U.S. Department of Labor

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

BRB Nos. 16-0029 BLA
and 16-0102 BLA

MYRTLE BARNETT (o/b/o and Widow of ROBERT C. BARNETT)	)	
Claimant-Respondent	)	
v.	)	
SEWELL COAL COMPANY/ MEADOW RIVER COAL COMPANY	)	DATE ISSUED: 05/22/2017
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decisions and Orders Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Maia S. Fisher (Nicholas C. Geale, Acting Solicitor of Labor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decisions and Orders Awarding Benefits (2012-BLA-6014 and 2013-BLA-5909) of Administrative Law Judge Richard A. Morgan, rendered on a miner's subsequent claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The miner filed a subsequent claim on October 31, 2011.[2] The district director issued a Proposed Decision and Order awarding benefits in the miner's claim on May 31, 2012, and employer requested a hearing before the Office of Administrative Law Judges (OALJ). The miner died on November 11, 2012. Claimant[3] filed her survivor's claim on June 13, 2013, and on June 21, 2013, the district director issued a Proposed Decision and Order awarding benefits. Employer thereafter requested a hearing before the OALJ on the survivor's claim. The two claims were consolidated for hearing before the administrative law judge on May 20, 2015.

In a Decision and Order issued in the miner's claim on September 10, 2015, the administrative law judge determined that the miner had at least nineteen years of underground coal mine employment, based on the parties' stipulation, and adjudicated the claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(i), (iv) and, consequently, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). Therefore, the administrative law judge determined that the claimant invoked the rebuttable presumption that the miner was totally disabled due to

[1] Employer's appeal in the miner's claim (2012-BLA-6014) was assigned BRB No. 16-0029 BLA, and its appeal in the survivor's claim (2013-BLA-5909) was assigned BRB No. 16-0102 BLA. By Order dated November 30, 2015, the Board consolidated these appeals for purposes of decision only. *Barnett v. Sewell Coal Co.*, BRB Nos. 16-0029 BLA and 16-0102 BLA (Nov. 30, 2015) (unpub. Order).

[2] The miner filed two prior claims for benefits. The miner's first claim, filed on July 26, 1972, was denied because he did not establish any element of entitlement. Director's Exhibit 1. The miner's second claim, filed on May 9, 1991, was also denied for failure to establish any element of entitlement. Director's Exhibit 2. The miner took no further action until he filed the current subsequent claim. Director's Exhibit 4.

[3] Claimant is the widow of the miner. In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim.

pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] The administrative law judge also found that employer did not rebut the presumption and awarded benefits in the miner's claim.

In a separate Decision and Order in the survivor's claim, also issued on September 10, 2015, the administrative law judge found that claimant was automatically entitled to receive benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[5] Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal in the miner's claim, employer contends that the administrative law judge did not properly weigh the medical opinion evidence, and did not comply with the requirements of the Administrative Procedure Act (APA),[6] when finding that employer failed to rebut the Section 411(c)(4) presumption. In the survivor's claim, employer argues that the administrative law judge erred in awarding benefits under Section 932(*l*) before the award of benefits in the miner's claim became final. Claimant has not filed a response to either appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed responses to both appeals. In the miner's claim, the Director maintains that employer's arguments are based on a mischaracterization of its burden of proof on rebuttal. In the survivor's claim, the Director urges the Board to reject employer's argument that Section 422(*l*) is inapplicable because the award of benefits in the miner's claim is not final.[7]

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[4] Under Section 411(c)(4) of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act), a miner's total disability is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[5] Section 422(*l*) of the Act provides that the 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).

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

[7] We affirm, as unchallenged on appeal, the administrative law judge's findings that: The miner had at least seventeen years of qualifying coal mine employment; claimant established the miner's total respiratory or pulmonary disability; claimant

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.[8] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. The Miner's Claim

Once claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[9] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. 718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 38-39, 41.

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invoked the Section 411(c)(4) presumption; and claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction 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).

[9] 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). "Arising out of coal mine employment" means that the disease or impairment is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(1).

A. Rebuttal of the Presumed Existence of Legal Pneumoconiosis

Employer contends that the administrative law judge "did not provide the reasons and bases" for his decision to discount the opinions of Drs. Zaldivar and Oesterling, when determining that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[10] Employer's Brief at 19. Employer maintains that, contrary to the administrative law judge's findings, Drs. Zaldivar and Oesterling adequately explained why they did not diagnose legal pneumoconiosis.[11]

Employer's contention with respect Dr. Zaldivar's opinion[12] does not have merit, as the administrative law judge permissibly determined that Dr. Zaldivar focused on the causal relationship between cigarette smoking and asthma, and did not "adequately explain why [the miner's] emphysema is not significantly related to, or substantially aggravated by, coal mine dust exposure." Decision and Order at 38; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). As the administrative law judge provided a valid basis for discrediting Dr. Zaldivar's opinion that claimant did not suffer from legal pneumoconiosis, this finding is affirmed. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998).

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[10] We affirm the administrative law judge's finding that employer did not disprove the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B), as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 39.

[11] Employer also contends that the administrative law judge "erred in finding that the medical opinions support a finding of legal pneumoconiosis." Employer's Brief at 12. We reject this argument, as it suggests that claimant had the burden to establish the existence of legal pneumoconiosis. Once claimant established invocation of the Section 411(c)(4) presumption, the existence of pneumoconiosis and total disability due to pneumoconiosis were presumed facts that employer was required to rebut by a preponderance of the evidence. 20 C.F.R. §718.305(d)(1)(i), (ii); 20 C.F.R. 718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015)

[12] Based on an examination of the miner on September 22, 2012, and a review of the miner's medical records, Dr. Zaldivar diagnosed emphysema, asthma, and an irreversible obstructive impairment caused by cigarette smoking. Employer's Exhibits 2, 7. He explained that the lack of reversible obstruction seen on the miner's pulmonary function studies did not rule out asthma because asthma causes remodeling of the lungs. *Id*.

With respect to the administrative law judge's determination that Dr. Oesterling's opinion[13] was insufficient to establish rebuttal of the presumed existence of legal pneumoconiosis, we agree with employer that the administrative law judge's finding is inadequately explained. The administrative law judge first acknowledged Dr. Oesterling's statement that the contributions of smoking and coal dust exposure to emphysema can be differentiated. Decision and Order at 38. He then stated: "[H]owever, Dr. Perper opined that the contributions of smoking and coal mine dust to emphysema cannot be differentiated. Further, as explained by Dr. Perper, focal emphysema, also caused by coal dust, is seen around pneumoc[oni]otic nodules and Dr. Sawyer observed emphysematous change surrounding anthracotic macrophages." Decision and Order at 38; Claimant's Exhibits 1, 4, 5; Employer's Exhibit 4. The administrative law judge found the opinion of Dr. Oesterling to be "well-reasoned and documented" in light of his detailed description of the autopsy material that he reviewed and his explanation of how this material supported his opinion. Decision and Order at 38. The administrative law judge then reiterated his discrediting of Dr. Zaldivar's opinion and concluded, "I find the opinions of Drs. Oesterling and Zaldivar, that coal mine dust did not contribute to [the miner's] respiratory affliction, namely, his chronic obstructive pulmonary disease (COPD), emphysema and chronic bronchitis and bronchiolitis, do not disprove the existence of legal pneumoconiosis." *Id*.

As employer has alleged, the administrative law judge's finding does not satisfy the requirements of the APA because the administrative law judge did not adequately identify the rationale for his determination that Dr. Oesterling's opinion was insufficient to establish the absence of legal pneumoconiosis. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Although the administrative law judge suggested that he gave more weight to the observations by Drs. Perper and Sawyer on the etiology of the miner's emphysema, he did not explicitly resolve the conflict between Dr. Oesterling and Dr. Perper with respect to the ability to distinguish between the effects of smoking and

[13] Dr. Oesterling reviewed the miner's autopsy slides and in a report dated August 17, 2013, he diagnosed chronic obstructive pulmonary disease (COPD)/moderate centrilobular emphysema and chronic bronchiolitis. Employer's Exhibit 4. He observed that the miner's COPD/emphysema "can largely be attributed to cigarette smoke inhalation." *Id*. Dr. Oesterling also attributed the miner's chronic bronchiolitis to smoking, as it was associated with smoker's macrophages. *Id*. However, in his subsequent deposition, Dr. Oesterling agreed that coal mine dust could have an additive effect on bronchiolitis. Employer's Exhibit 6 at 18. Dr. Oesterling also indicated that the miner's emphysema was panlobular. *Id*. at 36, 38-39. He identified the cause of the miner's emphysema as cigarette smoking, explaining that coal dust exposure is associated with centrilobular emphysema, while tobacco smoke is associated with panlobular emphysema. *Id*. at 48.

coal dust exposure, and among Drs. Oesterling, Perper, and Sawyer as to whether the miner had the type of emphysema that coal dust exposure can cause or aggravate.[14] Accordingly, we vacate the administrative law judge's finding that Dr. Oesterling's opinion was insufficient to rebut the presumed existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(A) and remand this case to the administrative law judge for reconsideration of Dr. Oesterling's opinion. Based on these determinations, we must further vacate the award of benefits in the miner's claim.

B. Rebuttal of the Presumed Fact of Total Disability Causation

Relying on his findings at 20 C.F.R. §718.305(d)(1)(i)(A), the administrative law judge concluded that employer did not rebut the presumed fact that the miner's total respiratory or pulmonary disability was caused by pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 39-41. Employer argues that the administrative law judge erred in finding that the opinions of Drs. Zaldivar and Oesterling were insufficient to satisfy employer's burden to rebut the presumed fact of total disability causation. Employer's allegation lacks merit with respect to the administrative law judge's weighing of Dr. Zaldivar's opinion. The administrative law judge rationally determined that the reasons he provided for discrediting the opinion of Dr. Zaldivar on the issue of legal pneumoconiosis also undercut his opinion that the miner's disabling respiratory or pulmonary impairment was unrelated to pneumoconiosis, whether legal or clinical. *See* 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 25 BLR 2-713 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 39-41.

With respect to Dr. Oesterling's opinion, the administrative law judge provided a definitive rationale for determining that it did not satisfy employer's burden under 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge stated, "Dr. Oesterling opined that he could not rule out coal mine dust as a cause of centrilobular emphysema, which he observed in the miner's histologic slides." Decision and Order at 41, *citing* Employer's Exhibit 6 at 49. As employer maintains, however, the administrative law judge did not consider the entirety of Dr. Oesterling's comments on the etiology of the miner's emphysema. Dr. Oesterling testified at his deposition that the miner had diffuse

[14] The administrative law judge found that Dr. Perper had better qualifications than Dr. Oesterling, and that Dr. Sawyer was "unranked" because her qualifications were not in the record. Decision and Order at 35. However, the administrative law judge did not cite Dr. Perper's allegedly superior qualifications in support of his finding that Dr. Oesterling's opinion was insufficient to rebut the presumed existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A).

emphysema, transitioning from severe centrilobular emphysema to panlobular emphysema. *Id*. at 36, 38-39. He identified the cause of the miner's emphysema as cigarette smoking, explaining that coal dust exposure is associated with centrilobular emphysema, while tobacco smoke is associated with panlobular emphysema. *Id*. at 48. On cross-examination by claimant's counsel, the following exchange occurred:

> Q. [C]oal mine dust inhalation can cause centrilobular emphysema, the fact that panlobular emphysema is present wouldn't rule out that coal mine dust caused centrilobular emphysema then, would it?
>
> A. Well, it doesn't – it doesn't rule it out. The coal dust can contribute to that.
>
> And I think any place where you're reading about emphysema in miners, they will comment on the fact that both tobacco smoke and coal dust are – can result in forms of emphysema.
>
> The thing we have to do – and by "we" – the physicians involved, pulmonologists, pathologists – we have to try to separate the effects [of smoking and coal dust exposure] to the best of our ability. Now, that's unfortunately not yet an absolute science. But as I've said, there are certain indications that one is more prevalent than the other.
>
> And obviously, one of the other things you have to realize is when you're looking at areas of emphysema, if you see heavy dust deposits throughout the membranes in that area, then coal dust is a major factor. If you don't see that same diffuse distribution of coal dust, and you know there's a history of tobacco smoke inhalation, and we're seeing more of a panlobular emphysema, then it's the cigarette [smoking], it's not a combination of the two.

Id. at 50. The administrative law judge correctly noted Dr. Oesterling's statement that the presence of panlobular emphysema does not preclude a determination that coal dust exposure, i.e., legal pneumoconiosis, played a role in the miner's total respiratory or pulmonary disability. Decision and Order at 41. However, he did not address Dr. Oesterling's conclusion that he was able to differentiate between cigarette smoking and legal pneumoconiosis as causes, based on the "indications" he observed in the histologic evidence. Employer's Exhibit 6 at 50.

Because the administrative law judge did not address this aspect of Dr. Oesterling's opinion, his finding does not comply with the APA. *See Wojtowicz*, 12 BLR at 1-165. We therefore vacate the administrative law judge's determination that Dr.

Oesterling's opinion is insufficient to rebut the presumed fact of total disability causation under 20 C.F.R. §718.305(d)(1)(ii).

C. Remand Instructions

In sum, we have vacated the administrative law judge's weighing of Dr. Oesterling's opinion under 20 C.F.R. §§718.305(d)(1)(i)(A) and (ii), and remanded for reconsideration of whether Dr. Oesterling's opinion is sufficient to establish rebuttal of the Section 411(c)(4) presumption. Because employer must disprove the existence of both legal and clinical pneumoconiosis, the administrative law judge's unchallenged finding that employer failed to establish that claimant does not have clinical pneumoconiosis precludes rebuttal of the presumption under 20 C.F.R. §718.305(d)(1)(i). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). The existence of legal pneumoconiosis may still be relevant, however, to the second prong of rebuttal: if the administrative law judge determines that clinical pneumoconiosis played no role in the miner's disability, and that the miner does not suffer from legal pneumoconiosis, the employer will have established that pneumoconiosis played "no part" in the miner's disability. 20 C.F.R. §718.305(d)(1)(ii). Moreover, the existence of legal pneumoconiosis provides a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii). *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

On remand, the administrative law judge therefore should initially reconsider the presumed existence of legal pneumoconiosis. The administrative law judge must render a specific determination as to whether Dr. Oesterling's opinion is sufficient to rebut the presumption that the miner's COPD, emphysema and chronic bronchitis, and bronchiolitis constitute legal pneumoconiosis. Thus, the administrative law judge must first determine whether Dr. Oesterling's opinion is reasoned and documented. *See Collins v. J & L Steel*, 21 BLR 1-181, 189 (1999) ("A reasoned medical opinion is one in which the physician explains how the underlying documentation supports the physician's conclusions."); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987) (A documented opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based his or her diagnosis.). If he credits Dr. Oesterling's opinion, the administrative law judge must then determine the relative probative value of the opinions of Drs. Oesterling, Perper and Sawyer in light of "the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 411, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). When assigning weight to the medical opinion evidence, the administrative law judge must resolve the conflict between Dr. Oesterling and Dr. Perper with respect to the ability to distinguish between the effects of smoking and coal dust exposure, and among Drs. Oesterling, Perper, and Sawyer as to whether the miner had a chronic respiratory or pulmonary impairment significantly

related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. §718.201(b); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08, 22 BLR 2-162, 1-168 (4th Cir. 2000).

If the administrative law judge determines that Dr. Oesterling's opinion is sufficient to rebut the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), he must then determine whether employer has proved that no part of the miner's disability was caused by clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Conversely, if the administrative law judge finds that employer has failed to rebut the presumed existence of legal pneumoconiosis, he must also consider whether employer has proven that no part of the miner's disability was caused by legal or clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Because the second prong of rebuttal focuses on the role pneumoconiosis the disease played in causing the miner's disability, the administrative law judge should focus on whether any part of the disability was caused by pneumoconiosis and not revisit the issue of whether coal dust exposure was a causal factor under the second prong.

When considering the medical opinions relevant to 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge must be mindful that if he has discredited a physician's opinion on the existence of pneumoconiosis, he should determine whether the probative value of the physician's opinion on total disability causation has been affected. *See Akers*, 131 F.3d at 411, 21 BLR at 2-275-76; *Toler v. E. Assoc. Coal Corp*., 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). In addition, the administrative law judge must set forth all of his findings on remand in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

II. The Survivor's Claim

In light of our decision to vacate the award of benefits in the miner's claim, we must further vacate the administrative law judge's finding that claimant was automatically entitled to receive survivor's benefits under Section 422(*l*).[15] However, in

[15] The administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 422(*l*): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner was found to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*). Survivor's Claim Decision and Order at 3-4. With the exception of the miner having been found eligible to receive benefits at the time of his death, we affirm, as unchallenged on appeal, the administrative law judge's determination that claimant met the prerequisites for the application of Section 422(*l*). *Skrack*, 6 BLR at 1-611.

the interest of judicial economy, we reach and reject employer's contention that the administrative law judge erred by applying Section 422(*l*) because the finality of the miner's award is a necessary prerequisite. As employer recognizes, the Board has determined that this argument is without merit, and has held that an award of benefits in a miner's claim need not be final for a claimant to receive benefits pursuant to Section 422(*l*). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). Thus, if the administrative law judge awards benefits in the miner's claim on remand, he must reinstate the award of benefits in the survivor's claim under Section 422(*l*).

If the administrative law judge denies benefits in the miner's claim, claimant must affirmatively establish, 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. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (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(b)(6); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92 (4th Cir. 1992).

Accordingly, the administrative law judge's Decisions and Orders Awarding Benefits in the miner's claim and the survivor's claim are affirmed in part, and vacated in part, and the cases are remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge