BRB Nos. 10-0491 BLA
and 10-0532 BLA

JOYCE RICE (o/b/o STELLA STILTNER, deceased widow of JAMES STILTNER) Claimant-Respondent v. WELLMORE COAL COMPANY and A.T. MASSEY c/o ACORDIA EMPLOYERS SERVICE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/24/2011 DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (06-BLA-6124 and 06-BLA-6125) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) awarding benefits on a miner's claim[1] and a survivor's claim filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public 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). The administrative law judge adjudicated the claims pursuant to the regulations contained in 20 C.F.R. Part 718. After crediting the miner with 32 years of coal mine employment, based on the parties' "stipulation," the administrative law judge found that the new autopsy and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). Consequently, the administrative law judge found that the new evidence established a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge also found that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Further, the administrative law judge found that the autopsy evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.[2] Accordingly, the administrative law judge awarded benefits in the miner's claim. Regarding the survivor's claim, the administrative law judge credited the miner with 30 years of coal mine employment and 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)(1), (2), (4), and 718.203(b). The administrative law judge also found that the x-ray and autopsy evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and (b), thereby establishing invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits in the survivor's claim.[3]

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[1] The miner filed his claim on February 7, 1986. Miner's Claim Director's Exhibit 1. He died on June 17, 2004. Miner's Claim Director's Exhibit 193; Survivor's Claim Director's Exhibit 7. The miner's widow filed her survivor's claim July 15, 2004. Survivor's Claim Director's Exhibit 2.

[2] Although the administrative law judge found that the evidence established a total respiratory disability pursuant to 20 C.F.R. §718.204(b), he also found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[3] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to

On appeal, employer challenges the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304 in the miner's and the survivor's claims. Employer also challenges the admissibility of Dr. Perper's autopsy report in the survivor's claim. Claimant responds, urging affirmance of the administrative law judge's award of benefits in both claims. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

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pneumoconiosis or, relevant to survivor's claims, that the miner's death was due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. Because both the miner's and the survivor's claims were filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

[4] The administrative law judge's findings that the new x-ray and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4), that the new evidence established a change in conditions pursuant to 20 C.F.R. §725.310, that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), that the evidence established a total respiratory impairment pursuant to 20 C.F.R. §718.204(b), and that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) are not challenged on appeal. We, therefore, affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record indicates that the miner was employed in the coal mining industry in Virginia. Miner's Claim Director's Exhibit 1; Survivor's Claim Director's Exhibit 4. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Additionally, the Fourth Circuit has held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Initially, we will address employer's contention that the administrative law judge erred in finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) in the miner's claim. The administrative law judge considered the autopsy reports of Drs. Perper, Abrenio, Crouch, and Naeye. Dr. Perper opined that the miner had severe complicated pneumoconiosis with lesions exceeding 1.0 centimeters. Miner's Claim Claimant's Exhibit 2. Dr. Abrenio opined that the miner had complicated coal workers' pneumoconiosis (progressive massive fibrosis). Miner's Claim Director's Exhibit 193. By contrast, Dr. Crouch opined that the miner did not have complicated pneumoconiosis (massive fibrosis). Miner's Claim Employer's Exhibit 1. Similarly, Dr. Naeye opined that the miner did not have complicated coal workers' pneumoconiosis. Miner's Claim Employer's Exhibit 2. The administrative law judge gave little weight to Dr. Naeye's opinion because he found that "[Dr. Naeye] failed to indicate the actual size of the lesions he observed or whether they would appear on an

x-ray as opacities greater than one centimeter." Decision and Order at 56. The administrative law judge then gave greater weight to Dr. Perper's opinion than to Dr. Crouch's contrary opinion, because he found that Dr. Perper was the most qualified physician. Further, the administrative law judge found that Dr. Perper's opinion, that the evidence established pathological lesions that were greater than one centimeter, was supported by Dr. Abrenio's opinion.[6] Hence, the administrative law judge found that the autopsy evidence established the presence of complicated pneumoconiosis.

Employer asserts that Dr. Perper's opinion does not satisfy the legal standard at 20 C.F.R. §718.304(b), which requires that "the autopsy evidence must establish 'massive lesions' from a chronic dust disease of the lung." Employer's Brief at 13. Citing *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561, the administrative law judge correctly stated that the Fourth Circuit has held that "[the statute] requires…that a miner have 'massive lesions,' which…are lesions that would show on an x-ray as opacities of at least one centimeter." Decision and Order at 56. In this case, Dr. Perper opined that the miner had severe complicated pneumoconiosis with lesions exceeding 1.0 centimeters. Claimant's Exhibit 2. Dr. Perper also noted that "a pathological lesion of a given size would appear on chest x-rays[] as being only of the same size or larger than its actual size." *Id*. Dr. Perper therefore found that "a 1.0 [centimeter] or larger actually measured tissue lesion would appear on x-rays as an opacity of 1.0 [centimeter] or larger, but never smaller."[7] *Id*. Thus, because the administrative law judge reasonably found that Dr. Perper diagnosed a pathological condition that would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray, we reject employer's assertion that Dr. Perper's opinion does not satisfy the legal standard at 20 C.F.R. §718.304(b).

[6] As noted by the administrative law judge, Dr. Abrenio observed pneumoconiotic lesions measuring up to 1.5 centimeters and Dr. Perper observed pneumoconiotic lesions measuring greater than 1.5 centimeters, while Dr. Crouch observed pneumoconiotic lesions measuring up to 6.0 milliliters. Decision and Order at 79.

[7] Employer additionally asserts that "Dr. Perper's belief that a one centimeter lesion on autopsy would equate to a one centimeter opacity by x-ray is inconsistent with the Act and regulations and cannot form a valid basis for finding complicated pneumoconiosis." *Id*. at 15. Contrary to employer's assertion, Dr. Perper's equivalency determination was based on pathological lesions that were greater than one centimeter, and not pathological lesions that were one centimeter. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Employer next asserts that the administrative law judge erred in failing to offer a valid basis for his equivalency determination. The administrative law judge determined that Dr. Perper's opinion was persuasive based on the doctor's "comment[s] on the relationship between a lesion's actual size and its appearance on an x-ray." Decision and Order at 56. After noting that Dr. Perper's finding of lesions measuring over one centimeter was supported by Dr. Abrenio's report, the administrative law judge found that "the evidence establishes the existence of pathological lesions greater than one centimeter, and, based on Dr. Perper's equivalency opinion, I find that these lesions would appear on x-rays as opacities greater than one centimeter." *Id*. Thus, the administrative law judge reasonably found that Dr. Perper's opinion established the presence of complicated pneumoconiosis in accordance with *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100, and *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561. Consequently, we reject employer's assertion that the administrative law judge erred in failing to offer a valid basis for his equivalency determination.

Employer further asserts that the administrative law judge erred in failing to address Dr. Perper's inconsistent findings concerning the sizes of lesions observed on the tissue slides. Contrary to employer's assertion, Dr. Perper rendered consistent findings with respect to the sizes of the lesions revealed on the tissue slides. Dr. Perper diagnosed complicated coal workers' pneumoconiosis (progressive massive fibrosis) with pneumoconiotic fibro-anthracotic lesions exceeding 1.5 centimeters. Miner's Claim Claimant's Exhibit 2. Dr. Perper also diagnosed severe complicated coal workers' pneumoconiosis with lesions exceeding 1.0 centimeters." *Id*. Because Dr. Perper's finding of lesions exceeding 1.0 centimeters is not inconsistent with the doctor's finding of lesions exceeding 1.5 centimeters, we reject employer's assertion that the administrative law judge erred in failing to address Dr. Perper's inconsistent findings concerning the sizes of lesions observed on the tissue slides.

Employer additionally asserts that the administrative law judge erred in finding that Dr. Perper's qualifications exceeded those of Dr. Crouch. After noting the sizes of the lesions observed by Drs. Perper, Abrenio, and Crouch, the administrative law judge gave greater weight to Dr. Perper's opinion because he found that Dr. Perper was the most qualified pathologist. 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 his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge noted that both Dr. Perper and Dr. Crouch are clinical professors of pathology. Decision and Order at 47. The administrative law judge also noted that "Dr. Perper is Board-certified in Anatomic Pathology, Surgical Pathology, and Forensic Pathology and served as Chairman of the Pennsylvania State Board of Medicine." *Id*. In addition, the administrative law judge noted that "Dr. Crouch is

Board-certified in Anatomic Pathology and has a doctorate degree in biochemistry." *Id*. However, the administrative law judge did not explain why he found that Dr. Perper's qualifications were superior to those of Dr. Crouch. *Wojtowicz*, 12 BLR at 1-165. Thus, because Dr. Crouch's qualifications are comparable to those of Dr. Perper, the administrative law judge erred in giving greater weight to Dr. Perper's opinion than to Dr. Crouch's contrary opinion, based on Dr. Perper's qualifications.

Employer also asserts that the administrative law judge did not provide a valid reason for discounting Dr. Naeye's opinion. Specifically, employer asserts that the administrative law judge mischaracterized Dr. Naeye's opinion regarding the size of the lesions that were seen on autopsy slides because, it alleges, "Dr. Naeye indicated that the largest cite (sic) he noted was '3.5 [millimeters] in its greatest dimension'." Employer's Brief at 17. The administrative law judge noted that "Dr. Naeye stated that two centimeters was the required size to diagnose complicated pneumoconiosis based on the report, *Pathology Standards for Coal Workers' Pneumoconiosis*." Decision and Order at 56. The administrative law judge also stated that "Dr. Naeye noted that none of the evidence indicated lesions of two centimeters or more, but he failed to indicate the actual size of the lesions he observed or whether they would appear on an x-ray as opacities greater than one centimeter." *Id*. Hence, the administrative law judge gave little probative weight to Dr. Naeye's opinion.

Contrary to employer's assertion that the administrative law judge mischaracterized Dr. Naeye's opinion regarding the size of the lesions that were seen on autopsy slides, the administrative law judge reasonably found that, while Dr. Naeye noted that the largest deposit of black pigment that was on microscopic lung tissue was 3.5 millimeters in its greatest dimension, Dr. Naeye did not discuss the size of the associated lesions. Decision and Order at 56 n.16; Miner's Claim Employer's Exhibit 2. Thus, we reject employer's assertion that the administrative law judge mischaracterized Dr. Naeye's opinion regarding the size of the lesions that were seen on autopsy slides. Furthermore, we reject employer's assertion that the administrative law judge discredited Dr. Naeye's opinion because Dr. Naeye relied on the "two centimeter standard" for establishing the presence of complicated pneumoconiosis by autopsy or biopsy evidence.

However, contrary to the administrative law judge's finding, the Fourth Circuit did not hold that a physician opining that the miner did not have pathological evidence of complicated pneumoconiosis was required to render an equivalency determination with regard to whether the diagnosed pathological condition would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. Moreover, the administrative law judge did not apply the same standard regarding equivalency determinations to Dr. Naeye's opinion that he applied to the

opinions of Drs. Abrenio and Crouch.[8] *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134, 1-139-40 (1999) (*en banc*). Thus, employer's assertion that the administrative law judge did not provide a valid reason for discounting Dr. Naeye's opinion has merit.

Employer additionally asserts that Dr. Abrenio's opinion does not support Dr. Perper's opinion that the miner had complicated pneumoconiosis. Specifically, employer argues Dr. Abrenio offered no measurements of the nodules based on autopsy slides and the doctor offered no basis for his finding that coal dust was the source of this condition. Contrary to employer's assertion, Dr. Abrenio, in his autopsy report, observed "multiple gray-black nodules varying in sizes for up to 1.5 [centimeters] in diameter with marked interstitial fibrosis, based on his gross examination of the miner's lungs. Further, Dr. Abrenio diagnosed complicated coal workers' pneumoconiosis (progressive massive fibrosis). Miner's Claim Director's Exhibit 193. The administrative law judge stated that "Dr. Abrenio observed pneumoconiotic lesions measuring up to 1.5 centimeters, and Dr. Perper noted pneumoconiotic lesions greater than 1.5 centimeters." Decision and Order at 56. Thus, the administrative law judge permissibly determined that "[Dr. Perper's] finding of lesions measuring over one centimeter is supported by Dr. Abrenio's report." *Id*. Consequently, we reject employer's assertion that the administrative law judge erred in finding that Dr. Abrenio's opinion supported Dr. Perper's opinion that the miner had complicated pneumoconiosis.

Nevertheless, in view of the forgoing, we vacate the administrative law judge's finding, in the miner's claim, that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b), and remand the case for further consideration of the autopsy evidence in accordance with the APA. *See Perry v. Mynu Coals, Inc*., 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006); *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *see also Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007)(holding that the miner must also establish that his complicated pneumoconiosis arose out of coal mine employment).

If the administrative law judge finds that the relevant evidence at 20 C.F.R. §718.304(b) establishes the presence of complicated pneumoconiosis thereunder, then he must weigh the evidence together under 20 C.F.R. §718.304(a)-(c) before determining whether the evidence is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. *Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Melnick*, 16 BLR at 1-31.

[8] The administrative law judge acknowledged that "Dr. Perper is the *only* physician to specifically comment on the relationship between a lesion's actual size and its appearance on an x-ray." Decision and Order at 56 (emphasis added).

Turning to the survivor's claim, we address employer's contention that the administrative law judge erred in finding that the x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). The administrative law judge considered four interpretations of x-rays dated October 3, 1985, November 18, 1991, March 11, 2003, and June 20, 2003, as well as several x-ray interpretations from treatment records of the miner. Dr. Wiot, who is dually-qualified as a B reader and a Board-certified radiologist, read the October 3, 1985 x-ray as negative for pneumoconiosis. Survivor's Claim Employer's Exhibit 1. Dr. Cappiello, a dually-qualified radiologist, classified the large opacities on the November 18, 1991 x-ray as Category A. Survivor's Claim Claimant's Exhibit 2. Dr. M. Patel, a dually-qualified radiologist, classified the large opacities on the March 11, 2003 x-ray as Category A. Survivor's Claim Claimant's Exhibit 1. Dr. Fino, a B reader, read the June 20, 2003 x-ray as negative for pneumoconiosis. Survivor's Claim Employer's Exhibit 1. Lastly, the interpretations of x-rays by Dr. D.R. Patel from the treatment records of the miner do not specifically note the presence or absence of pneumoconiosis.

The administrative law judge gave greater weight to the readings of Drs. Cappiello and M. Patel, based on the recency of their x-rays and their status as dually-qualified radiologists. Further, the administrative law judge gave no probative value to Dr. D.R. Patel's readings of x-rays from the miner's treatment records because he could not determine whether Dr. D.R. Patel found pneumoconiosis and the doctor never provided measurements for any of the changes that were observed.[9] Hence, the administrative law judge found that the x-ray evidence established the presence of complicated pneumoconiosis.

Employer asserts that the administrative law judge's finding, in the miner's claim, that the x-ray evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) must be considered *res judicata* and collateral estoppel in the survivor's claim. To successfully invoke the doctrine of collateral estoppel in the survivor's case, employer must establish the following criteria:

> (1) the issue sought to be precluded is identical to the one previously litigated;

[9] We reject employer's assertion that the administrative law judge erred in failing to properly consider the x-ray interpretations from the treatment records in this case because they are relevant to excluding a diagnosis of complicated pneumoconiosis. Contrary to employer's assertion, the administrative law judge properly gave no probative weight to the x-ray interpretations from the miner's treatment records because they did not specifically note the presence or absence of pneumoconiosis. Decision and Order at 75, 78-79; Miner's Claim Employer's Exhibit 3.

> (2) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
> (3) determination of the issue must have been necessary to the outcome of the prior determination;
> (4) the prior proceeding must have resulted in a final judgment on the merits; and
> (5) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Collins v. Pond Creek Mining Co., 468 F.3d 213, 218-19, 23 BLR 2-394, 2-403-06 (4th Cir. 2006); *Sedlack v. Braswell Services Group, Inc*., 134 F.3d 219, 224 (4th Cir. 1998); *Hughes*, 21 BLR at 1-137. A fact established by stipulation or concession may not be given collateral estoppel effect in a subsequent proceeding because "the issue was not actually litigated." *Justice v. Newport News Shipbuilding & Drydock Co*., 34 BRBS 97, 98 (2000).

Because the administrative law judge's award of benefits in the miner's claim is before the Board on appeal, the prior proceeding did not result in a final judgment on the merits. *Hughes*, 21 BLR at 1-137-38. Consequently, a required element of collateral estoppel was not established. *Collins*, 468 F.3d at 217, 23 BLR at 2-401. Thus, we reject employer's assertion that the administrative law judge's finding, in the miner's claim, that the x-ray evidence did not establish the presence of complicated pneumoconiosis precluded him from finding that the x-ray evidence established the presence of complicated pneumoconiosis in the survivor's claim, based on the doctrine of collateral estoppel.[10]

Employer also asserts that the administrative law judge erred in failing to consider the negative readings of the March 11, 2003 x-ray by Drs. Hayes and Barrett as admissible rebuttal evidence under 20 C.F.R. §725.414(a)(3)(ii) in the survivor's claim. Contrary to employer's assertion, the negative readings of the March 11, 2003 x-ray by Drs. Hayes and Barrett are not part of the record in the survivor's claim. Rather, these x-ray readings were admitted into the record in the miner's claim during the August 23, 2007 hearing. Hearing Tr. at 5-7. By Order dated September 2, 2009, the administrative

[10] We also reject employer's assertion that the administrative law judge was precluded from finding that the x-ray evidence established the presence of complicated pneumoconiosis in the survivor's claim based on the doctrine of *res judicata*. Contrary to employer's assertion, the principle of *res judicata* concerns claim preclusion, not issue preclusion. *See generally Johnson v. Eastern Associated Coal Corp.*, 8 BLR 1-248 (1985) (recognizing that a survivor's claim and a deceased miner's claim are separate claims).

law judge found that the evidentiary limitations set forth at 20 C.F.R. §725.414 applied to the survivor's claim, and not the miner's claim. Hence, the administrative law judge denied employer's motion to consolidate the evidentiary records in the miner's and survivor's claims. Employer could have designated the x-ray readings of Drs. Hayes and Barrett as part of its case, but it did not do so. 20 C.F.R. §725.414(a)(3)(i), (ii). Thus, we reject employer's assertion that the administrative law judge erred in failing to consider the negative readings of the March 11, 2003 x-ray by Drs. Hayes and Barrett as rebuttal evidence under 20 C.F.R. §725.414(a)(3)(ii) in the survivor's claim.

Employer further asserts that Dr. M. Patel's interpretation of the March 11, 2003 x-ray was equivocal. Section 718.304(a) provides invocation of the irrebuttable presumption "if such miner is suffering or suffered from a chronic dust disease of the lung which," when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B, or C. 20 C.F.R. §718.304(a). Dr. M. Patel classified the large opacities on the March 11, 2003 x-ray as Category A and noted bilateral apical masses, Category A opacities of CWP, and neoplasm not ruled out. Survivor's Claim Claimant's Exhibit 1. In addition, Dr. M. Patel noted bilateral upper zone calcified granulomas. *Id*. Because Dr. M. Patel definitively found Category A opacities of CWP on the March 11, 2003 x-ray pursuant to 20 C.F.R. §718.304(a), *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987), we reject employer's assertion that Dr. M. Patel's finding of complicated pneumoconiosis on the March 11, 2003 x-ray was equivocal.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

With respect to the autopsy evidence, employer contends that the administrative law judge erred in finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). The administrative law judge considered the autopsy reports of Drs. Perper, Abrenio, and Crouch. The administrative law judge gave greater weight to Dr. Perper's opinion that the miner had complicated pneumoconiosis than to the contrary opinion of Dr. Crouch because he found that Dr. Perper was the most qualified pathologist. The administrative law judge also found that Dr. Perper's opinion was supported by Dr. Abrenio's opinion. Hence, the administrative law judge found that the autopsy evidence established the presence of complicated pneumoconiosis.

Employer asserts that the administrative law judge's admission of Dr. Perper's autopsy report violated the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(2)(i). Specifically, employer argues that Dr. Abrenio's report was the only

autopsy report that claimant could submit into the record in the survivor's claim. Employer maintains that "claimant could not submit 'rebuttal' to Dr. Crouch's opinion, because Dr. Crouch was rebuttal evidence by employer to Dr. Abrenio's opinion." Employer's Brief at 9. Contrary to employer's assertion, the administrative law judge reasonably admitted Dr. Perper's autopsy report into the record, as claimant submitted Dr. Perper's autopsy report as rebuttal evidence to Dr. Crouch's autopsy report. 20 C.F.R. §725.414(a)(2)(ii). In an evidence summary form dated August 13, 2007, employer designated Dr. Crouch's autopsy report as part of its affirmative evidence. Employer did not change its designation of Dr. Crouch's autopsy report during the hearing or in its closing brief. In an evidence summary form dated August 13, 2007, claimant designated Dr. Abrenio's autopsy report as part of her affirmative evidence. Additionally, claimant designated Dr. Perper's autopsy report as rebuttal evidence during the hearing and in her closing brief. The administrative law judge noted that "[t]he autopsy reports of Dr. Abrenio (DXS 8), Dr. Perper (CXS 4), and Dr. Crouch (EXS 7) were submitted into evidence in this [survivor's] claim." Decision and Order at 72. The administrative law judge also noted that Dr. Perper's autopsy report was admissible as rebuttal evidence in response to Dr. Crouch's autopsy report. *Id*. at 68. Thus, the administrative law judge's reasonably admitted Dr. Perper's autopsy report into the record as rebuttal evidence to Dr. Crouch's autopsy report. 20 C.F.R. §725.414(a)(2)(ii). Consequently, we reject employer's assertion that the administrative law judge's admission of Dr. Perper's autopsy report violated the evidentiary limitations.

Employer also asserts that the administrative law judge erred in finding that Dr. Perper's qualifications exceeded those of Dr. Crouch. The administrative law judge noted that both Dr. Perper and Dr. Crouch are clinical professors of pathology and Board-certified in Anatomic Pathology. Decision and Order at 76. The administrative law judge additionally noted that Dr. Perper is Board-certified in Surgical Pathology and Forensic Pathology. *Id*. However, as discussed *supra*, with respect to the miner's claim, the administrative law judge did not explain why he found that Dr. Perper's qualifications were superior to those of Dr. Crouch. *Wojtowicz*, 12 BLR at 1-165. Thus, because Dr. Crouch's qualifications are comparable to those of Dr. Perper, the administrative law judge erred in giving greater weight to Dr. Perper's opinion than to Dr. Crouch's contrary opinion, based on Dr. Perper's qualifications. Consequently, we vacate the administrative law judge's finding that the autopsy evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b), and remand the case for further consideration of the autopsy evidence in accordance with the APA.

Finally, employer contends that the administrative law judge's admission of Dr. Perper's medical opinion into the record violated the evidentiary limitations set forth at 20 C.F.R. §725.414. Specifically, employer argues that "Dr. Perper's report makes reference to multiple elements of evidence from the miner's claim which have not been admitted into the record in the [survivor's] claim." Employer's Brief at 8. By Order

dated September 2, 2009, the administrative law judge addressed the admissibility of Dr. Perper's opinion. The administrative law judge noted that, in the course of preparing an autopsy report, Dr. Perper relied on a number of documents that exceeded the evidentiary limitations. The administrative law judge further stated:

> In this case the material considered by Dr. Perper is admissible on the living miner's claim, so redacting it from the record of this consolidated hearing is not appropriate. The most feasible approach appears to be the last one identified by the Board, factoring Dr. Perper's reliance on the material in excess of the evidence limitations when evaluating his opinion.

Order at 3. In his Decision and Order, the administrative law judge stated that "Dr. Perper's opinions that rely on medical evidence not in the record will be given less weight than the other medical opinion evidence." Decision and Order at 68. At Section 718.304(c), the administrative law judge considered the opinions of Perper, Rasmussen, and Dahhan.[11] The administrative law judge gave greater weight to the opinions of Drs. Rasmussen and Dahhan than to Dr. Perper's opinion "[b]ecause Dr. Perper's review of the autopsy slides has already been weighed and considered above, and because most of the additional records Dr. Perper reviewed were not admitted into evidence in the survivor's claim." *Id*. at 80. Thus, because the administrative law judge acted within his discretion in considering Dr. Perper's opinion at Section 718.304(c), *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting), we reject employer's assertion that the administrative law judge's admission of Dr. Perper's medical opinion violated the evidentiary limitations set forth at 20 C.F.R. §725.414.

In view of the foregoing, we vacate the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304, and remand the case for further consideration of all the evidence thereunder. *See Perry*, 220 F.3d at 364, 23 BLR at 2-384; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561; *see also Mitchell*, 479 F.3d at 337, 24 BLR at 2-28 (holding that the miner must also establish that his complicated pneumoconiosis arose out of coal mine employment).

If the administrative law judge finds that the relevant evidence at 20 C.F.R. §718.304(b) establishes the presence of complicated pneumoconiosis thereunder, then he must weigh the evidence together under 20 C.F.R. §718.304(a)-(c) before determining

[11] Drs. Perper and Rasmussen opined that the miner had complicated pneumoconiosis, while Dr. Dahhan opined that the miner did not have complicated pneumoconiosis.

whether the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. *Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Melnick*, 16 BLR at 1-31.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge