U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 17-0310 BLA and
17-0311 BLA

ALPHA BESS HAYES (Widow of, and on behalf of, DON HAYES, SR.)	)	
Claimant-Respondent	)	
v.	)	
ARCH ON THE NORTH FORK, INCORPORATED	)	DATE ISSUED: 03/30/2018
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
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 Awarding Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim (2009-BLA-5367, 2014-BLA-5883) rendered by Administrative Law Judge John P. Sellers, III, on a request for modification of a miner's subsequent claim and a survivor's claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1]

This is the second time that the Board has considered an appeal of an award of benefits in the miner's claim. In its previous decision, the Board affirmed, as unchallenged, the administrative law judge's finding that the miner had a totally disabling respiratory impairment. *Hayes v. Arch on the North Fork, Inc*., BRB No. 11-0252 BLA, slip op. at 3 n.3 (February 15, 2012). However, the Board vacated the administrative law judge's findings that Dr. Mannino's opinion was sufficient to establish the existence of legal pneumoconiosis, total disability due to legal pneumoconiosis, and a change in conditions.[2]

[1] The miner filed an initial claim for benefits on December 19, 1996, which was denied by the district director on April 17, 1997, because the miner did not establish that he had pneumoconiosis arising out of coal mine employment or that he was totally disabled due to pneumoconiosis. Miner Director's Exhibit 1. The miner did not take any further action prior to filing the current subsequent claim on October 18, 2004. Miner Director's Exhibit 3. Administrative Law Judge Joseph E. Kane denied the claim on February 29, 2008, finding that the miner established total disability, and a change in an applicable condition of entitlement at 20 C.F.R. §725.309, but did not establish the existence of pneumoconiosis or total disability causation. Miner Director's Exhibit 94. On June 5, 2008, the miner filed a request for modification of Judge Kane's denial of benefits. Miner Director's Exhibit 104. Administrative Law Judge John P. Sellers, III (the administrative law judge), issued a Decision and Order awarding benefits on November 29, 2010, which employer timely appealed. Miner Director's Exhibit 131.

[2] The rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act is not available in the miner's claim because the claim was filed prior to January 1, 2005. 30 U.S.C. 921(c)(4) (2012); 20 C.F.R. §718.305(a).

Id. at 5. The miner filed a request for reconsideration by the entire Board, which was granted. *Hayes v. Arch of the North Fork, Inc*., BRB No. 11-0252 BLA, slip op. at 3 (October 31, 2012) (unpub.) (en banc Decision and Order on Reconsideration) (McGranery and Hall, JJs, dissenting). The majority of the Board affirmed its previous Decision and Order and the case was remanded to the administrative law judge for reconsideration.[3] *Id*.

In the miner's claim, the administrative law judge found that the evidence was sufficient to establish that the miner had clinical and legal pneumoconiosis, and that he was totally disabled due to pneumoconiosis. Thus, the administrative law judge determined that claimant demonstrated a change in conditions, and that granting the miner's request for modification would render justice under the Act. The administrative law judge awarded benefits effective October 2004. Based on the award in the miner's claim, the administrative law judge found claimant automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[4] The administrative law judge further found that claimant independently established entitlement to survivor's benefits under Section 411(c)(4).

On appeal, employer argues that the administrative law judge erred in finding that claimant established that the miner was totally disabled due to legal pneumoconiosis. Employer also asserts that the administrative law judge erred in determining that benefits should commence in the miner's claim in October 2004, based on an erroneous finding that there was a mistake in a determination of fact. In the survivor's claim, employer contends that the administrative law judge erred in finding that the presumption of death due to pneumoconiosis at Section 411(c)(4) was not rebutted.[5] Claimant responds, urging

[3] During the pendency of the miner's claim on remand, the miner died. The administrative law judge remanded the case to the district director who substituted the miner's widow as claimant and consolidated the claims for decision. Miner Director's Exhibits 131, 133, 173.

[4] Under Section 422(*l*) of the Act, 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*) (2012); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-200 (2010).

[5] Eight months after filing a brief in support of the petition for review, and five months after the briefing schedule closed, employer moved to hold this case in abeyance pending a decision from the United States Supreme Court in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), *cert. granted*, U.S. , 2018 WL 386565 (Jan. 12, 2018). In its motion, employer argues for the first time that the manner in which Department of Labor administrative law judges are appointed may violate

affirmance of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[6]

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.[7] 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).

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the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 2-4. Because the Supreme Court will address in *Lucia* whether Securities and Exchange Commission administrative law judges are "inferior officers" within the meaning of the Appointments Clause, employer requests that this case be held in abeyance until the Court resolves the issue. *Id.* We generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). And while we retain the discretion in exceptional cases to consider nonjurisdictional constitutional claims that were not timely raised, *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991), employer has not attempted to show why this case so qualifies. Because employer did not raise the Appointments Clause issue in its opening brief, it waived the issue. Therefore, employer's motion to hold this case in abeyance is denied.

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established that the miner had twenty years of coal mine employment, clinical pneumoconiosis, and a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 4, 21, 29. Therefore, we also affirm as unchallenged the administrative law judge's determinations that claimant established a change in conditions at 20 C.F.R. §725.310, and that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 32-33.

[7] The record reflects that the miner's last coal mine employment was in West Virginia. Miner Director's Exhibits 1, 4. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

I. The Miner's Claim

To be entitled to benefits under the Act, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, the existence of a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 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 an award of benefits. *See 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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A. Existence of Legal Pneumoconiosis

After finding that the miner had clinical pneumoconiosis based on the autopsy evidence, the administrative law judge considered whether claimant also established that the miner had legal pneumoconiosis. Decision and Order on Remand at 21-29. We address the administrative law judge's findings on the issue of legal pneumoconiosis, as they are relevant to the administrative law judge's determination that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

The administrative law judge considered the medical opinions of Drs. Mannino, Baker, Buch, Broudy, Jarboe and Rosenberg. He found Dr. Mannino's diagnosis of legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) related to coal dust exposure entitled to substantial weight based on the physician's expertise in pulmonary epidemiology and because it is "consistent with science and studies endorsed by the [Department of Labor]." Decision and Order on Remand at 24-26; *see* Miner Director's Exhibits 107, 131. In addition, the administrative law judge noted that Dr. Mannino was the only physician to review the autopsy results, which revealed evidence of dust deposition in the miner's lungs. Decision and Order at 28. The administrative law judge gave "some probative weight" to the opinions of Drs. Baker and Buch that the miner's COPD was due to coal dust exposure, despite their reliance on smoking histories significantly less extensive than the administrative law judge found. *Id*. at 22-23; Miner Director's Exhibits 12, 72; Claimant's Exhibit 3.

The administrative law judge further noted that in its previous decision, the Board did not vacate his discrediting of the contrary opinions of Drs. Broudy, Jarboe and Rosenberg. Decision and Order on Remand at 23. He reasoned that "the two dissenting judges in the en banc decision observed that I had 'provided at least one valid reason for discrediting each of the contrary medical opinions of Drs. Broudy, Jarboe, and Rosenberg,

which the majority does not dispute . . . .'"[8] *Id*., *quoting Hayes*, BRB No. 11-0252 BLA, slip op. at 5 (en banc Decision and Order on Reconsideration). Additionally, the administrative law judge clarified that, contrary to the Board's "suggestion," he did not subject employer's experts to a higher degree of scrutiny in his 2010 Decision and Order. *Id*. at 28-29. Thus, the administrative law judge concluded that claimant established that the miner had legal pneumoconiosis. *Id*. at 29.

Employer argues that Dr. Mannino's misdiagnosis of complicated pneumoconiosis calls into doubt his diagnosis of legal pneumoconiosis and that the administrative law judge did not explain how Dr. Nichols's autopsy report supports Dr. Mannino's opinion. Employer further contends that the administrative law judge did not provide valid reasons for giving weight to the diagnoses of legal pneumoconiosis.

We reject employer's contentions. Employer has not explained how Dr. Mannino's allegedly incorrect diagnosis of complicated pneumoconiosis detracted from the credibility of his diagnosis of legal pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"). The administrative law judge permissibly determined that Dr. Mannino's diagnosis was entitled to probative weight because it is better supported by the more recent objective medical evidence.[9] *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 n.6 (1985); Decision and Order on Remand at 27-28; Director's Exhibit 131. Furthermore, employer does not challenge the administrative law judge's permissible findings that Dr. Mannino's opinion is sufficient to establish the existence of legal pneumoconiosis based on his "superior" credentials and because his opinion is consistent with the preamble to the 2001 regulations, which recognizes that cigarette smoking and coal dust exposure can have additive effects. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524,

[8] We affirm, as unchallenged on appeal, the administrative law judge's discrediting of the opinions of Drs. Broudy, Jarboe and Rosenberg on remand. *See Skrack*, 6 BLR at 1-711.

[9] In his October 29, 2013 report, Dr. Mannino stated that Dr. Nichols "found evidence of an acute pneumonia in the left upper lobe. Of note, on the microscopic sections 'polarizable materials, consistent with silica, are present in fibrotic reaction in all lung sections,' and the fourth listed diagnosis was 'Pulmonary silicoanthracosis.'" Miner Director's Exhibit 131, *quoting* Miner Director's Exhibit 139. Dr. Mannino also provided that "[t]he autopsy confirms what I had stated previously in 2008, that [the miner] did, in fact, [have] significant pneumoconiosis and that his severe [chronic obstructive lung disease] was significantly worsened by his exposure to coal . . . dust in his work site." *Id*.

536, 21 BLR 2-323, 2-341 (4th Cir. 1998); Decision and Order on Remand at 23-24, 26, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Similarly, the administrative law judge permissibly explained that, despite their reliance on less extensive smoking histories, he credited the opinions of Drs. Baker and Buch because they are also consistent with the regulations concerning the additive effects of cigarette smoking and coal dust exposure.[10] *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order on Remand at 22-23, *citing* 65 Fed. Reg. at 79,940 (Dec. 20, 2000). Consequently, we affirm the administrative law judge's finding that claimant "established legal pneumoconiosis by the weight of the medical opinion evidence" at 20 C.F.R. §718.202(a). Decision and Order on Remand at 29.

B. Total Disability Causation

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge noted that Drs. Broudy, Rosenberg, and Jarboe found that the miner was totally disabled due to COPD caused solely by smoking, which was contrary to the administrative law judge's finding that claimant proved the existence of legal pneumoconiosis. Decision and Order on Remand at 30. In contrast, he credited the opinions of Drs. Baker, Buch, and Mannino, and determined that claimant established that the miner was totally disabled due to legal pneumoconiosis. *Id*. The administrative law judge also considered Dr. Caffrey's opinion but found that although he diagnosed clinical pneumoconiosis, he did not address the issue of legal pneumoconiosis or whether it contributed to the miner's totally disabling respiratory impairment. *Id*. at 30-31.

Employer argues that the administrative law judge "erroneously conflated the issue of legal pneumoconiosis under Section 718.202(a)(4) with the issue of disability causation under Section 718.204(c)."[11] Employer's Brief at 6. Employer asserts that Dr. Mannino's

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[10] Dr. Baker diagnosed the miner with a severe obstructive ventilatory defect, mild resting arterial hypoxemia, and chronic bronchitis, which he found was due to a combination of cigarette smoking and coal dust exposure. Miner Director's Exhibit 12. Dr. Buch determined that the miner's "prolonged exposure to coal dust is the major cause of lung injury that has led to [the miner's] advanced pulmonary disease and chronic hypoxic respiratory failure." Miner Director's Exhibit 72.

[11] Employer also asserts that based on his finding of clinical pneumoconiosis, the administrative law judge should have focused on whether the miner's total disability was due to the simple clinical pneumoconiosis observed on autopsy. We reject employer's contention, as there is no provision in the law or regulations that once clinical or legal pneumoconiosis is established, a claimant is precluded from establishing total disability due to the other form of pneumoconiosis. Rather, the miner's totally disabling pulmonary

opinion is conclusory, does not specifically address disability causation, and is entitled to less weight because Dr. Mannino misdiagnosed complicated pneumoconiosis. Additionally, employer argues that the administrative law judge erred in requiring Dr. Caffrey to address whether legal pneumoconiosis caused the miner "any" disability. *Id*. at 15, *quoting* Decision and Order on Remand at 31.

Contrary to employer's contention, it was not error for the administrative law judge to rely on his findings concerning the existence of legal pneumoconiosis when weighing the disability causation opinions of the physicians who failed to diagnose the disease. The United States Court of Appeals for the Fourth Circuit has held that if an administrative law judge finds pneumoconiosis established, he or she may "only give weight to the causation opinion of the physicians who [did] not diagnose[] pneumoconiosis 'if he provide[s] specific and persuasive reasons for doing so, and those opinions could carry little weight at the most.'" *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006), *quoting Scott v. Mason Coal Co*., 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, 25 BLR 2-713, 2-721 (4th Cir. 2015). Consequently, the administrative law judge rationally gave less weight to the opinions of Drs. Broudy, Rosenberg, and Jarboe.[12]

In addition, the administrative law judge correctly found that Dr. Caffrey did not specifically address whether the miner was totally disabled due to legal pneumoconiosis. Decision and Order at 31; Miner Director's Exhibit 143 By contrast, Dr. Mannino clearly found that the miner "is totally disabled from a respiratory standpoint" by his COPD,[13] despite his erroneous diagnosis of complicated pneumoconiosis. Miner Director's Exhibits

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or respiratory impairment may stem from clinical pneumoconiosis or the more broadly defined legal pneumoconiosis. 20 C.F.R. §§718.201(a), 718.202; *see Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999).

[12] Based on our affirmance of the administrative law judge's decision to give them less weight for failing to diagnose legal pneumoconiosis, contrary to his finding, we need not address employer's additional contentions concerning the opinions of Drs. Jarboe, Caffrey, Broudy and Rosenberg. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[13] There is no dispute that the miner was totally disabled by his chronic obstructive pulmonary disease (COPD), and the administrative law judge rationally credited Dr. Mannino's opinion in finding that the miner's COPD is legal pneumoconiosis. Therefore, Dr. Mannino's diagnosis of totally disabling legal pneumoconiosis in the form of COPD establishes disability causation at 20 C.F.R. §718.204(c).

107, 131. Therefore, we affirm the administrative law judge's finding that the miner was totally disabled due to legal pneumoconiosis at 20 C.F.R. §718.204(c) and further affirm the award of benefits in the miner's claim.

C. Commencement Date for Benefits

Because this case involves a request for modification of the denial of the miner's subsequent claim, the administrative law judge was required to consider whether the evidence developed in the subsequent claim, in conjunction with the evidence submitted with the request for modification, established a change in conditions or a mistake in a determination of fact with regard to the prior denial of benefits. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-3 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-5, 18 BLR 2-26, 2-28 (4th Cir. 1993).

If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis, "provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge." *See* 20 C.F.R. §725.503(d)(2). If the date of onset of total disability due to pneumoconiosis is not ascertainable, benefits are payable "from the month in which the claimant requested modification." *Id*. If modification is based on the correction of a mistake in a determination of fact, including the ultimate fact of entitlement, the miner is entitled to benefits from the month he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the month he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(b), (d)(1); *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

In a joint dissent from the Board's October 31, 2012 en banc decision to remand this claim, Judges Hall and McGranery stated:

> Claimant's subsequent claim was denied by Administrative Law Judge Joseph E. Kane on February 29, 2008, who found that the evidence was sufficient to establish total respiratory disability but insufficient to establish the existence of pneumoconiosis. In opinions submitted in 2008 and in 2010, Dr. Mannino diagnosed legal pneumoconiosis and opined that the degree of [the miner's] respiratory impairment far exceeded the degree of impairment he would expect to see if it had been caused solely by [the miner's] smoking history. [Judge Kane's February 29, 2008] Decision and Order at 14-15. The administrative law judge credited Dr. Mannino's opinion as an expert in the epidemiology of respiratory disease, and reasonably interpreted the doctor's opinion as establishing that [the miner's] coal dust exposure was essential to

> render [the miner's] respiratory impairment totally disabling. Hence, Judge Kane had made a mistake in fact in determining that [the miner] did not have pneumoconiosis and was not totally disabled due to pneumoconiosis. Accordingly, the administrative law judge was correct in ordering benefits to commence as of October, 2004, the month in which [the miner] filed his subsequent claim.

Hayes, BRB No. 11-0252 BLA, slip op. at 5-6 (en banc Decision and Order on Reconsideration). Relying on this reasoning, the administrative law judge determined on remand that claimant established a mistake of fact and awarded benefits beginning in October 2004, when the miner filed the subsequent claim for benefits. Decision and Order on Remand at 34.

Employer argues that the administrative law judge erred in relying on the dissenting opinion in the Board's prior decision to find that the prior denial contained a mistake in a determination of fact and to identify October 2004 as the onset date. Employer also asserts the administrative law judge erred in stating that he was precluded from finding a change in conditions because "one would have to conclude that between 2008 and 2010, coal dust had suddenly begun to play a role in [the miner's] respiratory disability, which would mean that the cause came after the effect." Employer's Brief at 19, *quoting* Decision and Order on Remand at 34. Employer maintains that the administrative law judge's rationale conflicts with the recognition that pneumoconiosis is a latent and progressive disease. Consequently, employer contends that a change in conditions is the only basis for modification of Judge Kane's denial, requiring the date for the commencement of benefits to be no earlier than the date the miner requested modification.

Based on the facts of this case, we reject employer's assertion that it was improper for the administrative law judge to refer to the onset analysis laid out by the dissenting judges when the case was previously before the Board.[14] Contrary to employer's suggestion, the administrative law judge did not merely adopt the reasoning in the dissent. Rather, he reviewed his credibility findings and explained why they supported his conclusion that the prior denial contained a mistake of fact. Decision and Order on Remand at 33-34. In addition, the administrative law judge's analysis, and the conclusions he reached, are rational and supported by substantial evidence. At the time of Administrative Law Judge Joseph E. Kane's denial of benefits on February 29, 2008, he found that the miner established total disability, but did not establish the existence of pneumoconiosis or

[14] The majority did not reach the onset issue because they vacated the administrative law judge's no rebuttal findings, and the award of benefits, and remanded the case to the administrative law judge for reconsideration.

disability causation. Judge Kane's February 29, 2008 Decision and Order at 20; Miner Director's Exhibit 94. Dr. Mannino, whose opinion the administrative law judge primarily relied on to find total disability causation established, stated that legal pneumoconiosis was a necessary cause of the miner's totally disabling respiratory impairment, which existed at least as early as February 29, 2008. Miner Director's Exhibits 107, 131.

In light of his crediting of Dr. Mannino's opinion, which we have affirmed, the administrative law judge permissibly found that Judge Kane's 2008 denial of benefits contained a mistake in a determination of fact on the existence of pneumoconiosis and disability causation. *See Owens*, 14 BLR at 1-50. We therefore affirm the administrative law judge's findings and hold that error, if any, in the administrative law judge's discussion of change in conditions is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984). Finally, because the administrative law judge accurately determined that there is no evidence establishing when claimant became totally disabled due to pneumoconiosis, nor any credible evidence that claimant was not totally disabled due to pneumoconiosis subsequent to the filing of the 2004 claim, we affirm his determination that claimant's entitlement to benefits commenced on October 1, 2004. *See* 20 C.F.R. §725.503(d)(1); *Owens*, 14 BLR at 1-50.

II. The Survivor's Claim

Relying on the award of benefits in the miner's claim, the administrative law judge found that claimant satisfied the prerequisites for automatic entitlement under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012). Decision and Order on Remand at 35. Because employer raises no allegations of error in the administrative law judge's application of Section 422(*l*), we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*).[15] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[15] Based on our affirmance of the award of survivor's benefits under Section 422(*l*), 30 U.S.C. §932(*l*), we need not address employer's allegation that the administrative law judge erred in finding, in the alternative, that employer could not rebut the Section 411(c)(4) presumption of death due to pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge