BRB Nos. 09-0564 BLA
and 09-0565 BLA

DIANA C. ALSBROOKS (Widow and o/b/o JERRY ALSBROOKS, SR.)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 09/30/2010
ISLAND CREEK 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 Award of Benefits in Living Miner's Claim and Award of Benefits in Survivor's Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Emily Goldberg-Kraft (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits in Living Miner's Claim and Award of Benefits in Survivor's Claim (2007-BLA-05579 & 2004-BLA-06787) of Administrative Law Judge Daniel F. Solomon with respect to claims 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). The administrative law judge credited the miner with at least fifteen years of coal mine employment, as stipulated by the parties, and adjudicated both claims pursuant to 20 C.F.R. Part 718. With respect to the miner's claim, the administrative law judge determined that claimant established that the miner had legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), (c). With respect to the survivor's claim, the administrative law judge found that the evidence was sufficient to establish that the miner had legal pneumoconiosis arising out of his coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203, and that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner's and survivor's claims.

Employer argues that the administrative law judge erred in finding that claimant established that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). In addition, employer challenges the administrative law judge's determinations that the miner's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and that his death was hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the award of benefits in both claims.[1] The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief in this appeal.[2]

The relevant procedural history of this case is as follows: The miner filed his application for benefits on November 24, 2003, and the district director issued a finding of entitlement on June 21, 2004. Director's Exhibits 2, 22. Employer requested a hearing and the case was initially assigned to Administrative Law Judge Daniel F. Sutton for a hearing. Director's Exhibits 23, 31 at 454. On August 31, 2005, claimant's representative requested that the scheduled hearing be cancelled so that claimant could

[1] Claimant is the widow of the miner, Jerry Alsbrooks, Sr. Director's Exhibit 43.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i)-(ii), (iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

have time to find an attorney. Director's Exhibit 31 at 429. On September 8, 2005, Judge Sutton continued the hearing and returned the case for reassignment. Director's Exhibit 31-425. The case was reassigned to Judge Solomon (the administrative law judge) and a hearing was scheduled for September 27, 2006. Director's Exhibit 31 at 4. However, the miner died on June 1, 2006. Director's Exhibit 43. Consequently, the miner's representative requested that the case be remanded to the district director to be consolidated with the survivor's claim, filed on June 30, 2006, and the request was granted. Director's Exhibits 31 at 2, 34. The district director issued a finding of entitlement in the survivor's claim on January 23, 2007, and employer requested a hearing. Director's Exhibits 61, 62. Thereafter, the claims were assigned for a hearing before the administrative law judge, who issued his Decision and Order on April 16, 2009, which is the subject of this appeal.

By Order dated March 31, 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.[3] *Alsbrooks v. Island Creek Coal Co.*, BRB No. 09-0564 and 09-0565 BLA (Mar. 31, 2010)(unpub. Order). The Director, claimant, 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), will not affect the survivor's claim if the Board affirms the administrative law judge's award of benefits. However, the Director further contends that, if the Board does not affirm the administrative law judge's findings in the survivor's claim, remand for consideration under Section 411(c)(4), and for the possible submission of additional evidence, would be required, as the survivor's claim was filed after January 1, 2005, and the administrative law judge credited claimant with at least fifteen years of coal mine employment. Claimant responds, arguing that the amendments apply in the miner's claim, based on the administrative law judge's length of coal mine employment finding. Claimant also states that if the Board affirms the award of benefits in the

[3] 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. 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. In addition, under Section 422(*l*), 30 U.S.C. §932(*l*) of the Act, as amended, a qualified survivor of a miner who filed a successful claim for benefits is automatically entitled to survivor's benefits without the burden of reestablishing entitlement.

miner's claim, then the amendments would result in an automatic award in the survivor's claim. Therefore, claimant asserts that, if the Board does not affirm the award of benefits in the miner's claim, the case must be remanded to the administrative law judge for additional consideration.

Employer responds that the miner's claim is not affected by the amendments, based on the filing date. In addition, employer states that since the miner was not receiving benefits at the time of his death, the amendments to 30 U.S.C. §923(*l*) do not apply to the survivor's claim, but the amendments to 30 U.S.C. §921(c)(4) could apply. Consequently, employer contends that due process requires that the case be remanded for employer to develop evidence addressing the new standards. Employer also states that the Board should hold that the retroactive application of the amendments is unconstitutional because they deny employer due process and constitute an improper taking of private property.

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.[4] In the survivor's claim, however, the applicability of the amended versions of Sections 411(c)(4) and 422(*l*), depends upon the Board's disposition of the arguments raised in employer's appeal of the miner's claim. Accordingly, we will consider employer's allegations of error with respect to the administrative law judge's award of benefits in the miner's claim.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Miner's Claim

In order to establish entitlement to benefits in the miner's claim, pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that

[4] Because the amendments do not apply to the miner's claim, it is not necessary to address employer's additional argument, that the application of the amendments in the miner's claim would be unconstitutional.

[5] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. 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*).

the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his disability was due to pneumoconiosis. *See* 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

A. 20 C.F.R. §718.202(a)(4)

1. The Administrative Law Judge's Findings

In evaluating whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Simpao, Repsher, Selby, Houser, and Hanke, the CT scan interpretations by Dr. Wiot, and the miner's hospitalization and treatment records, including the miner's death certificate. The administrative law judge found Drs. Repsher, Selby, and Houser to be the most qualified physicians of record because they are experts in the field of pulmonary medicine.[6] Decision and Order at 36. The administrative law judge accorded less weight to Dr. Simpao's opinion, that he could not rule out coal dust exposure as a cause of the miner's respiratory impairment, because it was not clear from Dr. Simpao's report whether he diagnosed clinical or legal pneumoconiosis, and the administrative law judge could not determine whether his diagnosis was dependent on his x-ray findings. *Id*. at 38; Director's Exhibit 44. The administrative law judge explained that since he found the preponderance of the x-ray evidence to be negative for pneumoconiosis at 20 C.F.R. §718.202(a)(1), he would find an opinion based on a positive x-ray to be flawed. Decision and Order at 39. The administrative law judge also noted that Dr. Simpao's opinion supported Dr. Houser's opinion, that the miner suffered from legal pneumoconiosis. *Id*. at 40.

Regarding Dr. Repsher's opinion, the administrative law judge stated that all of the studies he referenced to support his position, that the miner's respiratory impairment was due to his smoking, coronary artery disease, and obstructive sleep apnea, predated the amended definition of pneumoconiosis, which became effective on January 21, 2001, and were only relevant to clinical pneumoconiosis. Decision and Order at 36-38; Director's Exhibit 31 at 1147; Employer's Miner's Claim Exhibit 2. In addition, the administrative law judge determined that the Attfield and Hodous study cited by Dr.

[6] Drs. Repsher, Selby, and Houser are Board-certified pulmonologists. Director's Exhibit 31-364 at 3; Claimant Miner's Exhibit 4 at 3; Employer Miner's Exhibit 2 at 3-4. The record does not reflect that Dr. Simpao is Board-certified in any specialty. Director's Exhibit 31-837 at 3.Dr. Hanke is Board-certified in family medicine and was the miner's treating physician. Claimant Miner's Exhibit 2 at 5.

Repsher actually refuted his opinion. Decision and Order at 37; Employer's Miner's Claim Exhibit 2 at 16. The administrative law judge accorded less weight to Dr. Repsher's opinion because he found that it was "based on general statistical probabilities rooted in out-dated studies rather than the [m]iner's individual history and condition." Decision and Order at 38. Further, the administrative law judge determined that Dr. Repsher's assessment of the miner's occupational history as "quite modest," and only "potentially significant," to be contrary to the weight of the evidence, as the other physicians found that the length of the miner's coal mine employment was significant. *Id*.; Employer's Miner's Claim Exhibit 2 at 11.

The administrative law judge gave less weight to Dr. Selby's opinion, that the miner's respiratory impairment was due to cigarette smoking, cardiac disease, and other medical problems unrelated to coal dust exposure, because Dr. Selby relied on a pulmonary function study that he described as invalid, to exclude a diagnosis of legal pneumoconiosis. Decision and Order at 37; Director's Exhibit 31 at 364. The administrative law judge indicated that Dr. Selby improperly dismissed Dr. Simpao's valid pulmonary function study, which showed a moderate restrictive impairment, based on his invalid study. Decision and Order at 37-38. Additionally, the administrative law judge discredited Dr. Selby's opinion because he did not adequately address whether the miner's emphysema or asthma were aggravated by the miner's coal dust exposure. *Id*. at 38. Further, the administrative law judge determined that Dr. Selby's opinion, that if the miner's asthma was due to coal dust, he would have complained of shortness of breath while working in the mines, is contrary to the accepted principle that pneumoconiosis is a latent and progressive disease. *Id*.; Director's Exhibit 31-364 at 19.

The administrative law judge accorded greater weight to Dr. Houser's opinion, that the miner's chronic obstructive pulmonary disease (COPD) was due to cigarette smoking and coal dust exposure, because it was well reasoned and documented, as the administrative law judge determined it was supported by the underlying documentation and evidence in the record. Decision and Order at 39; Director's Exhibit 31 at 336; Claimant's Miner's Claim Exhibit 4 at 19. In addition, the administrative law judge found that Dr. Houser's opinion was sufficient to meet claimant's burden of proving the existence of pneumoconiosis and was consistent with the studies cited by the Department of Labor (DOL). Decision and Order at 39. The administrative law judge noted that, in contrast to Dr. Repsher, one of the studies cited by Dr. Houser was published after the regulations were amended and several of the other cited studies were reviewed by the DOL during the rulemaking process. *Id*. at 37. The administrative law judge found that the Attfield and Hodous study cited by Drs. Repsher and Houser supported Dr. Houser's opinion. *Id*. Further, the administrative law judge determined that Dr. Houser's legal pneumoconiosis opinion was independent of his consideration of a positive x-ray. *Id*. at 39.

The administrative law judge indicated that Dr. Hanke's opinion, that the miner's COPD was due to smoking and coal dust exposure, supported Dr. Houser's diagnosis of legal pneumoconiosis; however, he discredited it because Dr. Hanke indicated that he would defer to the expertise of a pulmonologist regarding the cause of the miner's respiratory impairment. Decision and Order at 40; Director's Exhibit 43; Claimant's (Miner's Claim) Exhibit 2 at 15-16, 35. The administrative law judge stated that Dr. Hanke, as the miner's treating physician, was in the best position to understand the miner's symptoms, medical history, and treatment, but he did not accord Dr. Hanke's opinion any additional weight on this basis. Decision and Order at 40.

Regarding the CT scan evidence, the administrative law judge determined that Dr. Wiot's negative interpretations were consistent with his determination that clinical pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1). Decision and Order at 32.

Consequently, based on Dr. Houser's opinion, as supported by the opinions of Drs. Simpao and Hanke, the administrative law judge concluded that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 40.

2. Arguments on Appeal

Employer contends that, in weighing the medical opinion evidence regarding legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge improperly credited Dr. Houser's opinion over the contrary opinions of Drs. Repsher and Selby. Employer alleges that the administrative law judge automatically deferred to Dr. Houser's opinion, based on the presumption that the miner's COPD was caused, in part, by coal dust exposure and that cigarette smoke and coal dust had a cumulative effect on the miner's impairment. Employer further argues that the administrative law judge's only explanation of why Dr. Houser's medical opinion is well reasoned and documented is Dr. Houser's understanding of the miner's coal mine employment history. In addition, employer indicates that the administrative law judge erroneously relied on the United States Court of Appeal for the Sixth Circuit's decision in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Employer contends that, contrary to the administrative law judge's finding, Dr. Houser's diagnosis of legal pneumoconiosis was based upon the miner's positive x-ray.

Employer's contentions are without merit. Despite employer's arguments to the contrary, the administrative law judge did not automatically defer to Dr. Houser's opinion that the miner's COPD was due, in part, to coal dust exposure. Rather, the administrative law judge acted within his discretion in determining that Dr. Houser's opinion was supported by the recent medical literature he cited, the DOL's comments to the regulations, and the miner's occupational and social histories and objective test results.

See Jericol Mining, Inc. v. Napier, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). Further, the administrative law judge properly relied on *Cornett* to support his determination that Dr. Houser's opinion was sufficient to satisfy claimant's burden of proof at 20 C.F.R. §718.202(a)(4), despite his inability to precisely distinguish between the effects of smoking and coal dust on the miner's COPD. *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Regarding Dr. Houser's alleged reliance on a positive x-ray interpretation to diagnose legal pneumoconiosis, the administrative law judge permissibly explained that Dr. Houser's statement, that the positive x-ray supported coal dust exposure as a cause of the miner's impairment, only reinforced Dr. Houser's opinion regarding legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), which was already established, independent of the x-ray. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; Decision and Order at 39-40.

Employer also asserts that the administrative law judge improperly shifted the burden of proof by discrediting Dr. Selby's opinion because he did not rule out coal dust exposure as a cause of the miner's impairment. Employer indicates that, contrary to the administrative law judge's determination, Dr. Selby explained why the miner's emphysema and asthma were not caused, or aggravated by, coal dust. In addition, employer argues that the administrative law judge substituted his own opinion for that of Dr. Selby when he concluded that, as coal workers' pneumoconiosis may be latent and progressive, the miner's asthma was exacerbated by coal dust exposure. Further, employer states that, while pneumoconiosis may be progressive, there is no presumption that it is always progressive.

There is no merit to employer assertion that, in weighing the opinion of Dr. Selby, the administrative law judge improperly shifted the burden of proof to employer to rule out coal dust exposure as a cause of claimant's COPD. Rather, the administrative law judge permissibly rejected Dr. Selby's opinion because he found that it did not contain any rational explanation as to why claimant's respiratory condition was due only to smoking, and could not be related, at least in part, to coal dust exposure. Decision and Order at 38; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Clark*, 12 BLR at 1-155. In addition, as the administrative law judge accurately noted, Dr. Selby's conclusion, that because the miner did not complain of shortness of breath during his coal mine employment, the miner's asthma must be due to cigarette smoke rather than coal mine dust, is inconsistent with the recognition by the courts, and the DOL, that pneumoconiosis is latent and progressive in nature. Decision and Order at 38; Director's Exhibit 31-364; 20 C.F.R. §718.201(c); *see* 65 Fed. Reg. 79972, 79975 (Dec. 20, 2000). Furthermore, contrary to employer's contention, the administrative law judge did not conclude that the miner's asthma was exacerbated by

exposure to coal dust or that pneumoconiosis is always progressive, but rather rationally determined that Dr. Selby's opinion did not adequately address the cause of the miner's impairment. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513.

Employer also contends that the administrative law judge erred in wholly discrediting Dr. Selby's opinion, based upon an invalid spirometry result, as Dr. Selby reviewed additional studies in forming his opinion. In making this argument, employer asserts that, because Dr. Simpao did not obtain lung volume measurements, it was irrational for the administrative law judge to accord more weight to his opinion than Dr. Selby's more complete opinion. In addition, employer states that it was error for the administrative law judge to credit Dr. Houser's statement, that he could not determine whether there was a restrictive impairment, when he did not review lung volume measurements.

Employer is correct in alleging that Dr. Selby reviewed the pulmonary function studies of Drs. Simpao and Repsher, which he found to be "fairly consistent" with the results of the invalid test he performed, showing evidence of an obstructive respiratory impairment. Director's Exhibit 31-364 at 29. However, Dr. Simpao also diagnosed a moderate restrictive disease, which Dr. Selby discredited in his written report, based on the invalid pulmonary function study he performed. Director's Exhibits 31-646, 44. Therefore, the administrative law judge acted within his discretion in giving less weight to Dr. Selby's opinion, that there was no clinical evidence suggestive of restrictive disease consistent with coal workers' pneumoconiosis, based on his reliance on the invalid study.[7] *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513.

Regarding the Attfield and Hodous study, employer contends that the administrative law judge conducted his own review and analysis of the medical literature in finding that the survey supported Dr. Houser's opinion and refuted Dr. Repsher's opinion. Employer further argues that the administrative law judge mischaracterized Dr. Repsher's testimony regarding the miner's coal mine employment history because his understanding of the length of the employment was identical to the other physicians and he agreed that it was "potentially significant," but found it did not cause the miner's impairment. Additionally, employer asserts that the administrative law judge selectively analyzed the medical evidence by discrediting Dr. Repsher's opinion because it was

[7] Because the administrative law judge gave valid reasons for his finding, that Dr. Selby's opinion was not persuasive, we need not address employer's additional allegations of error regarding the administrative law judge's weighing of Dr. Selby's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

based on generalities, while not explaining how Dr. Houser's opinion was not similarly deficient.

In his opinion, Dr. Repsher indicated that he excluded coal dust exposure as a causal factor because the degree of obstruction caused by coal dust exposure is not clinically significant and he cited studies, including one by Attfield and Hodous, in support of this conclusion. Director's Exhibit 31-1147; Employer Miner's Exhibit 2 at 15-16. As the administrative law judge noted, in the comments to the regulations, the DOL found that, based on a review of medical literature on this issue, there was a consensus among medical experts that coal dust-induced COPD is clinically significant and that the causal relationship between coal dust and COPD is not merely rare. 65 Fed. Reg. 79,938, 79,943 (Dec. 20, 2000); Decision and Order at 37-38. Therefore, the administrative law judge's determination, that Dr. Repsher's opinion was entitled to diminished weight, to the extent that he relied upon a position contrary to the view accepted by DOL, is rational and supported by substantial evidence. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *see also Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 23 BLR 2-184 (4th Cir. 2004). Because the administrative law judge ultimately was not persuaded by Dr. Repsher's opinion and he gave at least one valid reason why his opinion was not persuasive, we need not address employer's additional arguments at 20 C.F.R. §718.202(a)(4). *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We affirm, therefore, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a).

B. 20 C.F.R. §718.204(b)(2)(iii)

1. The Administrative Law Judge's Findings

When addressing total disability under 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge found that Dr. Houser diagnosed cor pulmonale and that the condition was mentioned in the miner's treatment records. Decision and Order at 29. The administrative law judge noted that Dr. Houser rendered his diagnosis of cor pulmonale in June 2005 and further noted that Dr. Houser testified that when he examined the miner, his condition was consistent with end-stage respiratory failure due to severe COPD and cor pulmonale. *Id*. The administrative law judge found that Dr. Houser's opinion was supported by the miner's treatment records, which document a history of congestive heart failure, and by the miner's death certificate, which lists congestive heart failure as a secondary cause of death. *Id*. at 29-30. In addition, the administrative law judge indicated that he did not find any evidence challenging Dr. Houser's finding of cor pulmonale, so he concluded that the miner established total disability at 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 30.

2. Arguments on Appeal

Employer argues on appeal that the administrative law judge improperly determined that the miner had cor pulmonale, without addressing the opinions in which Drs. Repsher and Selby stated that the miner's heart condition was not related to his coal dust exposure. Employer also asserts that Dr. Castle, whose opinion was admitted in the survivor's claim, indicated that, because the miner did not have right ventricular hypertrophy, he did not have cor pulmonale. Employer indicates that, although Dr. Castle's opinion is associated with the survivor's claim, the administrative law judge should have considered it in light of his reliance on the miner's death certificate, which is also evidence in the survivor's claim.

Employer has not identified any error requiring us to vacate the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2). *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In addition to finding that claimant established total disability under 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge stated: "As a result of the preponderantly qualifying pulmonary function testing, qualifying arterial blood gas testing, and well-reasoned opinions stating that the [m]iner suffers from total pulmonary or respiratory disability, I find that the [m]iner has successfully established total disability under [20 C.F.R.] §718.204(b)(2)." Decision and Order at 31. In light of the administrative law judge's determination that the evidence relevant to 20 C.F.R. §718.204(b)(2)(i), (ii), and (iv), was sufficient to establish total disability, when considered separately and when considered together, the administrative law judge rationally concluded that total disability was established at 20 C.F.R. §718.204(b)(2). *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Therefore, we affirm the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b).

C. 20 C.F.R. §718.204(c)

1. The Administrative Law Judge's Findings

The administrative law judge credited Dr. Houser's opinion, as supported by those of Drs. Simpao and Hanke, that the miner's totally disabling respiratory impairment was due to his legal pneumoconiosis. Decision and Order at 41. The administrative law judge discredited the opinions of Drs. Repsher and Selby because they failed to diagnose legal pneumoconiosis, contrary to his finding at 20 C.F.R. §718.202(a)(4). *Id*. Therefore, the administrative law judge determined that the miner's legal pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment at 20 C.F.R. §718.204(c). *Id*.

2. Arguments on Appeal

Employer asserts that the administrative law judge erred in failing to explain why Dr. Houser's deposition testimony establishes disability causation at 20 C.F.R. §718.204(c) and in discrediting the opinions of Drs. Selby and Repsher because they did not diagnose legal pneumoconiosis. Contrary to employer's contention, the administrative law judge set forth the basis for his finding that Dr. Houser's opinion was insufficient to establish disability causation at 20 C.F.R. §718.204(c). Decision and Order at 41. As the administrative law judge noted, all of the physicians agreed that the miner was totally disabled due to his respiratory impairment but disagreed as to its etiology. Decision and Order at 30; Director's Exhibits 31-336, 31-364, 31-646, 31-837, 31-1147, 44; Claimant Miner's Exhibits 2, 4; Employer Miner's Exhibit 2. Therefore, relying on his determination that claimant established that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge rationally concluded that the miner's totally disabling respiratory impairment was due, in part, to coal dust exposure at 20 C.F.R. §718.204(c). *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513. Because Drs. Selby and Repsher did not diagnose pneumoconiosis, the administrative law judge permissibly gave their opinions less weight as to the cause of claimant's disability. *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989).

Consequently, we affirm the administrative law judge's determination that claimant established that the miner had a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c). Because we have affirmed the administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis , we affirm the award of benefits in the miner's claim. *See Trent*, 11 BLR at 1-28; *Perry*, 9 BLR at 1-2.

II. 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.[8] 30 U.S.C.§932(*l*). Based upon the filing date of the survivor's

[8] 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

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).

Because the amended version of Section 422(*l*) applies to the survivor's claim, we must address employer's arguments challenging its constitutionality. Employer initially contends that it is unconstitutional to apply Section 932(*l*) to claims, such as this one, filed prior to the March 23, 2010, amendments to the Act. Employer concedes that Congress has the right to enact retroactive legislation, as long as the statute serves a legitimate legislative purpose and is furthered by rational means. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-20, 3 BLR 2-36, 2-43-47 (1975); Employer's Supplemental Brief at 9-10. Employer also concedes that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality" and that due process requires inquiry into whether the legislature acted in an arbitrary and irrational way when enacting retroactive law. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Usery*, 428 U.S. at 15, 3 BLR at 2-43; Employer's Brief at 9. However, relying on *Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-37 (1998), employer contends that retroactive application of amended Section 932(*l*) to claims filed after January 1, 2005 is a violation of due process because Congress provided no "legitimate purpose" for making the legislation retroactive, and arbitrarily

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> revalidate the claim of such miner, except with respect to a claim filed 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).

chose January 1, 2005 as the operative filing date for the application of amended Section 932(*l*). Employer's Supplemental Brief at 10-11.

We disagree. The Board recently addressed arguments substantially similar to employer's current arguments in *Mathews v. United Pocahontas Coal Co.*, BLR , BRB No. 09-0666 BLA (Sept. 22, 2010). In *Mathews*, the Board agreed with the Director, that an examination of the legislative history discloses that the sponsor of the amendments, Senator Robert C. Byrd, explained that amended Section 932(*l*) would apply not only to all future miners' and survivors' claims, but that it would "also benefit all of the claimants who have recently filed a claim, and are awaiting or appealing a decision or order, or who are in the midst of trying to determine whether to seek a modification of a recent order." *Mathews*, slip op. at 4, *citing* 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010)(statement of Sen. Byrd). Thus, the rational purpose for applying amended Section 932(*l*) retroactively is to compensate the survivors of deceased miners "for the effects of disabilities bred in the past." *See Usery*, 428 U.S. at 15, 3 BLR at 2-43 (upholding the retroactive application of the Black Lung Benefits Act of 1972); *Mathews*, slip op. at 4.

Nor is there merit to employer's assertion that Congress' choice of January 1, 2005, as the operative filing date for the application of amended Section 932(*l*) violates due process. As the Board noted in *Mathews*, the United States Supreme Court has "never insisted that a legislative body articulate its reasons for enacting a statute . . . particularly . . . where the legislature must necessarily engage in a process of line-drawing." *Mathews*, slip op. at 4, *quoting U.S. R..R.. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Indeed, the Court has held that the "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976).

Moreover, employer's reliance on *Apfel* is misplaced. In *Apfel*, the Court held that retroactive application of the Coal Industry Retiree Health Benefit Act (Coal Act) to one particular former operator was unconstitutional because it required the former operator to fund health benefits for retired miners who had worked for the operator before it left the coal industry. *Apfel*, 524 U.S. at 528-39. The Court did not hold, as employer implies, that retroactive application of any economic legislation necessarily violates due process. Moreover, as the Director contends, *Apfel* undercuts employer's assertion. Justice O'Connor, writing for the Court, emphasized that the disproportionate and severe retroactive burden placed upon the former operator by the Coal Act, which rendered the Coal Act unconstitutional, as applied to the former operator, "differ[ed] from coal operators' responsibility for benefits under the Black Lung Benefits Act of 1972. That legislation merely imposed 'liability for the effects of disabilities bred in the past [that] is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.'" *Apfel*, 524 U.S. at 536, *quoting Usery*,

428 U.S. at 18, 3 BLR at 2-45; Director's Brief at 11 n.4. Thus, *Apfel* is not only distinguishable from the instant case; it does not support employer's position. We hold, therefore, that employer has not met its burden to establish that retroactive application of amended Section 932(*l*) is a violation of due process.

We turn next to employer's assertion that retroactive application of amended Section 932(*l*) to this case constitutes an unlawful taking of employer's property under the Fifth Amendment. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. There is no dispute that a "takings" analysis may apply to general economic regulations which, in effect, transfer a property interest from one party to another for the greater good, and is not limited to outright acquisitions of property by the government for itself. *See Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). Further, as the Board noted in *Mathews*, while there is no set formula for determining whether a regulatory taking has occurred, the Court has set forth a factually specific, three-prong analysis, inquiring into: 1) the economic impact of the regulation on the complainant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1985); *Mathews*, slip op. at 5.

Employer asserts that the economic impact of amended Section 932(*l*) on it is substantial. Employer's Supplemental Brief at 13. Employer explains that it relied to its detriment on the existing law from 2005 through 2010 and that if it had been notified of these changes, it could have altered its business practices to compensate for the significant increase in the number of claims that will be awarded. *Id*. While amended Section 932(*l*) may affect employer financially, the assessment of the economic impact "directly depends on the relationship between the employer and the plan to which it had made contributions" and the impact must be "out of proportion" to employer's experience with the plan. *Connolly*, 475 U.S. at 225-26. In this case, employer has offered no direct proof of its financial situation, without which, it is difficult to assess the degree of economic impact that amended Section 932(*l*) will have on employer. Therefore, on the facts of this case, we hold that employer has not met its burden to establish this prong of the takings analysis. *See United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989).

Employer further asserts that amended Section 932(*l*) interferes with employer's investment-backed expectations by imposing a harsh new liability that employer could not have foreseen in 2005, depriving employer of the opportunity to adjust its conduct to avoid or minimize any adverse effect. Employer's Brief at 12-13. Contrary to employer's argument, since 1974, the federal black lung benefits program has required each policy issued to cover liabilities under the Act to include the Federal Coal Mine Health and Safety Act endorsement. 20 C.F.R. §726.203(a); *see Mathews*, slip op. at 6. This endorsement provides, in pertinent part, that insurers are liable for their principals'

obligations under the Act "and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force . . . ." 20 C.F.R. §726.203(a). We hold that the inclusion of this endorsement in the policies issued to employer by its carrier supports a conclusion that employer has been on notice that it may be responsible for any liability arising from amendments to the Act. Moreover, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery*, 428 U.S. at 16, 3 BLR at 2-44. Thus, we conclude that the alleged disruption of employer's investment-backed expectations, under the facts presented here, does not support a conclusion that the application of amended Section 932(*l*) effects an unlawful taking of employer's property.

Employer next asserts that the retroactive character of amended Section 932(*l*) renders it constitutionally suspect. We disagree. First, as the Board noted in *Mathews*, "the enactment of retroactive statutes . . . is a customary congressional practice," *Mathews*, slip op. at 6, *quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984), and Congress may "impose retroactive liability to some degree, particularly where it is 'confined to short and limited periods required by the practicalities of producing national legislation,'" without effecting an unconstitutional taking. *Apfel*, 524 U.S. at 529, *quoting Gray*, 467 U.S. at 731. Moreover, the character of the governmental action in this case is not one where the government has physically invaded or permanently appropriated any of employer's assets for its own use. *See Connolly*, 475 U.S. at 225. Instead, retroactive application of amended Section 932(*l*) "adjust[s] the benefits and burdens of economic life to promote the common good." *Id*. For the foregoing reasons, we hold that, under the facts presented, employer has not met its burden to establish that retroactive application of amended Section 932(*l*) to this case constitutes an unlawful taking of employer's property under the Fifth Amendment. *See Sperry Corp.*, 493 U.S. at 60.

Finally, we reject employer's request that this case be held in abeyance until sixty days after DOL issues guidelines or promulgates regulations implementing amended Section 932(*l*). As the Board noted in *Mathews*, the mandatory language of amended Section 932(*l*) supports the conclusion that the provision is self-executing, and, therefore, there is no need to hold this case in abeyance, pending the promulgation of new regulations. *See, e.g., Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Alabama Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998); *Gholston v. Housing Authority of Montgomery*, 818 F.2d 776, 784-87 (11th Cir. 1987); *Mathews*, slip op. at 7. Employer also notes that the constitutionality of Public Law No. 111-148 has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Employer therefore requests that "[p]otentially affected federal black lung claims . . . be held in abeyance until resolution of this legal challenge . . . ." Employer's Supplemental Brief at 14-15. Employer does not indicate that any court has yet enjoined the application, or ruled on the validity, of the recent amendments to the Act.

Consequently, employer's request to hold this case in abeyance is denied, and we affirm the award of benefits on the basis that claimant is derivatively entitled to survivor's benefits.[9]

Accordingly, the administrative law judge's Decision and Order Award of Benefits in Living Miner's Claim and Award of Benefits in Survivor's Claim is affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge

[9] In light of our disposition herein, we need not address the administrative law judge's findings regarding the merits of entitlement, pursuant to 20 C.F.R. §§718.202(a)(4), 718.205(c).