BRB Nos. 10-0152 BLA
and 10-0383 BLA

PHYLLIS G. BORING (o/b/o and Widow of WILLIAM BORING) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION and PEABODY INVESTMENTS, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/29/2010 DECISION and ORDER

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

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

Sarah M. Hurley (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Lifetime and Survivor Benefits (2008-BLA-5107 and 2008-BLA-5169) of Administrative Law Judge Thomas M. Burke rendered on a miner's subsequent claim and a survivor's claim filed 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).[1] The administrative law judge credited the miner with a minimum of 7.65 years, and a maximum of 9.01 years, of coal mine employment,[2] and adjudicated both the miner's and the survivor's claims pursuant to the regulations contained in 20 C.F.R. Part 718. In considering the miner's claim, the administrative law judge found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the autopsy and medical opinion evidence established the existence of clinical pneumoconiosis,[3] arising out of coal mine

[1] The miner's first claim, filed on November 14, 1984, was finally denied because the miner failed to establish the existence of a totally disabling respiratory impairment. Miner's Director's Exhibit 1. On March 31, 2003, the miner filed the instant claim, which was denied by the district director on November 4, 2004. Miner's Director's Exhibit 3. The miner died on January 2, 2007, while the claim was pending, and prior to the scheduled hearing before an administrative law judge. Survivor's Director's Exhibit 14. On January 22, 2007, claimant, the miner's widow, filed her claim for survivor's benefits. Survivor's Director's Exhibit 2. The miner's and survivor's claims were consolidated, and were referred to the Office of Administrative Law Judges for a hearing. Miner's Director's Exhibits 73, 75

[2] The miner alleged twelve years of coal mine employment. Decision and Order at 3-4. However, the administrative law judge found that the miner's Security Administration earnings report and tax return evidence indicated that the miner worked for 7.65 years in coal mine employment, and that, even considering the miner's written statement listing undocumented coal mine employment, the miner could be credited with a maximum of only 9.01 years of coal mine employment. Decision and Order at 3-4.

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine

employment, pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(c), in both the miner's and survivor's claims. The administrative law judge also found that the autopsy evidence established the existence of legal pneumoconiosis,[4] in the form of emphysema due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(2), in both the miner's and survivor's claims. In addition, in the miner's claim, the administrative law judge found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). With regard to the survivor's claim, the administrative law judge found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge awarded benefits in both the miner's and survivor's claims.

On appeal, employer asserts that the administrative law judge erred in finding, in both claims, that claimant established the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(2), (4), and that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). Employer further asserts that the administrative law judge erred in finding that the miner's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief relevant to the merits of entitlement.[5]

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

[4] "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).

[5] The administrative law judge's finding that the new medical opinion evidence established the existence of a totally disabling respiratory impairment, and thus a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §§718.204(b), 725.309(d), and his finding that the autopsy evidence established the existence of legal pneumoconiosis in both the miner's and survivor's claims, pursuant to 20 C.F.R. §718.202(a)(2), are affirmed, as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

By Order dated June 30, 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.[7] The Director and employer have responded.

The Director states that Section 1556 does not apply to the miner's claim because it was filed prior to January 1, 2005. In addition, the Director asserts that Section 411(c)(4), 30 U.S.C. §921(c)(4), is inapplicable to the survivor's claim, because the administrative law judge credited the miner with a maximum of 9.01 years of coal mine employment. However, the Director further contends that, if the Board affirms the administrative law judge's findings in the miner's claim, and that award becomes final, claimant will be automatically entitled to survivor's benefits pursuant to Section 422(*l*), 30 U.S.C. §932(*l*), based on the award in the miner's claim. Director's Brief at 2.

Employer responds, agreeing that the miner's claim is not affected by the amendments, based on the claim's filing date, and that Section 411(c)(4), 30 U.S.C. §921(c)(4), is inapplicable to the survivor's claim, because the administrative law judge credited the miner with a maximum of 9.01 years of coal mine employment. In contrast

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[6] The record indicates that the miner's coal mine employment was in Pennsylvania. Miner's Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[7] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act)), 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. Under Section 411(c)(4), if a miner had at least fifteen years of qualifying coal mine employment, and had a totally disabling respiratory impairment, there is a rebuttable presumption that he or she was totally disabled due to pneumoconiosis and that his or her death was due to pneumoconiosis. The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a 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*).

to the Director, however, employer states that, because the miner was not receiving benefits at the time of his death, the amendments to 30 U.S.C. §932(*l*) do not apply to the survivor's claim.

We agree with the Director and employer that Section 1556 does not apply to the miner's claim because it was filed prior to January 1, 2005. We further agree that, in the survivor's claim, the amended version of 30 U.S.C. §921(c)(4) is inapplicable, because there is no evidence and no allegation that the miner had at least fifteen years of coal mine employment. Before we can determine whether 30 U.S.C. §932(*l*) applies to the survivor's claim, however, as the Director notes, we must first determine whether the administrative law judge's award of benefits in the miner's claim can be affirmed. Accordingly, we will initially consider employer's allegations of error with respect to the administrative law judge's award of benefits in the miner's claim.

The Miner's Claim

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Employer initially contends that the administrative law judge erred in finding the autopsy evidence sufficient to establish the existence of clinical pneumoconiosis in the miner's claim, pursuant 20 C.F.R. §718.202(a)(2). Specifically, employer asserts that the administrative law judge erred in crediting the opinion of Dr. Rizkalla, the autopsy prosector, over the opinion of Dr. Naeye, who reviewed the tissue slides. Employer's Brief at 16-20.

Dr. Rizkalla, a Board-certified pathologist, conducted the miner's autopsy. Dr. Rizkalla stated that gross examination of the lungs revealed twenty percent dark black pigmentation of the pulmonary parenchyma, with fibrinopurulent material and emphysematous bullae. Survivor's Director's Exhibit 14. On microscopic examination, Dr. Rizkalla observed that "[f]ocal anthracotic pigment deposition with fibrosis (macule) in peribronchial, peri septal [sic], perivascular and subpleural locales involve[s] 30 percent of the lung parenchyma with needle shaped crystals of silica." Survivor's Director's Exhibit 14.[8] Dr. Rizkalla also observed extensive airspace enlargement in a

[8] For ease of reference, the exhibits are identified to reflect the record folder in which they are physically located. However, at the hearing, the administrative law judge consolidated the Director's Exhibits from the miner's and survivor's claims, allowing

centrilobular pattern and emphysematous changes, and stated that the "anthracosilicotic macules are associated with the emphysematous regions." Survivor's Director's Exhibit 14. Dr. Rizkalla's final anatomic diagnoses included severe diffuse interstitial fibrosis of the lungs, severe acute bronchitis with bronchopneumonia and microabscess, mild to moderate simple coal workers' pneumoconiosis, and moderate pulmonary emphysema. Survivor's Director's Exhibit 14. During his deposition, Dr. Rizkalla clarified his opinion, stating that the miner's emphysema, interstitial fibrosis, and coal workers' pneumoconiosis were due to coal mine dust exposure, and added that the interstitial fibrosis "was one of the most severe interstitial fibrosis [sic] that some pathologists can see." Survivor's Claimant's Exhibit 2 at 21-22, 24, 25, 27.

By contrast, Dr. Naeye, a Board-certified pathologist, opined that a review of the lung tissue slides revealed "very little black pigment," involving "far less than 1%" of the lung tissue contained on the slides, and that "none of the many pieces of lung tissue . . . have microscopic findings of coal workers' pneumoconiosis." Survivor's Employer's Exhibit 7. Dr. Naeye also observed that the "very rare tiny birefringent crystals of toxic silica in [the miner's] lung tissues" were "far too few to have produced any lung damage including fibrosis." Survivor's Employer's Exhibit 7. Dr. Naeye also opined that "the prosector who performed the autopsy selected tissues for microscopic review that [are] unrepresentative of the lungs as a whole. No man could have lived with the severe, widespread areas of old fibrosis that are present in the lung tissues that are available for microscopic review." Survivor's Employer's Exhibit 7. Dr. Naeye concluded that the lung fibrosis was "most likely the consequence of episodes of lobular pneumonia that were not treated" and was "categorically not related to exposures to any constituents in coal mine dust." Survivor's Employer's Exhibit 7.

An administrative law judge may credit the prosector over the opinion of one who reviews the slides if there is evidence that the prosector had an advantage by being able to see the gross tissue. *See Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-22-23 (1992). Employer states that there was no evidence that Dr. Rizkalla had such an advantage and that, therefore, the administrative law judge erred in crediting his opinion over that of Dr. Naeye. Employer's Brief at 17.

Contrary to employer's argument, in crediting the opinion of Dr. Rizkalla over that of Dr. Naeye, the administrative law judge accurately summarized Dr. Rizkalla's testimony that his position as the autopsy prosector "definitely" put him in a better position to render a diagnosis. Survivor's Claimant's Exhibit 2 at 12-13. Taking into consideration Dr. Rizkalla's testimony, together with Dr. Naeye's statement that he

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evidence developed in the survivor's claim to be considered in the miner's lifetime claim, and vice versa. Decision and Order at 2; Hearing Tr. at 11.

believed the tissue slides he received were "unrepresentative" of the lungs as a whole, the administrative law judge rationally concluded that Dr. Rizkalla's ability to observe the miner's entire cardio-pulmonary structure during the autopsy provided him with an advantage over Dr. Naeye.[9] *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Urgolites*, 17 BLR at 1-22-23.

Nor is there merit to employer's contention that the administrative law judge erred in crediting the opinion of Dr. Rizkalla because he is not a specialist in pulmonary pathology, or because he relied on inaccurate smoking and coal mine employment histories. Employer's Brief at 18-19. Contrary to employer's arguments, in weighing the pathology opinions, the administrative law judge properly considered "the qualifications of the competing physicians and the quality of their respective reasoning."[10] *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). In asserting that Dr. Rizkalla is less qualified than Dr. Naeye, or that his opinion is undermined based on the exposure histories he recorded, employer essentially asks the Board to assess the credibility of Dr. Rizkalla's opinion, which we are not authorized to do.[11] *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Anderson*, 12 BLR at 1-113. Because

[9] The administrative law judge took into account Dr. Rizkalla's testimony that he collected random samples of the miner's lung tissue, in compliance with "the standards of [the] coal workers' pneumoconiosis protocol." Survivor's Claimant's Exhibit 2 at 25-26; Decision and Order at 12.

[10] The administrative law judge accurately noted that Drs. Rizkalla and Naeye are both Board-certified in Anatomic and Clinical Pathology. Decision and Order at 16. Contrary to employer's argument, while an administrative law judge may assign weight to a physician's report based on that physician's additional specialty qualifications or publications, *see Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988), he is not required to do so. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988).

[11] We also reject employer's assertion that Dr. Rizkalla stated that a smoking history of thirty or forty pack-years, versus the lesser history of twenty years that he considered, would alter his opinion as to the cause of the miner's lung fibrosis. Employer's Brief at 20. Rather, Dr. Rizkalla stated only that additional cigarette exposure "may alter the amount of emphysema in [the miner's] lungs." Survivor's Claimant's Exhibit 2 at 22. As noted, employer has not challenged the administrative law judge's finding that the miner's emphysema constituted legal pneumoconiosis. *See* n.5, *supra*. Moreover, the etiology of the miner's emphysema has no bearing on employer's

the administrative law judge provided an adequate rationale for concluding that Dr. Rizkalla, as the physician who conducted the autopsy, was in a better position to render an opinion on the extent and the etiology of the lung fibrosis than was Dr. Naeye, we affirm the administrative law judge's determination that Dr. Rizkalla's opinion is sufficient to establish that the miner suffered from clinical coal workers' pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(2).[12]

Employer next asserts that the administrative law judge erred in evaluating the medical opinion evidence relevant to the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Employer specifically asserts that the administrative law judge erroneously discredited the opinions of Drs. Fino and Renn, on the grounds that they are inconsistent with both the pathology evidence, and the medical evidence of fibrosis dating back to 1984, and further erred in crediting the opinion of Dr. Schaaf. We disagree.

Considering the medical opinions as to the existence of pneumoconiosis, the administrative law judge correctly found that Drs. Zlupko, Schaaf, and Begley diagnosed coal workers' pneumoconiosis, in the form of pulmonary fibrosis due to coal mine dust exposure. Drs. Fino and Renn opined that the miner's fibrosis was not due to coal mine dust exposure, but was of unknown, or idiopathic, origin. Contrary to employer's arguments, the administrative law judge correctly noted that, in contrast to Drs. Fino and Renn, neither pathologist opined that the miner suffered from idiopathic interstitial fibrosis. Decision and Order at 19; Survivor's Director's Exhibits 14, 17; Survivor's Claimant's Exhibit 2. Rather, Dr. Rizkalla opined that the miner's fibrosis was due to coal mine dust exposure, and Dr. Naeye opined that the fibrosis was most likely due to untreated bouts of pneumonia. Moreover, the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and Renn because neither physician

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challenge to the administrative law judge's finding that the miner's lung fibrosis constituted clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1).

[12] Employer also asserts that the administrative law judge irrationally stated that Dr. Rizkalla's opinion is corroborated by the x-rays and computerized tomography (CT) scans, which the administrative law judge earlier found insufficient to establish the existence of pneumoconiosis. Employer's Brief at 19. Employer misstates the administrative law judge's conclusion. The administrative law judge noted that Dr. Rizkalla's "pathological observations corroborate the [positive] x-ray readings . . . and CT scan evidence . . . ." Decision and Order at 17. This was rational, in light of the administrative law judge's additional finding that autopsy evidence is the most reliable evidence as to the existence of pneumoconiosis. Decision and Order at 16, *citing Terlip v. Director, OWCP*, 8 BLR 1-363 (1985).

reconciled his opinion, that the miner had idiopathic pulmonary fibrosis, a condition that Drs. Renn and Schaaf agreed has a survival rate of approximately five years, with the record evidence documenting that the miner had a long-standing fibrotic condition dating back to 1984. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-21 (3d Cir. 1997); *Clark*, 12 BLR at 1-155; Decision and Order at 18-19. By contrast, the administrative law judge noted that Dr. Schaaf alone had considered the significance of the miner's x-rays from 1984, and explained that the slow progression of the fibrotic condition was more consistent with a diagnosis of coal workers' pneumoconiosis than idiopathic pulmonary fibrosis. Decision and Order at 18-19. Thus, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Schaaf and Begley, as well-reasoned and better supported by the evidence of record, than to the opinions of Drs. Fino and Renn. *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Lango*, 104 F.3d at 578, 21 BLR at 2-21; *Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge credibility determinations, we affirm his finding of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004). We further affirm the administrative law judge's finding that, weighing all of the relevant evidence as a whole, and according greatest weight to the autopsy evidence, claimant established the existence of clinical pneumoconiosis in the miner's claim. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997); Decision and Order at 19.

Employer also challenges the administrative law judge's finding, pursuant to 20 C.F.R. §718.203(c), that the miner's clinical pneumoconiosis arose out of his coal mine employment. Employer argues that the opinions of Drs. Schaaf and Begley are not competent evidence of disease causation because they relied on coal mine employment histories of more than ten years. Employer's Brief at 21. Employer's argument lacks merit.

Contrary to employer's argument, the administrative law judge did not rely exclusively on the opinions of Drs. Schaaf and Begley to find disease causation established, but accurately found that all of the physicians who diagnosed pneumoconiosis attributed it to coal mine dust exposure, including Dr. Zlupko, who based his opinion on a coal mine employment history of only eight years. Decision and Order at 19; Miner's Director's Exhibit 20. Moreover, while Drs. Schaaf and Begley recorded more than ten years of coal mine employment, the administrative law judge reasonably found that they supported their conclusions as to the cause of the miner's coal workers' pneumoconiosis by explaining that a lymph node biopsy performed in 1984 revealed mild to moderate anthracosilicosis, and thus confirmed that the miner was exposed to, and inhaled, "significant coal dust." Miner's Director's Exhibit 67 at 11-12, 15-16 (Begley Tr.), 25 (Schaaf Tr.). In addition, Dr. Rizkalla explained that the miner's fibrosis was due to coal mine dust exposure because anthracotic pigment was present in

the lung tissue, along with coal dust particles and birefringent crystals of silica, a substance that is contained in coal dust, is known to cause fibrosis, and is not generally present in the air. Survivor's Claimant's Exhibit 2 at 21, 23-25. Further, the administrative law judge correctly noted that the record contains no evidence of any other occupational exposures that might have caused the pneumoconiosis. Decision and Order at 19. As the administrative law judge's findings pursuant to 20 C.F.R. §718.203(c) are supported by substantial evidence, they are affirmed. *See Soubik*, 366 F.3d at 233, 23 BLR at 2-97.

We next address employer's contention that, in considering the cause of the miner's totally disabling impairment pursuant to 20 C.F.R. §718.204(c), the administrative law judge applied an improper standard in weighing the medical opinions, and erred in crediting the opinions of Drs. Zlupko, Schaaf, and Begley, over those of Drs. Fino and Renn. Employer's Brief at 19-25. Contrary to employer's contention, the administrative law judge permissibly discounted the opinions of Drs. Fino and Renn, that the miner's disability was unrelated to pneumoconiosis, because they did not diagnose pneumoconiosis, contrary to the administrative law judge's finding. *See Soubik*, 366 F.3d at 226, 23 BLR at 2-82; *Clites v. J & L Steel Co.*, 663 F.3d 14, 3 BLR 2-86 (3d Cir. 1981); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Having discredited the only contrary evidence of record, the administrative law judge permissibly found the opinions of Drs. Zlupko, Schaaf, and Begley, that coal mine dust was a substantial contributing cause of the miner's disabling respiratory impairment, to be well-reasoned and documented, and sufficient to establish disability causation at 20 C.F.R. §718.204(c).[13]

[13] Dr. Zlupko, who is Board-certified in Internal Medicine and specializes in the treatment of pulmonary disorders, examined the miner and recorded a coal mine employment history of eight years, and a smoking history of one-half pack per day for thirty-eight years. Miner's Director's Exhibits 20, 21. Dr. Zlupko opined that the miner was totally disabled due to pneumoconiosis, but acknowledged that smoking played some role in his symptoms. Miner's Director's Exhibit 20.

Dr. Schaaf, who is Board-certified in Internal Medicine and Pulmonary Diseases, examined the miner and recorded a coal mine employment history of twelve years, but noted that other physicians recorded employment histories of up to fifteen years. Miner's Director's Exhibits 60, 67 at 14 (Schaaf Tr.). Dr. Schaaf considered a smoking history of between thirty-five and forty-seven pack years. Miner's Director's Exhibits 60, 67 at 19-20 (Schaaf Tr.). Dr. Schaaf opined that the miner was totally disabled due to pneumoconiosis, with no contribution from smoking. Miner's Director's Exhibits 60, 67 at 44 (Schaaf Tr.).

Dr. Begley, who is Board-certified in Internal Medicine, Critical Care Medicine, and Pulmonary Diseases, was the miner's treating physician from 2003 until the miner's

See Balsavage, 295 F.3d at 396-97, 22 BLR at 2-396; *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989). In asserting that the opinions of Drs. Zlupko, Schaaf, and Begley are undermined by the exposure histories upon which they relied, employer requests a reweighing of the evidence.[14] *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Anderson*, 12 BLR at 1-113. Because the administrative law judge's finding at 20 C.F.R. §718.204(c) is supported by substantial evidence, it is affirmed. *See Soubik*, 366 F.3d at 233, 23 BLR at 2-97. We therefore affirm the award of benefits in the miner's claim. *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Anderson*, 12 BLR at 1-113.

Survivor's Claim

The recent amendments, in pertinent part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that an eligible survivor of a miner who was "determined to be 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.[15] 30 U.S.C. §932(*l*). Based upon the filing date of the survivor's

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death in 2007. Miner's Director's Exhibits 62, 67 at 3, 7 (Begley Tr.). Dr. Begley considered a coal mine employment history of twelve to fifteen years, and a smoking history of up to fifty pack years. Miner's Director's Exhibit 67 at 12, 13, 21 (Begley Tr.). Dr. Begley opined that the miner's totally disabling respiratory impairment was due to both coal workers' pneumoconiosis and smoking. Miner's Director's Exhibit 67 at 13-14 (Begley Tr.).

[14] Employer asserts that the opinions of Drs. Zlupko, Schaaf, and Begley are undermined by the fact that they relied on greater coal mine employment histories, and lesser smoking histories, than the maximum of 9.01 years of coal mine employment and thirty-three pack years of smoking that were found by the administrative law judge. Employer's Brief at 22. Contrary to employer's contention, as noted above, Dr. Zlupko considered only an eight-year coal mine employment history, and Drs. Schaaf and Begley considered smoking histories of between thirty-five and fifty pack years. Moreover, employer does not specify how the smoking and coal mine employment histories the physicians relied upon called into question their opinions that the miner's disabling lung fibrosis was due to coal mine dust. Employer's Brief at 22.

[15] As it existed prior to March 23, 2010, Section 422(*l*) provided that:

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed

claim and the award of benefits in the miner's claim, we hold that Section 422(*l*) applies to the current claim, despite the fact that the miner was not receiving payments as a result of an award of benefits at the time of his death. Contrary to employer's assertion, as long as there is a final adjudication in a miner's claim determining that the miner was totally disabled due to pneumoconiosis at the time of his death, a survivor is derivatively entitled to benefits. 30 U.S.C. §§901(a), 932(*l*); *see* 20 C.F.R. §725.212(a)(3)(ii); *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-70 (3d Cir. 1988); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989). Consequently, we affirm the award of benefits on the basis that claimant is derivatively entitled to survivor's benefits. Therefore, we need not address the administrative law judge's findings regarding the merits of entitlement in the survivor's claim, pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.205(c).

> under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(*l*). On March 23, 2010, Public Law No. 111-148 amended Section 422(*l*) as follows: "(b) Continuation of Benefits – Section 432(*l*) of the Black Lung Benefits Act (30 U.S.C. §932(*l*)) is amended by striking 'except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981'." Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*)). Section 1556 of Public Law No. 111-148 provides further that "[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. §921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c).

Accordingly, the administrative law judge's Decision and Order Awarding Lifetime and Survivor Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge