benefits in the survivor's claim. 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* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205, 718.304; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1), (3), or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112.

In determining that the biopsy evidence in the survivor's claim established the existence of clinical pneumoconiosis at Section 718.202(a)(2), the administrative law judge found, as he did in the miner's claim, that Dr. Caffrey did not comment on the existence of simple pneumoconiosis. Decision and Order on Remand at 18. Therefore, the administrative law judge concluded that the majority of the biopsy evidence, represented by the opinions of Drs. Dennis and Delara, who diagnosed pneumoconiosis, outweighed the contrary opinion of Dr. Naeye, that the miner did not have the disease. Decision and Order on Remand at 18. However, as set forth above, Dr. Caffrey specifically stated that "simple coal workers' pneumoconiosis . . . is not seen on these

biopsies." Director's Exhibit 131 at 311. Therefore, substantial evidence does not support the administrative law judge's determination that Dr. Caffrey did not comment on the existence of pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Thus, we vacate the administrative law judge's determinations, in the survivor's claim, that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205(c).

On remand, prior to considering the merits of the survivor's claim, the administrative law judge must make a determination as to the length of the miner's qualifying[11] coal mine employment,[12] and, if applicable, must consider claimant's entitlement to the presumption, set forth in Section 411(c)(4), that the miner's death was due to pneumoconiosis. The administrative law judge should allow for the submission of additional evidence by the parties to address the change in law, consistent with the evidentiary limitations at 20 C.F.R. §725.414. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). Should the administrative law judge determine that the presumption is not applicable, or if employer rebuts the presumption, then the administrative law judge should determine whether claimant has established the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and, if so, should consider whether pneumoconiosis hastened the miner's death, pursuant to 20 C.F.R. §718.205(c), in accordance with the standard set forth in *Williams*, 338 F.3d at 518, 22 BLR at 2-655.

Because we have vacated the administrative law judge's award of benefits in both the miner's and survivor's claims, there has not been a successful prosecution of the claims. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Therefore, the administrative law judge's Supplemental Decision and Order awarding attorney's fees,

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[11] Claimant must establish that the miner was employed for fifteen years or more in one or more underground coal mines, or in conditions substantially similar to conditions in an underground mine. 30 U.S.C. §921(c)(4).

[12] While the administrative law judge stated that twenty-three years of coal mine employment had been previously established, by stipulation, in the miner's claim, and further stated that the Board did not disturb this finding, there is no evidence in the record of such a stipulation. Decision and Order on Remand at 1, 7, 8, 9, 10. The record contains only a 1998 stipulation, before Administrative Law Judge Wood, to "at least ten years" of coal mine employment. August 20, 1997 Hearing Tr. at 6.

and the Order Denying Reconsideration of the fee award are not final and enforceable at this time. Consequently, we decline to address, as premature, employer's contentions with respect to the administrative law judge's award of attorney's fees.[13]

We have also considered employer's request to assign this case to another administrative law judge, on remand. Reluctantly, and in view of the administrative law judge's response to the Board's prior remand instructions, we hold that it is in the interest of justice and judicial economy to grant employer's request to remand this case for assignment to a new administrative law judge, for a "fresh look at the evidence" and proper application of the law to the evidence. *See Milburn Colliery v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

[13] Additionally, because there has not been a successful prosecution of the claims we decline to address, at this time, the two fee petitions filed by claimant for work before the Board. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993).

Accordingly, the administrative law judge's Decision and Order on Remand Award of Benefits is vacated, and the case is remanded for reassignment to a different administrative law judge for further consideration in accordance with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge