BRB Nos. 12-0011 BLA, 12-0011 BLA-A,
12-0012 BLA and 12-0012 BLA-A

JANICE FAYE TRUMP (o/b/o and Widow of JESSE WILLARD TRUMP) Claimant-Respondent Cross-Petitioner v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/07/2012 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and Jody Smith (Washington & Lee University School of Law), Lexington, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals, and claimant[1] cross-appeals, the Decision and Order Awarding Benefits (2008-BLA-5114 and 2008-BLA-5508) of Administrative Law Judge Thomas M. Burke (the administrative law judge) on a miner's subsequent claim, filed on October 23, 2001, and a survivor's claim, filed on December 19, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[2] The administrative law judge credited the miner with forty years of underground coal mine employment, as stipulated by the parties, and adjudicated both the miner's and the survivor's claims pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that the amendments to the Act contained in Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*),) were applicable to the survivor's claim, but were not applicable to the miner's claim because it was filed prior to January 1, 2005. With respect to the miner's subsequent claim, the administrative law judge found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the merits of entitlement, the administrative law judge found the

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[1] Claimant is the widow of the miner, who died on October 22, 2006. The miner filed his first claim for benefits on October 8, 1974. On August 18, 1980, Administrative Law Judge Arthur C. White issued a Decision and Order denying benefits because the evidence was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b). The Board affirmed that decision. *Trump v. Eastern Associated Coal Corp.*, BRB No. 81-0713 BLA (May 15, 1984)(unpub.).

The miner's second claim, filed on May 29, 1986, was denied by Associate Chief Administrative Law Judge G. Marvin Bober on June 22, 1987 because the evidence was insufficient to establish total respiratory disability and a material change in conditions.

The miner filed his current claim on October 23, 2001, but died while the claim was pending before the Office of Administrative Law Judges. Claimant filed her survivor's claim on December 19, 2006, and is pursuing the miner's claim on behalf of his estate. On January 24, 2007, Administrative Law Judge Michael P. Lesniak remanded the miner's claim to the district director for consolidation with the survivor's claim.

[2] 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. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).

weight of the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits in the miner's claim. The administrative law judge further found that claimant meets the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), and that, given the filing date of her claim, claimant is entitled to benefits based on the award of benefits to her deceased husband.

On appeal, employer challenges the administrative law judge's award of benefits in both claims.[3] With respect to the miner's claim, employer challenges the administrative law judge's finding that the newly submitted medical opinion evidence of record establishes total respiratory disability at 20 C.F.R. §§718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Additionally, while employer concedes that the miner had clinical pneumoconiosis, employer challenges the administrative law judge's finding that the medical opinion evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c). In the survivor's claim, employer asserts that the award of benefits must be vacated if the miner's award of benefits is vacated.[4] Claimant responds in support of the award of benefits in both claims, and cross-appeals,[5] challenging the administrative law judge's evidentiary rulings. Claimant also argues that the administrative law judge failed to meet his duty of explanation in weighing the evidence on the issue of total disability at 20 C.F.R. §718.204(b). Employer responds, asserting that claimant's cross-appeals lack merit and should be denied. Claimant has

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[3] On January 6, 2012 employer filed a Motion for Leave to File Instanter its Petition for Review and Brief in Support of Petition for Review. We hereby grant employer's motion and accept employer's petition and supporting brief as part of the record. Employer's appeals were assigned BRB No. 12-0011 BLA, representing Case No. 08-BLA-5114, and BRB No. 12-0012 BLA, representing Case No. 08-BLA-5508.

[4] Employer's alternative argument, that this case should be held in abeyance pending resolution of the constitutional challenges to the PPACA and the severability of its non-health care provisions, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

[5] By its Order dated December 1, 2011, the Board consolidated employer's appeals and claimant's cross-appeals for purposes of decision. Claimant's cross-appeals were assigned BRB No. 12-0011 BLA-A, representing Case No. 08-BLA-5114, and BRB No. 12-0012 BLA-A, representing Case No. 08-BLA-5508.

filed a reply brief in support of her position. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address claimant's challenges on cross-appeal to the administrative law judge's evidentiary rulings. Claimant contends that the administrative law judge improperly admitted into the record, over her objection, three pulmonary function studies, administered by Drs. Mullins and Zaldivar, that did not meet the quality standards outlined in Appendix B to 20 C.F.R. Part 718. Director's Exhibit 15; Employer's Exhibits 5, 6; Claimant's Brief at 8-13. Claimant's argument lacks merit. A party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009), citing *Harris v. Old Ben Coal Co.*, 24 BLR 1-13,1-17 n.1 (2007)(en banc recon.)(McGranery & Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting). At the hearing, the administrative law judge denied claimant's request to exclude these studies, as he agreed with employer that the issue of the studies' validity goes to the weight of the evidence, not its admissibility. Hearing Transcript at 7, 54-55. Claimant has not shown that the administrative law judge abused his discretion in admitting these studies into the record, and we affirm his ruling in this regard. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc). We also find no merit in claimant's contention that the administrative law judge "improperly excluded" four qualifying[7] arterial blood gas studies obtained in 2006, Claimant's Exhibits 5, 6, 10, 12; Claimant's Brief at 13-22, as the record reflects that the administrative law judge admitted this evidence into the record. *See* Hearing Transcript at 46, 51. While claimant asserts that these tests establish a totally disabling pulmonary impairment and should have been accorded determinative weight under the "later

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[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

evidence" rule, the administrative law judge determined that the miner's treatment records showed that the studies were administered while the miner was hospitalized for treatment of acute and/or cardiac conditions and, as such, could not be considered to support a finding of total pulmonary disability.[8] Decision and Order at 16-17; *see* 20 C.F.R. Part 718, Appendix C; *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992). We find no abuse of discretion in the administrative law judge's determination.

Miner's Claim

Turning to the miner's claim, employer challenges the administrative law judge's finding of total respiratory disability at Section 718.204(b) and a change in an applicable condition of entitlement at Section 725.309. Employer argues that the administrative law judge: failed to satisfy his duty of rational explanation when weighing the medical opinion evidence at Section 718.204(b)(2)(iv); failed to provide a reason for not crediting the opinion of Dr. Rosenberg; mischaracterized the opinions of Drs. Naeye and Zaldivar and/or substituted his expertise for that of the physicians; and failed to weigh the relevant evidence of record together, like and unlike. Employer also asserts that the administrative law judge's reliance on Dr. Houser's opinion to establish total disability, on the ground that the arterial blood gas studies disclosed hypoxemia, is not rational or supported by the evidence. Employer's Brief at 11-18. Some of employer's arguments have merit.

In evaluating the newly submitted pulmonary function studies of record at Section 718.204(b), the administrative law judge determined that the studies administered by Dr. Mullins on December 11, 2001, and by Dr. Zaldivar on April 10, 2002 and May 5, 2004, yielded non-qualifying values and were invalidated due to the poor cooperation or understanding of the miner.[9] Thus, the administrative law judge found that the pulmonary function studies failed to establish total respiratory disability at Section 718.204(b)(2)(i).

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[8] The treatment records indicate that in February 2006 and September 2006, the miner was treated in the emergency room for a "decreased level of consciousness" and then was admitted into the hospital. Claimant's Exhibits 10, 12. In October 2006, the miner was treated in the emergency room for a myocardial infarction and was admitted into the hospital. Claimant's Exhibit 9.

[9] The quality standards for pulmonary function studies require a notation of the miner's understanding and cooperation. 20 C.F.R. §718.103.

The administrative law judge reviewed the newly submitted blood gas studies at Section 718.204(b)(2)(ii), and determined that the December 11, 2001 study administered by Dr. Mullins and the April 10, 2002 and May 5, 2004 studies administered by Dr. Zaldivar produced non-qualifying values. Of the seven blood gas studies administered while the miner was hospitalized, the administrative law judge determined that the March 21, 2001 study yielded qualifying values; the July 30, 2004 and August 5, 2004 studies were non-qualifying; and the study performed on February 28, 2006, the two studies performed on September 29, 2006, and the October 20, 2006 study all yielded qualifying results. The administrative law judge concluded that the blood gas study evidence was insufficient to establish total respiratory disability, as the qualifying studies performed during the miner's hospitalizations did not evidence a chronic disabling pulmonary condition because they were administered during, or soon after, an acute or cardiac illness, as prohibited by the regulations,[10] and the remaining studies produced non-qualifying values. Decision and Order at 16-17.

At Section 718.204(b)(2)(iv), the administrative law judge summarized the medical opinions of Drs. Houser, Rosenberg, and Zaldivar, as well as the autopsy report of Dr. Imbing[11] and the pathology reports of Drs. Naeye[12] and Oesterling,[13] and

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[10] 20 C.F.R. Part 718, Appendix C states, in relevant part, that tests shall not be performed during or soon after an acute respiratory or cardiac illness.

[11] Dr. Imbing opined that the miner died of acute myocardial infarction, and that coal workers' pneumoconiosis in both lungs contributed to his death. He noted on gross description that "the hilar nodes are enlarged, black, and firm. The lung parenchyma is purple red and spongy with multiple coal dust nodules measuring 0.3-0.6 cm in greatest diameter." On microscopic description he noted, in part:

> There are coal dust macules present consisting of dust-filled macrophages with minimal to absent fibrosis. Coal dust nodules are also identified which contain in addition to dust-filled macrophages a fibrous stroma with haphazardly arranged collagen bundles. Intra-alveolar pigment laden macrophages are seen in several places.

Claimant's Exhibit 8.

[12] Dr. Naeye stated that tissue findings show the presence of very old coal workers' pneumoconiosis, but not "late-in-life progressive coal workers' pneumoconiosis." He stated that coal workers' pneumoconiosis lesions occupy <15% of the lung tissue and that "80-85% of the lung tissues not occupied by coal workers' pneumoconiosis lesions have very little or no black pigment and only mild to moderately severe centrilobular emphysema." He indicated that the absence of large numbers of

concluded that the miner suffered from a total pulmonary disability. In so finding, the administrative law judge determined that "the disagreement [among the doctors] centers on the interpretation of the miner's blood gas testing." Decision and Order at 18. While Dr. Houser[14] opined that the miner suffered from a disabling pulmonary condition evidenced by hypoxemia, Claimant's Exhibit 7, Dr. Rosenberg[15] opined that the miner had no pulmonary impairment or disability, but had multiple whole person impairments unrelated to coal dust exposure, and Dr. Zaldivar[16] opined that the miner had a vascular

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normoblasts in the miner's blood at the time of death confirms that the miner was not experiencing clinically significant chronic hypoxemia due to coal workers' pneumoconiosis prior to his terminal acute lobular pneumonia. Employer's Exhibit 12.

[13] Upon reviewing the slides, Dr. Oesterling found evidence of moderate micronodular coal workers' pneumoconiosis and focal emphysema surrounding the micronodules. He stated that the combined structural alterations appear insufficient to have altered function, and should not have affected the miner's respiratory capabilities. Employer's Exhibits 11, 18.

[14] Dr. Houser provided a consulting opinion on September 28, 2010, and diagnosed "clinical (confirmed by chest x-rays and autopsy) and legal (emphysema noted at autopsy) pneumoconiosis, which is a consequence of [the miner's] coal mine employment." He stated that the pathology findings of fibrosis and centrilobular emphysema caused the miner's hypoxemia, as evidenced by the miner's blood gas study results, and that the hypoxemia resulted in total respiratory disability. Claimant's Exhibit 7.

[15] Dr. Rosenberg provided a consulting opinion dated September 17, 2008, and a deposition on October 13, 2010, and opined that despite the presence of clinical coal workers' pneumoconiosis, the miner had no associated impairment from a pulmonary perspective. He determined that the miner had multiple whole person impairments leading to his disability, but that neither coal dust exposure nor coal workers' pneumoconiosis were factors in the disability. Employer's Exhibits 9, 17.

[16] Dr. Zaldivar examined the miner on April 10, 2002 and on May 5, 2004; prepared a report on September 17, 2010; and provided depositions on October 7, 2008 and October 13, 2010. Employer's Exhibits 10, 16. He opined that the miner had simple coal workers' pneumoconiosis, but no pulmonary impairment resulting from it. He stated that the pneumoconiosis found was of no clinical significance, because it did not affect the functioning of the lungs and did not cause or contribute to the miner's death, which was a vascular event due to an acute myocardial infarction. He noted that there was no pulmonary dysfunction because, in spite of the fact that the miner did not cooperate in the

impairment, but no pulmonary impairment. Employer's Exhibits 9, 10, 16, 17. The administrative law judge noted that Dr. Rosenberg interpreted the July 30, 2004 and August 5, 2004 blood gas studies as showing mild hypoxemia, and interpreted the 2006 studies, obtained during the miner's hospitalizations for acute conditions, as showing severe hypoxemia, while Dr. Zaldivar interpreted the same studies as normal, "even though the test reports themselves interpreted the results as indicative of moderate hypoxemia, as the test reports consider normal pO_2 results to be above 80, and the July 30, 2004 pO_2 result was 66, and the August 5, 2004 test pO_2 result was 68." Decision and Order at 18-19. The administrative law judge determined that:

> Although Drs. Rosenberg and Zaldivar report that the arterial blood gas tests are variable, the tests from April, 2002 through August, 2004 are consistent except for the result of Dr. Zaldivar's test on May 5, 2004. Otherwise, the pO_2 results range from 66 to 68 and the pCO_2 from 35 through 38. The exception is the pO_2 result on May 5, 2004 of 83. Subsequent tests administered on February 28, 2006, September 29, 2006 and October 20, 2006 at the Appalachian Regional Hospital produced abnormal results as they showed severe hypoxemia.

Decision and Order at 19. Acknowledging Dr. Zaldivar's testimony, that the abnormal blood gas values obtained while the miner was hospitalized in 2006 do not evidence a chronic pulmonary impairment, the administrative law judge concluded that:

> Nevertheless, the weight of the arterial blood gas results support the conclusion of Dr. Houser that the miner suffered from a disabling pulmonary condition. Of the six tests administered before his 2006 hospitalizations only one, the May 5, 2004 test, resulted in values not evidencing hypoxemia.

Decision and Order at 19. After reviewing the autopsy and pathology reports of Drs. Imbing, Naeye, and Oesterling, the administrative law judge determined that the miner suffered from a total pulmonary disability, based on:

> Dr. Houser's report revealing a total pulmonary disability evidenced by hypoxemia; pathology reports finding lung tissue occupied by coal worker's [sic] pneumoconiosis, and mild to moderately severe centrilobular emphysema; treating records listing prescribed breathing medications; and

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breathing test, the test was normal, and given maximum cooperation, the results would have been even better. Employer's Exhibit 16 at 12.

> the Claimant's testimony of the miner suffering from severe shortness of breath. . . .

Decision and Order at 21.

We agree with employer that the administrative law judge gave no reason for not crediting Dr. Rosenberg's opinion. Thus, the administrative law judge's decision does not comport with the Administrative Procedure Act (APA). *See* 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). Additionally, while we reject employer's argument that the administrative law judge mischaracterized Dr. Zaldivar's opinion as being inconsistent with claimant's testimony and the miner's treatment records,[17] we agree with employer that the administrative law judge failed to adequately explain his rationale for crediting Dr. Houser's opinion and for discounting the opinions of Drs. Zaldivar and Naeye. Moreoever, the administrative law judge appears to have assumed that any notation of hypoxemia, regardless of the degree of severity, supports a finding of total respiratory disability. Further, the administrative law judge appears to have substituted his own opinion for that of a physician in finding that, with the exception of the May 5, 2004 test,

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[17] The administrative law judge rationally determined that, while Dr. Zaldivar correctly noted that the miner's medical records did not reflect admission to a hospital or treatment by a physician for pulmonary problems, Dr. Zaldivar's testimony, that the miner's lungs were never a problem and were not being treated with any medications, Employer's Exhibit 16(1) at 13-14, was inconsistent with claimant's testimony and the medical records evidencing a pulmonary condition and breathing medications. Decision and Order at 20-21. Claimant testified that the miner began experiencing serious breathing difficulties in 1998 or 1999; that he was prescribed breathing medications; and that he started using oxygen in 2004. Hearing Transcript at 34-35. The administrative law judge determined that the miner's medical records corroborated claimant's testimony as follows: March 21, 2002 treatment records listed current medications as including Albuterol and Seravent inhalers, Claimant's Exhibit 18; August 8, 2004 x-ray was interpreted as showing chronic interstitial lung disease, Claimant's Exhibit 16; April 19, 2005 hospitalization discharge diagnosis listed history of pneumoconiosis, and medications included a Flovent inhaler, Claimant's Exhibit 13, Employer's Exhibit 14; February 28, 2006 hospitalization included respiratory treatment with Albuterol and Flovent, and the miner was placed on oxygen, Claimant's Exhibit 12, Employer's Exhibit 14; September 29, 2006 to October 4, 2006 respiratory therapy notes show the miner was given Albuterol and placed on oxygen, Claimant's Exhibit 10; and the miner's final hospitalization records listed a history of pneumoconiosis, with his assessment chart listing a history of COPD, Claimant's Exhibit 9, Employer's Exhibit 15. Decision and Order at 14-15, 21.

the values obtained on blood gas testing from April 2002 through August 2004 evidenced hypoxemia and were not variable. For the aforementioned reasons, we vacate the administrative law judge's finding of total disability at Section 718.204(b)(2), and remand the case for further consideration. Thus, we must also vacate the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement pursuant to Section 725.309(d).

On remand, the administrative law judge is cautioned not to provide his own interpretation of the medical data, but is instructed to reassess the conflicting medical opinions in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses, and fully explain the reasons for his credibility determinations. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). The administrative law judge must set forth a rationale that comports with the requirements of the APA in determining whether each opinion is well-reasoned and sufficient to meet claimant's burden of establishing total respiratory disability. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). If, on remand, the administrative law judge finds that the new evidence establishes a change in an applicable condition of entitlement under Section 725.309, and that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *Fields*, 10 BLR at 1-22; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc).

Because the administrative law judge's findings on the issue of total respiratory disability may have affected his weighing of the evidence on the issues of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c), we also vacate the administrative law judge's findings thereunder for a reevaluation of the relevant evidence on remand. In the interests of judicial efficiency, however, we will address various specific arguments raised by employer. We reject employer's argument that Dr. Houser's opinion is insufficient to support a finding of legal pneumoconiosis, Employer's Brief at 18-19, as the physician attributed the miner's centrilobular emphysema to coal dust exposure. Claimant's Exhibit 7. The administrative law judge, as trier-of-fact, is charged with determining, on remand, whether the opinion is sufficiently reasoned to support a finding of legal pneumoconiosis.

Next, we reject employer's assertion that the administrative law judge erroneously determined that Dr. Zaldivar's opinion is inconsistent with the pathology evidence. Employer's Brief at 20; Decision and Order at 23. Dr. Zaldivar stated in his September

17, 2008 report that the pathologists did not find any evidence of emphysema in the miner's lungs, *see* Employer's Exhibit 10, and later testified that focal emphysema was present in this case because Dr. Oesterling specifically said so, but that there was no mention of centrilobular emphysema, *see* Employer's Exhibit 16(2) at 45. In fact, the record reflects that Dr. Naeye diagnosed mild to moderately severe centrilobular emphysema. Employer's Exhibit 12. Employer correctly asserts, however, that no pathologist stated that the emphysema caused any functional impairment. Employer's Brief at 20; Claimant's Exhibit 8; Employer's Exhibits 11, 12.

Lastly, we agree with employer that the administrative law judge mischaracterized Dr. Rosenberg's opinion, that the miner did not have legal pneumoconiosis, when he found that the opinion was inconsistent with the scientific studies underlying the revised regulations. Employer's Brief at 20-21; *see* Decision and Order at 23. The administrative law judge explained that Dr. Rosenberg found no legal pneumoconiosis based on his finding of no significant obstruction and his belief that "the sole type of emphysema that can be caused by coal dust is that associated with coal macules and nodules," Decision and Order at 23, whereas the preamble to the revised regulations indicated that:

> …epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC. Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present.

Decision and Order at 23, *citing* 65 Fed. Reg. 245 at 79,943 (Dec. 20, 2000). Contrary to the administrative law judge's findings, however, Dr. Rosenberg stated in his report that emphysema, when it occurs in relationship to coal dust exposure, "*begins* as focal emphysema in association with coal macules and micronodules." Employer's Exhibit 9 at 4 (emphasis added). At his deposition, Dr. Rosenberg testified that the kind of emphysema related to coal dust exposure is "more of a localized type of emphysema, both focal around the macules and nodules, but also more focally distributed centrilobularly and in other areas," and concluded that the emphysema found on the miner's autopsy was not causing impairment. Employer's Exhibit 17 at 14. Dr. Rosenberg diagnosed clinical pneumoconiosis, explained how the miner's objective test results supported his conclusion that there was no obstruction or restriction, Employer's Exhibit 17 at 9-16, and acknowledged that "[one] can get obstructive impairment even with a negative chest x-ray, but specific to [the miner], he didn't have obstruction … [s]o in this case, legal coal workers' pneumoconiosis is not really an issue….[because] he didn't have any kind of functional impairments related to any emphysema and he didn't have obstruction." Employer's Exhibit 17 at 25-26.

In view of the foregoing, the administrative law judge, on remand, is instructed to reconsider his determination that Dr. Rosenberg's opinion is inconsistent with the preamble, and to reassess the medical opinion evidence relevant to the issues of legal pneumoconiosis at Section 718.202(a)(4), and disability causation at Section 718.204(c).

Survivor's Claim

Turning to the survivor's claim, the administrative law judge found that claimant was automatically entitled to receive benefits pursuant to amended Section 932(*l*), based on the award of benefits in the miner's claim. Because we have vacated the award of benefits in the miner's claim, we also vacate the award in the survivor's claim. In this case, it is uncontested that claimant filed her claim after January 1, 2005; that she is an eligible survivor of the miner; and that her claim was pending on or after March 23, 2010. Thus, if the administrative law judge, on remand, awards benefits in the miner's claim, claimant is automatically entitled to benefits in the survivor's claim pursuant to amended Section 932(*l*). However, if the administrative law judge denies benefits in the miner's claim on remand, he must determine whether the evidence establishes that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205.

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

BETTY JEAN HALL
Administrative Appeals Judge