BRB No. 10-0121 BLA

JOYCE ANN BLACKBURN (Widow of JAMES BLACKBURN)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 10/29/2010
SCOTTS BRANCH COAL COMPANY	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits on Survivor's Claim of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Glenn M. Hammond and Stephanie L. Kinney (Glenn M. Hammond Law Office), Pikeville, Kentucky for claimant.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits on Survivor's Claim (2008-BLA-05794) of Administrative Law Judge Alan L. Bergstrom issued with

respect to a survivor's claim filed on April 8, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. 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 credited the miner with 23.8 years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, asserting that substantial evidence does not support the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that he erred in crediting "the limited report and findings" of Dr. King, over the opinions of Drs. Vuskovich and Caffrey, in concluding that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Brief of Employer at 16. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response brief in this appeal.

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.[1] 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, 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. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or if claimant establishes invocation of the irrebuttable presumption of death due to pneumoconiosis. 20 C.F.R. §§718.205(c)(2), (4), 718.304. Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Piney Mountain Coal Co. v. Mays*, 176

[1] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 4, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

F.3d 753, 21 BLR 2-587 (4th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-901 (4th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

I. LEGAL PNEUMOCONIOSIS

In considering whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. King, Martin, Broudy,[2] Caffrey, and Vuskovich. The administrative law judge found that Dr. King was the miner's treating physician from January 17, 1997, until the miner's death on June 5, 2007, and that the bulk of Dr. King's treatment related to an occupational back injury. Decision and Order at 8. Dr. King reported on January 20, 1998, that the miner was in for a check-up and had a history of hypertension, cardiovasucular disease, chronic obstructive pulmonary disease (COPD) and coal workers' pneumoconiosis. Director's Exhibit 18. He continued to list these conditions in subsequent treatment notes. *Id*. On December 6, 2006, the miner was admitted to the hospital with complaints of shortness of breath and Dr. King indicated that the miner's chest x-ray showed "stable" interstitial lung disease, but that he had suffered an acute exacerbation of COPD. *Id*. On April 8, 2007, the miner was again admitted to the hospital with respiratory symptoms and Dr. King's impressions included congestive heart failure and COPD.

The miner's terminal hospitalization began on May 20, 2007, when he was admitted for an acute myocardial infarction, and a chest x-ray revealed a complete "white out" of his right lung, which was treated with suction and irrigation to the right and middle lobe. In dictation of June 26, 2007, Dr. King described that the miner was moved from the intensive care unit (ICU) to a floor room, but "began to decompensate acutely"

[2] The administrative law judge prepared a summary of what he referenced as the August 8, 2005 report by "Dr. Coyer," but the information he summarized was actually from an August 8, 2005 report by Dr. Broudy. *See* Decision and Order at 19; Director's Exhibit 18. It appears from the record, that both Dr. Coyer and Dr. Broudy examined the miner on August 8, 2005. Dr. Broudy, a Board-certified pulmonologist, examined the miner for treatment of his respiratory disease, while Dr. Coyer evaluated the miner regarding his cardiovascular disease. Director's Exhibit 18. Although employer does not make this distinction in its brief, we consider employer's argument, that the administrative law judge erred in relying on "the single treatment record of Dr. Conyers [sic]" to be applicable instead to Dr. Broudy. Brief of Employer at 11.

on June 4, 2007. *Id*. In the evening of June 5, 2007, the family declined to have the miner either returned to ICU or placed on a ventilator. Comfort measures were taken and the miner died that same night.

Following the miner's death, Dr. King completed the death certificate and listed arteriosclerotic heart disease as the immediate cause of the miner's death. Director's Exhibit 11. Under other significant conditions contributing to the miner's death, Dr. King listed COPD and arteriosclerotic cardiovascular disease. *Id*. In response to a questionnaire, Dr. King stated that heart disease was the immediate cause of death but that advanced lung disease made it difficult for the miner to achieve adequate blood oxygenation, which hastened his death. Director's Exhibit 16.

Dr. Broudy conducted a pulmonary evaluation of the miner on August 8, 2005, at which time he obtained a chest x-ray, a pulmonary function study and an arterial blood gas study. Director's Exhibit 18. Dr. Broudy noted that the pulmonary function testing showed obstructive and restrictive respiratory impairment. *Id*. He indicated that the miner had dyspnea on exertion, secondary to coal workers' pneumoconiosis and that there was evidence of interstitial fibrosis, which was "probably multifactoral and may have resulted from [the miner's] previous occupational exposure, cigarette smoking and incomplete resolution of adult respiratory distress syndrome."[3] *Id*.

Dr. Vuskovich prepared a medical report, based on his review of the medical record, on February 26, 2009. Employer's Exhibit 4. Dr. Vuskovich noted that the miner was employed for forty-three years in coal mine employment and stopped working in 1986. *Id*. He noted that the miner fell from a roof in November 1999, and suffered multiple rib fractures, at which time he began taking an anti-inflammatory drug (naproxen) for chronic muscoskeletal pain. *Id*. According to Dr. Vuskovich, the miner's x-rays were clear at the time he left the mines until 1999, and he had no evidence of a respiratory condition based on the pulmonary function and arterial blood gas tests. *Id*. He noted that around 1999, the miner developed x-ray images that were consistent with pulmonary fibrosis, and coincided with his use of naproxen. *Id*. Dr. Vuskovich also noted that by April 2005, the miner was taking four anti-clotting medications, which included aspirin, for a heart condition. Dr. Vuskovich opined that, in addition to coal dust exposure, the miner had four potential exposures that could have damaged his lungs: gastroesophageal reflux disease (GERD), long term aspirin and naproxen use, transfusion

[3] The record also contains an earlier report by Dr. Broudy dated November 20, 1986, which was not summarized by the administrative law judge in his Decision and Order. Employer's Exhibit 1. Dr. Broudy reported in 1986 that there was no coal workers' pneumoconiosis by x-ray, and that pulmonary function and arterial blood gas testing was normal. *Id*.

related acute alveolar damage, and aspiration of a large volume of blood. *Id*. Dr. Vuskovich explained that x-rays obtained in 1999 described appearances of interstitial fibrosis in 1999, that GERD causes aspiration of food and saliva, and induces both infiltrates and interstitial fibrosis in the lungs. *Id*. He also noted that aspirin and naproxen therapy may cause infiltrates, and that after the miner's blood transfusions in 2005, he developed acute pulmonary edema, which substantially diminished his pulmonary function and damaged his heart. *Id*. Dr. Vuskovich opined that based on the miner's age "the effects of the medications, strokes, gastrointestinal bleeding, transfusions, heart attack and aspirating blood were magnified." *Id*. When asked whether "[p]rior to his death did the miner have pulmonary impairment that was caused by his exposure to respirable coal dust?," Dr. Vuskovich answered "No" and specifically noted that, when the miner left the mines, he did not have COPD. He attributed the miner's pulmonary impairment that developed "years later" to complications from heart disease, adverse reactions to medications, GERD and blood transfusions. *Id*.

In weighing the conflicting medical opinions, the administrative law judge gave less weight to Dr. Martin's opinion, that the miner had coal workers' pneumoconiosis, because he found that it was not sufficiently explained. Decision and Order at 20. The administrative law judge found that, although Dr. King was the miner's treating physician, because he did not explain the bases for his diagnosis of coal workers' pneumoconiosis and COPD in great detail, his opinion was entitled to some weight, but not controlling weight. *Id*. The administrative law judge found that Dr. Broudy's opinion was reasoned and documented. *Id*. The administrative law judge gave little weight to Dr. Caffrey's opinion, that the miner's COPD was due entirely to smoking, finding that Dr. Caffrey did not specifically address whether coal dust exposure played any role in the miner's lung disease. *Id*. Finally, the administrative law judge found that while Dr. Vuskovich offered several explanations for the development of the miner's respiratory condition, his opinion was not persuasive. The administrative law judge noted that Dr. Vuskovich attributed the miner's respiratory condition to events occurring after 2005, but did not address the fact that the miner had "fibrotic reaction of the lung tissue" beginning in 1999, which worsened and progressed over time. *Id*. The administrative law judge specifically noted that Dr. Vuskovich did not evaluate chest x-rays after 1999 that showed a worsening of infiltrates and interstitial fibrotic disease consistent with COPD.[4] Decision and Order at 21. Thus, the administrative law judge determined that Dr. Vuskovich's opinion was not well-reasoned and was entitled to little weight. *Id*. Based on his review of the medical opinions pursuant to 20 C.F.R.

[4] The administrative law judge stated that, "Dr. Vuskovich did not analyze the development and worsening of the lung infiltrates with the medical events he noted in his report." Decision and Order at 21.

§718.202(a)(4), the administrative law judge concluded that claimant established that the miner suffered from legal pneumoconiosis at the time of his death. *Id*.

Employer asserts that the administrative law judge improperly based his finding of legal pneumoconiosis on "a single treatment note from August 8, 2005," and that he erred in his consideration of Dr. Vuskovich's opinion. Brief of Employer at 10. Contrary to employer's contention, the administrative law judge did not rely solely on Dr. Broudy's opinion to support his finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), but instead accorded "some weight" to Dr. King's opinion, although he found it was not controlling. *See* Decision and Order at 20. However, we agree with employer that the administrative law judge's credibility determinations do not satisfy the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a).[5]

With regard to Dr. Broudy, the administrative law judge noted that, although Dr. Broudy's objective testing did not strictly conform to the quality standards, he found his opinion to be credible "in light of all relevant evidence, including the radiologist readings since 1999, medical treatment records and the progressive nature of pneumoconiosis."[6] Decision and Order at 19 n.10. The administrative law judge then summarily stated that Dr. Broudy offered a reasoned and documented opinion.

Employer correctly asserts that, although the administrative law judge concluded that Dr. Broudy's opinion was consistent with the record, as a whole, the administrative law judge erred in failing to specifically discuss how the objective evidence supported Dr. Broudy's conclusions. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-284 (6th Cir. 2005). The administrative law judge's citation to x-ray evidence in support of Dr. Broudy's opinion regarding the existence of legal pneumoconiosis is also not properly explained. *Id*. Furthermore, as discussed *infra*, the administrative law judge has not properly resolved the conflict in the evidence regarding the miner's smoking history, and has not considered whether the physicians of record had an accurate understanding of that history in reaching their opinions as to the cause of claimant's respiratory condition. Because the administrative law judge did not

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[5] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a).

[6] As noted *supra*, the administrative law judge inadvertently referred to Dr. Broudy's opinion as being authored by Dr. Coyer.

specifically address whether Dr. Broudy had an accurate understanding of the miner's smoking, medical and work histories, prior to finding that his opinion was reasoned and documented, we vacate the administrative law judge's finding that Dr. Broudy's opinion was sufficient to establish the existence of legal pneumoconiosis. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Furthermore, we agree with employer that the administrative law judge erred in stating that Dr. Vuskovich "failed to evaluate the [B]oard[-]certified radiologist reports on chest x-rays after 1999 that all showed gradual worsening of infiltrates, nodules and pulmonary fibrotic disease," as Dr. Vuskovich's report reflects that he considered numerous x-rays dated from 1977 through 2007.[7] Decision and Order at 21; Employer's Exhibit 4; *see generally Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding that Dr. Vuskovich's opinion was not well-reasoned. We therefore vacate the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for additional consideration.

II. DEATH DUE TO PNEUMOCONIOSIS

Because we vacate the administrative law judge's finding of legal pneumoconiosis, we also vacate his finding that legal pneumoconiosis (COPD due to coal dust exposure) was a substantially contributing cause or factor leading to the miner's death. However, in the interest of judicial economy, we will address employer's arguments relevant to whether the administrative law judge erred in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.205(c).

The administrative law judge found that while Dr. Caffrey opined that the miner's death was not due to clinical pneumoconiosis, he did not specifically address whether legal pneumoconiosis (COPD due in part to coal dust exposure) played a role in the miner's death. Decision and Order at 24. The administrative law judge also gave little weight to Dr. Vuskovich's opinion, that the miner's death was unrelated to coal dust exposure, noting that while Dr. Vuskovich specifically described the miner's pulmonary function as "degraded," he did not address whether it contributed to the miner's death. *Id*. In contrast, the administrative law judge stated that Dr. King's "detailed explanations in [Director's Exhibits] 16 and 18 are given greater weight as to the role the pulmonary

[7] Dr. Vuskovich specifically reviewed x-ray readings by Drs. Halbert and Poulos, who were noted as being Board-certified radiologists and B readers by the administrative law judge. Decision and Order at 6; Employer's Exhibit 4.

impairment played in the [m]iner's death." Decision and Order at 23. The administrative law judge specifically noted:

> From the family's decision to forgo return to [the] ICU and mechanical ventilation, followed by the rapid decompensation and death, Dr. King's opinion that the advanced lung disease, without mechanical ventilation, [sic] properly infers that the [m]iner's life was reduced by a specifically defined process, i.e., inadequate blood oxygenation, that could have been medically extended by mechanical ventilation.

Id. The administrative law judge concluded that "Dr. King's report of the [m]iner's last two hours after ICU and mechanical ventilation were withheld and his rationale concerning the [m]iner's death, are sufficient to establish a specifically defined process that reduced the [m]iner's life by an estimable time due to his respiratory impairments caused by his coal workers' pneumoconiosis and the medical opinions of Dr. Vuskovich and Dr. Caffrey fail to rebut Dr. King's reports." *Id*. at 24. Thus, the administrative law judge found that claimant satisfied her burden to establish that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id*.

We agree with employer that the administrative law judge erred in failing to consider whether Dr. King had an accurate understanding of the miner's smoking history in rendering his opinion that the miner's COPD was due entirely to coal dust exposure and contributed to the miner's death.[8] *See Clark v. Karst-Robbins Coal Co*. 12 BLR 1-49 (1989) *(en banc*); *Tackett*, 7 BLR at 1-706. We therefore direct the administrative law judge on remand to render a specific finding as to the length and extent of the miner's smoking history, and then assess the credibility of the medical opinions in light of that finding.

[8] Dr. Broudy indicated that the miner was an ex-smoker and smoked at a rate of a pack per day or less until he quit twenty-five years ago. Director's Exhibit 18. In treatment notes, dated April 8, 2007 and April 23, 2007, Dr. King identified the miner as a "reformed smoker." Director's Exhibit 18. However, in the December 3, 2007 questionnaire, he identified the miner as a "non-smoker" and stated that the miner's chronic obstructive pulmonary disease was due "entirely to his coal dust exposure." Director's Exhibit 16. In a subsequent treatment note of December 6, 2007, Dr. King wrote that the miner was an "ex-smoker." *Id*. Dr. Caffrey reported that the miner had a significant smoking history of approximately fifty years, quitting in 1985. Employer's Exhibit 3. Dr. Vuskovich also noted that the miner had a fifty pack-year smoking history. Employer's Exhibit 4.

We also agree that the administrative law judge improperly inferred, based on the family's decision not to put the miner on a ventilator, that the miner's death was hastened by legal pneumoconiosis. Such an inference is irrational and constitutes an impermissible substitution of the administrative law judge's opinion for that of a medical expert. Decision and Order at 23; *see Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Thus, on remand, the administrative law judge must resolve the conflict in the medical opinions as to the etiology of the miner's COPD and its role in the miner's death, and determine whether claimant has satisfied her burden to establish that the miner's death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-63 (6th Cir. 1989);

III. RECENT AMENDMENTS TO THE ACT

By Order dated June 15, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[9] *Blackburn v. Scotts Branch Coal Co.*, BRB No. 10-0121 BLA (June 15, 2010)(unpub. Order). The Director responded and asserts that, based on the filing date of the claim, the recent amendments are applicable, but that there is no need to remand the case for further consideration by the administrative law judge, if the Board affirms the award of benefits. However, if the award is vacated, the Director maintains that the case must be remanded to the administrative law judge for consideration of whether claimant has established invocation of the Section 411(c)(4) presumption.[10] The Director notes that Section 411(c)(4) requires a determination of whether the miner was totally disabled due to a respiratory or pulmonary impairment, an issue that was not relevant to survivors' claims

[9] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was due to pneumoconiosis.

[10] Section 1556 of Public Law No. 111-148 also amended Section 422(*l*) of the Act, 30 U.S.C §932(*l*), to provide that a survivor is automatically entitled to benefits if the miner was receiving benefits. However, the Director, Office of Workers' Compensation Programs, indicates that claimant cannot benefit from Section 422(*l*), as the miner's lifetime claim for benefits was denied.

prior to the 2010 amendments. Furthermore, because successful invocation of the presumption will alter the parties' burden of proof, the Director contends that the administrative law judge must offer the parties the opportunity to submit additional evidence in accordance with the evidentiary limitations at 20 C.F.R. §725.414. Employer agrees that the amendments may apply, based on the filing date of the claim, but asserts that claimant "is still required to establish death due to pneumoconiosis in order to be entitled to an award of benefits." Employer's Supplemental Brief at 2. Employer also states that any "interpretation of [Section] 1556 that would create an 'automatic survivors entitlement' is irreconcilably inconsistent with the still effective provisions of [the Act]." *Id*.

In light of our decision to vacate the administrative law judge's award of benefits, we direct the administrative law judge to consider whether claimant is entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act. If the administrative law judge finds that claimant has established invocation of the presumption at Section 411(c)(4), he should then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

In rendering his findings on remand, the administrative law judge is required to resolve all questions of fact and law and set forth his findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR 1-165. Further, on remand, the administrative law judge must properly identify the author of all the medical reports of record, which serve as a basis for his findings.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits on Survivor's Claim is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge