

BRB No. 08-0580 BLA

F.R.)
(Widow of D.R.))
)
Claimant-Respondent)
)
v.)
)
ROBERT COAL COMPANY) DATE ISSUED: 05/27/2009
)
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

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

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5447) of Administrative Law Judge Janice K. Bullard (the administrative law judge) awarding benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with thirty-five years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer also contends that the administrative law judge failed to consider whether the evidence established that the miner's death was due to clinical, as opposed to legal, pneumoconiosis,¹ as the administrative law judge relied on a finding of clinical pneumoconiosis to find the existence of pneumoconiosis established. Claimant²

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

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

² Claimant is the widow of the miner. Director's Exhibit 2. After a lengthy procedural history, the miner, who filed claims on June 23, 1973 and March 31, 1983, was awarded benefits. Specifically, the United States Court of Appeals for the Fourth Circuit reversed the Board's decision affirming an administrative law judge's denial of benefits and remanded the case with directions to award benefits to the miner. *Robinson v. Pickland and Mather/Leslie Coal Co.*, No. 92-2106 (4th Cir. June 21, 1993)(unpub.). The miner died on January 30, 2006. Director's Exhibit 1. Claimant filed her survivor's

responds, urging affirmance of the administrative law judge's award of survivor's benefits.³ The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response.⁴ The Director takes no position on the ultimate merit of this claim, but urges the Board to reject employer's assertion that claimant's entitlement to benefits hinges on whether the miner's death was due to clinical, as opposed to legal, pneumoconiosis at Section 718.205(c). The Director contends that whether the existence of clinical or legal pneumoconiosis was established does not affect the outcome of this case, because employer stipulated to the existence of both clinical and legal pneumoconiosis at the September 12, 2007 hearing, Hearing Transcript at 14-15, and the administrative law judge's analysis of the evidence indicates that she assumed that the miner suffered from both manifestations of the disease.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁵ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

claim on April 24, 2006. Director's Exhibit 2.

³ We affirm the administrative law judge's finding of thirty-five years of coal mine employment and her findings that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ Employer filed briefs in reply to the response briefs filed by claimant and the Director, Office of Workers' Compensation Programs (the Director), reiterating its prior contentions.

⁵ The record indicates that the miner was last employed in the coal mining industry in West Virginia. Director's Exhibits 3, 10. 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 (1989)(*en banc*).

Because this survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁶ See *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

The following evidence is relevant to death causation: The death certificate signed by Dr. Tuanquin, the miner's treating physician, as well as the reports of Drs. Tuanquin, Cohen, Renn, and Tuteur addressing the cause of death. In the death certificate, Dr. Tuanquin listed the immediate cause of the miner's death as septic shock and septicemia due to urosepsis and urinary tract infection. Director's Exhibit 11. Dr. Tuanquin also listed CVA with left hemiparesis, ASHD, chronic obstructive pulmonary disease (COPD), and aspiration pneumonitis, as significant conditions contributing to the miner's death. *Id.* In a subsequent report dated June 7, 2006, Dr. Tuanquin opined that the miner expired from overwhelming lung infections and pneumonitis. Director's Exhibit 12. Dr. Tuanquin also opined that the miner's underlying severe COPD was a main contributor to his demise. *Id.*

⁶ Section 718.205(c) provides that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

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

20 C.F.R. §718.205(c).

Dr. Cohen found that the miner had coal workers' pneumoconiosis and COPD due to coal mine employment and smoking. In reports dated August 13, 2007 and October 19, 2007, Dr. Cohen opined that the miner's underlying coal workers' pneumoconiosis was the cause of his inability to transfer gas normally and hastened his death from aspiration pneumonia and sepsis, *i.e.*, "[the miner's] 35 years of coal mine employment significantly contributed to the development of his obstructive lung disease and severe gas exchange abnormalities with exercise" and "this impairment hastened his death from urosepsis and aspiration pneumonia." Claimant's Exhibits 5, 8.

By contrast, in a report dated April 18, 2007, Dr. Renn opined that the miner had coal workers' pneumoconiosis and COPD due to smoking. Employer's Exhibit 1. Dr. Renn further opined that the miner's coal workers' pneumoconiosis did not cause, contribute to, or hasten his demise, although COPD was a main contributor to the miner's death. *Id.* Dr. Tuteur found that the miner had coal workers' pneumoconiosis and COPD due to smoking. In a report dated September 22, 2006, Dr. Tuteur opined that neither coal workers' pneumoconiosis nor any other coal mine dust related disease hastened the miner's death. Director's Exhibit 13.

In addressing the evidence at Section 718.205(c), the administrative law judge discounted the opinions of Drs. Renn and Tuteur, that pneumoconiosis did not hasten the miner's death, as she found they were speculative and not well-reasoned. Decision and Order at 15, 16. Instead, the administrative law judge gave substantial weight to Dr. Cohen's opinion that pneumoconiosis hastened the miner's death because she found it was well-documented and well-reasoned, and it was supported by the death certificate, signed by Dr. Tuanquin, the miner's treating physician, and by Dr. Tuanquin's opinions.⁷ *Id.* at 16. Consequently, the administrative law judge concluded that claimant established that the miner's death was due to pneumoconiosis at Section 718.205(c). *Id.*

Employer asserts that the administrative law judge erred in crediting the opinion of Dr. Cohen, who believed that the miner's gas exchange abnormalities were due to pneumoconiosis and contributed to his death, instead of the opinions of Drs. Renn and Tuteur, who believed that the miner's gas exchange problems did not stem from

⁷ In considering Dr. Tuanquin's treatment records, death certificate, and report dated June 7, 2006, the administrative law judge noted that Dr. Tuanquin considered the miner's pneumoconiosis to be a contributing factor to his chronic obstructive pulmonary disease (COPD), and therefore a contributing factor in his death. Decision and Order at 14. However, the administrative law judge declined to give Dr. Tuanquin's opinion *controlling weight* because "the physician did not provide a full rationale for his conclusion that the [miner] 'expired from overwhelming lung infections and pneumonitis and that his underlying severe [COPD] was a main contributor to his demise.'" *Id.*

pneumoconiosis and that the condition of the miner's lungs did not affect the course of the septicemia shock that caused his death. The administrative law judge found that Dr. Cohen explained how the evidence of abnormalities on gas exchange, seen on the miner's exercise blood gas study, affected the miner's lungs, by stating:

Dr. Cohen looked at the [m]iner's blood gas studies upon exercise, which he believed showed that the [m]iner's lungs were compromised to the point where he could not ward off infection or pneumonia. Dr. Cohen noted that the [m]iner was on supplemental oxygen, and therefore, could (sic) blood gas studies that showed normal results were not reliable. He explained that some of those tests produced results in excess of what would be expected upon room air, which is the most accurate way to measure the ability of the lungs to exchange gases.

Decision and Order at 14-15.

Consequently, the administrative law judge accorded significant weight to Dr. Cohen's opinion that "normal results in gas studies conducted on an individual using oxygen are not reliable." *Id.* at 15.

In considering Dr. Renn's opinion regarding the results of the miner's blood gas studies, however, the administrative law judge found the opinion speculative and not well-reasoned because:

Dr. Renn used a calculation to convert the results of a test administered to a person on oxygen to results using room air. However, that calculation was not fully explained, nor fully documented. In addition, Dr. Renn assumed that the tests were administered appropriately, although [he] admitted that he had no actual knowledge of how the tests were conducted.

Id.

The administrative law judge also discredited Dr. Renn's opinion that the October 2004 blood gas test was conducted on room air because:

This conclusion ignores the well-documented medical evidence that the [m]iner had been prescribed supplemental oxygen since 1995. Dr. Renn did not offer an explanation for concluding that the [m]iner would not have been using oxygen on this test, other than his observation that there was no documentation regarding the [m]iner's use of oxygen at that time.

Id.

Further, in finding that Dr. Renn's opinion regarding the blood gas evidence was internally inconsistent, the administrative law judge stated:

[Dr. Renn] agreed that the last exercise blood gas study of record demonstrated total disability (EX 2 at 37), but then did not consider the studies that showed desaturation of oxygen with exercise when opining that blood gas studies were normal. This is a significant inconsistency, because Dr. Renn concluded that the [m]iner "did not have any problem with an interference with gas transfer from any disease of his respiratory system, and therefore that would not have influenced his ability to live through this septic shock and urosepsis." EX 2 at 12.

Id. The administrative law judge also found that Dr. Renn's opinion, that the miner would have died as he did regardless of the condition of his lung, was inconsistent with his suggestion that a problem with gas transfer could have affected the miner's ability to withstand septic shock and urosepsis. *Id.* The administrative law judge concluded, therefore, that Dr. Renn's opinions were "internally inconsistent, based at least in part upon conjecture, and do not entirely address all of the evidence." *Id.* The administrative law judge also found that Dr. Renn's opinions were compromised by speculation, as she noted that "[d]espite the treating records that support the [m]iner's prescription for oxygen due to pneumoconiosis, Dr. Renn speculates that [the miner] was prescribed oxygen for his sleep apnea. EX 2 at 34." *Id.*

Turning to Dr. Tuteur's opinion, the administrative law judge found that "Dr. Tuteur also emphasized normal resting blood gas [results] shown on testing in 2004, without explaining the impact of the [m]iner's use of oxygen that was noted in other tests that produced results in the normal range." *Id.* Furthermore, the administrative law judge found that "Dr. Tuteur acknowledged that the [m]iner had pneumoconiosis, but did not consider whether the abnormal gas exchange with exercise could be the result of pneumoconiosis." *Id.* The administrative law judge concluded, therefore, that Dr. Tuteur's opinion was speculative and not well-documented.

The administrative law judge also found that Dr. Tuteur's opinion, that pulmonary emboli could have caused the miner's abnormal gas exchange with exercise on the arterial blood gas study, was conjecture because:

Dr. Tuteur also emphasized normal resting blood gas shown on testing in 2004, without explaining the impact of the [m]iner's use of oxygen that was noted in other tests that produced results in the normal range. Dr. Tuteur acknowledged that the [m]iner had pneumoconiosis, but did not consider whether the abnormal gas exchange with exercise could be the result of pneumoconiosis. Instead, Dr. Tuteur hypothesized that pulmonary emboli

could have caused the abnormality. This conjecture is not supported by the treatment records, and I accord substantial weight to Dr. Cohen's observation that if pulmonary emboli had been suspected, the [m]iner's treating physician would have tested for the presence of that condition. CX 8. Although Dr. Tuteur stated that the [m]iner's breathlessness could be due to pneumoconiosis, he nevertheless looked for an alternative diagnosis, not of record, to explain the [m]iner's symptoms and test results.

Id. at 15-16.

However, the administrative law judge did not consider Dr. Tuteur's September 10, 2007 deposition. Employer's Exhibit 3 (Dr. Tuteur's Deposition). In that deposition, contrary to the administrative law judge's finding, Dr. Tuteur discussed the effects of the miner's use of supplemental oxygen on his blood gas test results. Employer's Exhibit 3 (Dr. Tuteur's Deposition at 15-20, 25-41, 44-50). Dr. Tuteur also discussed the effects that the miner's coal workers' pneumoconiosis and the abnormal results on his exercise blood gas study could have had in hastening his death, by stating:

If coal workers' pneumoconiosis were of sufficient severity and profusion to produce permanent irreversible impairment of gas exchange, manifested by worsening of gas exchange during exercise, but normal at rest, then super imposing urosepsis and bacteremia and septic shock, that impairment of gas exchange could adversely affect the outcome by hastening his death by a little bit....

However, those are not the facts that we have.

Employer's Exhibit 3 (Dr. Tuteur's Deposition at 42-43). Instead, Dr. Tuteur stated:

He has a PO₂ of 84 - - or I'm sorry, 88, in 2004. When he had impairment of gas exchange during exercise, his PO₂ at room air dropped to as low as 64. That's a huge difference. And with the utmost of reasonable certainty, identifies interval improvement in lung function from 1985 to 2004, a condition that does not occur in the irreversible condition of coal workers' pneumoconiosis.

Id. (Dr. Tuteur's Deposition at 43).

Thus, because Dr. Tuteur explained why he opined that the miner did not have coal workers' pneumoconiosis even though the results of the blood gas test during exercise were abnormal, the administrative law judge mischaracterized Dr. Tuteur's opinion, *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-26 (1991); *Tackett v. Director*,

OWCP, 7 BLR 1-703, 1-706 (1985), and the case must be remanded for the administrative law judge to reconsider Dr. Tuteur's opinion, along with the opinions of Drs. Cohen and Renn.

Moreover, we agree with employer that the administrative law judge erred in uncritically accepting Dr. Cohen's opinion, regarding the effect of the miner's use of oxygen on the blood gas tests, while critically scrutinizing the opinions of Drs. Renn and Tuteur on the same issue. This disparate treatment affected her weighing of the evidence. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999) (*en banc*). Thus, as employer asserts, the administrative law judge erred in summarily according greater weight to Dr. Cohen's opinion regarding the blood gas study evidence. On remand, in weighing the opinions of Drs. Cohen, Renn and Tuteur on the issue, the administrative law judge must apply the same critical scrutiny in analyzing the credibility of all of the opinions. *Hughes*, 21 BLR at 1-140.

Employer additionally asserts that the administrative law judge erred in finding that the miner's death certificate supported Dr. Cohen's opinion that clinical pneumoconiosis contributed to the miner's death. Specifically, employer argues that the death certificate did not constitute substantial evidence because it was not a reasoned and documented opinion. Employer also argues that Dr. Tuanquin did not opine, in the death certificate, that either clinical or legal pneumoconiosis contributed to the miner's death. Employer maintains that Dr. Tuanquin's finding of COPD on the death certificate is not a finding of clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), and is not a finding of legal pneumoconiosis, because Dr. Tuanquin did not attribute it to coal mine employment, *see* 20 C.F.R. §718.201(a)(2). Employer's Brief at 14.

Dr. Cohen opined that the miner's death was hastened by his clinical and legal pneumoconiosis. Claimant's Exhibits 5, 8. In the death certificate, Dr. Tuanquin listed COPD as a significant condition contributing to the miner's death. Director's Exhibit 11. The administrative law judge acknowledged that Dr. Tuanquin was the miner's treating physician. Decision and Order at 14. The administrative law judge noted that Dr. Tuanquin's treatment records were in the record and that "they clearly demonstrate that Dr. Tuanquin diagnosed the [m]iner with pneumoconiosis and prescribed him oxygen for that condition." *Id.* The administrative law judge stated that "[she was] able to infer from the record as a whole that Dr. Tuanquin considered the [m]iner's pneumoconiosis to be a contributing factor to his COPD, and therefore a contributing factor in his death." *Id.* The administrative law judge also stated that she declined to accept Dr. Renn's characterization that Dr. Tuanquin's June 7, 2006 report, opining that the miner expired from overwhelming lung infections and pneumonitis and that the miner's underlying severe COPD was a main contributor to his demise, was a reversal of the death certificate, as she "infer[red] that Dr. Tuanquin meant to explain how the [m]iner's history of lung infections and COPD contributed to [his] death." *Id.*

The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge did not explain how she inferred, from Dr. Tuanquin’s treatment records and the death certificate, that the doctor believed that the miner’s pneumoconiosis contributed to his COPD, and thereby contributed to his death. *Wojtowicz*, 12 BLR at 1-165. Although Dr. Tuanquin noted on a prescription for oxygen that coal workers’ pneumoconiosis was the reason the miner needed oxygen, Dr. Tuanquin’s treatment records do not otherwise indicate that the miner had either clinical or legal pneumoconiosis. Director’s Exhibit 13. In the treatment records, Dr. Tuanquin diagnosed COPD, but he did not render an opinion regarding the cause of this disease. *Id.* In addition, although employer conceded, at the hearing, that the miner had pneumoconiosis, it did not specifically indicate whether it was conceding that the miner had both clinical and legal pneumoconiosis.⁸ Hearing Transcript at 14-15. Further, the administrative law judge specifically found that the medical opinion evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(4). The administrative law judge did not address whether the medical opinion evidence established legal pneumoconiosis. Decision and Order at 12. The record contains medical reports opining that the miner’s COPD was due to smoking. *Id.* at 7. Thus, the administrative law judge did not point to any credible medical opinion evidence

⁸ At the hearing, employer conceded that, in light of the Fourth Circuit’s decision awarding benefits on the miner’s claim, the existence of pneumoconiosis was no longer an issue in this case and the sole issue to be decided by the administrative law judge was whether the miner’s death was due to pneumoconiosis. Employer noted that while the Fourth Circuit’s decision was “not a model of clarity of exactly what kind of pneumoconiosis they [found]”...“either pneumoconiosis is fine.” Hearing Transcript at 14. The Director, referring to employer’s statements at the hearing, contends that employer stipulated to the existence of both clinical and legal pneumoconiosis.

We note, however, that the issue in this case is not whether the existence of pneumoconiosis was established for entitlement purposes at 20 C.F.R. Part 718. Rather, the issue is whether the administrative law judge properly found that the miner’s death was due to pneumoconiosis. In order to make a reasoned finding on that issue, the administrative law judge must consider whether the medical opinion evidence established clinical pneumoconiosis, legal pneumoconiosis or both and, then, whether the evidence establishes that the miner’s death was due to clinical pneumoconiosis, legal pneumoconiosis, or both. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

that provided a causal link between the diagnosis of COPD on the death certificate and legal pneumoconiosis. *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). Instead, the administrative law judge noted that she “inferred” that Dr. Tuanquin considered that pneumoconiosis was a cause of the miner’s COPD and, therefore, a cause of death and “inferred” that Dr. Tuanquin meant to explain how the miner’s history of lung infections and COPD contributed to his death. Decision and Order at 14. However, in considering Dr. Tuanquin’s opinion, the administrative law judge stated that she declined to give Dr. Tuanquin’s opinions *controlling weight* because they were inadequately explained. *Id.* Consequently, we conclude that the administrative law judge did not adequately explain why she found that the miner’s death certificate supported Dr. Cohen’s opinion attributing death to legal pneumoconiosis at Section 718.205(c). *Wojtowicz*, 12 BLR at 1-165.

In view of the foregoing, we vacate the administrative law judge’s finding that the evidence established that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and remand the case for further consideration of all the evidence in accordance with the APA. On remand, the administrative law judge must determine whether the evidence establishes the existence of legal pneumoconiosis in addition to clinical pneumoconiosis and then determine whether the evidence establishes that the miner’s death was due to clinical pneumoconiosis, legal pneumoconiosis, or both. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge