BRB Nos. 09-0603 BLA
and 09-0604 BLA

BESSIE KEEN (Widow of and o/b/o of WILLIAM KEEN) Claimant-Respondent v. KOCH CARBON, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/30/2010 DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2007-BLA-05124 and 2005-BLA-00022) of Administrative Law Judge Daniel F. Solomon issued with respect to a consolidated case involving the miner's request for modification of his denied claim, filed on February 5, 1993, and a survivor's claim, filed on October 27, 2005, 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] This case is before the Board for a second time. A procedural history of the case is provided in *B.K.* [*Keen*] *v. Koch Carbon, Inc.*, BRB Nos. 07-0968 and 07-0972 BLA, slip op. at 2 n.2 (Sept. 30, 2008) (unpub.), which is incorporated herein. The Board previously vacated the administrative law judge's denial of benefits in both claims because his Decision and Order did not satisfy the requirements of the Administrative Procedure Act (APA).[2] *Keen*, slip op. at 5. Specifically, the Board held that the administrative law judge mischaracterized the evidence, did not identify with specificity the evidence in the record relevant to the miner's request for modification, and did not adequately set forth the rationale underlying his findings. *Id*. at 3, 5. The Board remanded the miner's claim in order for the administrative law judge to consider all of the evidence submitted subsequent to the miner's modification request, filed on June 8, 2001, in determining whether claimant established a basis for modification pursuant to 20 C.F.R. §725.310 (2000).[3] *Id*. The administrative law judge was instructed to consider whether claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Id*. at 4. The Board further directed the administrative law judge to render specific findings, pursuant to 20 C.F.R. §718.304(a)-(c), as to whether claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *Id*. at 5.

With respect to the survivor's claim, the Board vacated the denial of benefits because the administrative law judge erred in failing to render complete findings under 20 C.F.R. §718.202(a)(1), (4), and did not address all of the relevant evidence. *Keen*, slip op. at 10. The Board remanded the case for further consideration, in accordance with *Compton*. *Id*. The Board directed the administrative law judge on remand to also

[1] Bessie Keen is the widow of the miner, William Keen, and is pursuing benefits based on the miner's modification request and her own survivor's claim.

[2] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[3] The Department of Labor revised the regulations implementing 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*)). These regulations apply to all claims filed after January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the revised regulations.

consider, if applicable, whether the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and whether claimant was entitled to invocation of the irrebuttable presumption of death due to pneumoconiosis set forth in 20 C.F.R §718.304. *Id*. at 11. In reaching his findings in both claims, the administrative law judge was required to explain the bases for his credibility determinations in accordance with the APA. *Id*. at 8, 11.

On remand, the administrative law judge addressed the Board's instruction that he identify the evidence relevant to the miner's modification request and stated, "[a]fter review of all the evidence, I now find that as the life claim involves a series of requests for modification of the 1993 claim, the documents in the survivor's claim should, [in the] interests of justice, be used in the life claim."[4] Decision and Order on Remand at 3. The administrative law judge concluded that the "complete record establishes total disability as of February, 2003." *Id*. at 5. The administrative law judge noted that the evidence before the district director as of June 8, 2001, the date of the miner's modification request, clearly established the existence of simple pneumoconiosis. However, in weighing the newly submitted x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative laws judge found that there were twenty-two readings of nine x-rays, of which, seven were positive for pneumoconiosis and fifteen were negative for the disease. *Id*. at 7. The administrative law judge concluded that, "[a]lthough employer was permitted under the rules in force prior to January 21, 2001 to submit more than one piece of evidence to rebut [the miner's] position . . . [c]laimant has not submitted enough evidence to meet her burden of proof" as to the x-ray evidence. *Id*. at 9. Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge found that the biopsy evidence, while including references to some degree of anthracotic pigmentation, was insufficient to establish the existence of clinical pneumoconiosis.[5] *Id*. Relevant to 20 C.F.R.

[4] We note that the administrative law judge's decisions refer to the Director's Exhibits in the miner's claim as "Government Exhibits," and in the survivor's claim as "Director's Exhibits." For purposes of this decision, however, we refer to the Miner's Claim Director's Exhibits as "MDX" and the Survivor's Claim Director's Exhibits as "SDX."

[5] "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. 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. 20 C.F.R. §718.201(a)(1).

§718.202(a)(3), the administrative law judge found that while there was evidence of complicated pneumoconiosis, claimant failed to establish that she was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. *Id*. at 9-10.

However, pursuant to 20 C.F.R. §718.202(a)(4),[6] the administrative law judge found that Dr. Byers' opinion was sufficient to establish the existence of legal pneumoconiosis.[7] *Id*. at 10-14. The administrative law judge also found that the miner's twenty-three year history of dust exposure in coal mine employment "in part caused the pneumoconiosis." *Id*. at 14. In considering the issue of disability causation at 20 C.F.R. §718.204(c), the administrative law judge gave less weight to the opinions of Drs. Dahhan and Castle because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *Id*. The administrative law judge credited Dr. Byers' opinion that the miner's total disability was caused in significant part by coal dust exposure and found that claimant satisfied her burden of proving that the miner was totally disabled due, in part, to pneumoconiosis. *Id*. Noting that Dr. Patel rendered the first diagnosis of total disability in the record in a report dated October 11, 2000, the administrative law judge awarded benefits in the miner's claim, commencing in October 2000. *Id.* at 15. With respect to claimant's survivor's claim, the administrative law judge also found that claimant established the existence of legal pneumoconiosis, and determined, based on the death certificate, that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id*. Accordingly, the administrative law judge awarded survivor's benefits, beginning on March 1, 2005, the month in which the miner died. *Id*.

On appeal, employer argues that the administrative law judge erred in failing to explain why the interests of justice required that he consider evidence from the survivor's claim in the miner's claim. Employer challenges the administrative law judge's finding that the miner was totally disabled due to legal pneumoconiosis, asserting that he did not properly consider whether Dr. Byers' opinion was reasoned and documented. Employer contends that the administrative law judge's credibility findings fail to satisfy the APA, and that he erred in finding that claimant was entitled to benefits in the miner's claim

[6] The administrative law judge did not attribute any weight to the CT scan evidence because he found that neither party established that CT scans are "medically acceptable and relevant to establishing or refuting claimant's entitlement to benefits," as required by 20 C.F.R. §718.107(b). Decision and Order at 9, 11.

[7] "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).

commencing in October 2000. With respect to the survivor's claim, employer argues that the administrative law judge erred in considering evidence from the miner's claim in the survivor's claim, erred in considering Dr. Byers' December 13, 2004 letter, and erred in finding that claimant established the existence of pneumoconiosis and death due to pneumoconiosis. Claimant, who is not represented by counsel, has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter, indicating that he will not file a response brief on the merits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

In order to establish entitlement to benefits under Part 718 in the miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish a basis for modification in the miner's claim, claimant must demonstrate either a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §725.310 (2000). In considering whether a change in conditions has been established pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). If a change in conditions is established, the administrative law judge must then consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim. *Nataloni*, 17 BLR at 1-84. In addition, the administrative law judge has the authority to consider, based on a weighing of all of the evidence of record, whether the prior denial contained a mistake in a determination of fact, including the ultimate fact of entitlement. *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Under the facts of this case, in order to establish a change in conditions, claimant is required to demonstrate that the miner was

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, Office of Workers' Compensation Programs*, 12 BLR 1-200, 1-202 (1989 (*en banc*).

totally disabled, in order to obtain a review of the miner's claim on the merits pursuant to 20 C.F.R. §725.310 (2000).[9]

On appeal, employer contends that the administrative law judge erred in failing to explain why the "interests of justice" required him to consider documentary evidence from the survivor's claim in the miner's claim. Employer's Brief in Support of Petition for Review at 6. However, because employer does not describe with any specificity how it was prejudiced by the administrative law judge's action, and does not identify the evidence that the administrative law judge should not have considered, employer has not provided the Board with a basis for review of the administrative law judge's evidentiary ruling. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

We also reject employer's assertion that the administrative law judge erred in finding that the miner was totally disabled, because he did not discuss whether the "treatment note evidence" was well-reasoned and documented, and because he "cherry-pick[ed]" various qualifying diagnostic studies to support his conclusions. Employer's Brief in Support of Petition for Review at 10. The administrative law judge correctly determined that "all of the recent medical opinions find that the [m]iner was totally disabled from a respiratory standpoint," notwithstanding the qualifying or non-qualifying nature of his objective test results. Decision and Order on Remand at 4. Specifically, Drs. Byers, Dahhan and Fino agree that the miner had a disabling respiratory impairment, although they disagree as to the etiology of that impairment, and whether it is due to coal

[9] We note that in *B.K.* [*Keen*] *v. Koch Carbon, Inc.*, BRB Nos. 07-0968 and 07-0972 BLA, slip op. at 2 n.2 (Sep. 30, 2008) (unpub.), the Board misstated that the miner's claim was denied for failure to establish pneumoconiosis. Although Administrative Law Judge Stuart A. Levin initially denied the claim on the ground that the evidence was insufficient to establish the existence of pneumoconiosis, the claim was later assigned to Administrative Law Judge Jeffrey Tureck, pursuant to the miner's request for modification. MDX 56, 57, 93, 97. Judge Tureck ultimately concluded that the miner had pneumoconiosis but that the most recent evidence failed to establish total disability. MDX 97. On appeal, the Board affirmed Judge Tureck's finding that the miner was not totally disabled. *Keen v. Koch Carbon, Inc.*, BRB No. 99-0708 BLA (June 14, 2000). Claimant filed several timely requests for modification, the most recent of which was on May 14, 2004, and is the subject of this appeal. Although Administrative Law Judge Daniel F. Solomon (the administrative law judge) did not render specific findings pursuant to 20 C.F.R. §725.310 (2000), the proper inquiry in this case is whether there was a mistake in fact with regard to the denial of the miner's claim by Judge Tureck or whether the newly submitted evidence submitted since 2000 establishes that the miner was totally disabled. Thereafter, claimant would be entitled to a review of the miner's claim on the merits, based on a consideration of all of the record evidence.

dust exposure. MDX 188; Employer's Exhibit 1 (Miner's Claim); SDX 14. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that the miner was totally disabled. Decision and Order on Remand at 5; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Furthermore, we hold that because claimant established total disability, she has proven a change in conditions pursuant to 20 C.F.R. §725.310 (2000), and was entitled to have the miner's claim reviewed on the merits. *See Nataloni*, 17 BLR at 1-84.

However, employer is correct in maintaining that the administrative law judge's Decision and Order fails to satisfy the requirements of the APA, as he did not adequately explain the basis for his finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). As discussed *supra*, the administrative law judge determined that the most recent x-rays failed to establish the existence of clinical pneumoconiosis, and that the evidence, as a whole, did not establish the existence of complicated pneumoconiosis. In considering whether the evidence was sufficient to establish the existence of legal pneumoconiosis, the administrative law judge noted that all of the physicians were in agreement that the miner had tuberculosis. Decision and Order at 10. He stated that he accepted "the explanation given [by Dr. Byers] that the mining exposure led to tuberculosis is more rational and comports to 20 C.F.R. §718.201(a)(2), and that there is evidence of aggravation due to mining exposure." *Id*. at 13. The administrative law judge further stated:

> In rationalizing all of the evidence under *Compton*, I note that the x-ray evidence is very conflicted. The claimant has not presented probative evidence of complicated [pneumoconiosis], however, the record shows that the tuberculosis was not diagnosed until after pneumoconiosis had been acknowledged by all of the newer relevant evidence during 1999 to 2001. Therefore, Dr. Byers' rationale ties the medical history to the diagnosis and the hospitalization for the tuberculosis. I note that although aggravation by tuberculosis was noted by Dr. Byers, it has not been discussed by any of the other experts . . . I credit the [m]iner's testimony that he had been a roof bolter and had been directly exposed to coal dust. Beginning in April 2002, chest x-rays were interpreted as showing evidence of cavitary tuberculosis in the upper lobe of his right lung, documented by smears and cultures which produced typical findings for tuberculosis . . . it is reasonable that the tuberculosis was a natural consequence as described by Dr. Byers. He says that this is a common occurrence and that fact is not controverted. I note that the regulations refer to any chronic lung disease or impairment and its sequelae arising out of coal mine employment. I also note that courts have held that a diagnosis of tuberculosis does not necessarily exclude the possibility that a miner also suffers from pneumoconiosis. A miner may be

> diagnosed with both black lung disease and tuberculosis, or tuberculosis may be an alternative explanation for lesions on a miner's lungs.

Id. (citations omitted). Thus, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We agree with employer that it is unclear from his discussion of the evidence, whether the administrative law judge concluded that the miner's tuberculosis constitutes legal pneumoconiosis, in and of itself, or the fact that the miner had either simple or complicated pneumoconiosis made him more susceptible to the development of tuberculosis. Additionally, although the administrative law judge found that Dr. Byers "had the best rationale in the record," he did not address whether Dr. Byers' opinion is reasoned and documented, in light of his determination that the record evidence was insufficient to establish the existence of either simple or complicated clinical pneumoconiosis.[10] Decision and Order at 13. The administrative law judge also did not consider the extent to which Dr. Byers relied on CT scans to diagnose complicated pneumoconiosis, when the administrative law judge specifically found that the CT scan evidence has not been proven, in this case, to be medically acceptable pursuant to 20 C.F.R. §718.107(b). Moreover, the administrative law judge did not address whether Dr. Byers' opinion is premised on general assumptions regarding the interplay of coal dust exposure and tuberculosis, or whether Dr. Byers has explained, based on specific evidence in the record, why he believes that the miner's respiratory condition was caused, substantially contributed to, or aggravated by, coal dust exposure.

Because the administrative law judge did not adequately explain his rationale for finding that claimant established legal pneumoconiosis, and for the weight accorded the conflicting medical opinions, we hold that his Decision and Order fails to satisfy the requirements of the APA. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999), *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998) *Wojtowicz v.*

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[10] Dr. Byers opined that "tuberculosis in and of itself is not the proximate cause" of the miner's significant radiologic changes, and that the miner's thirty years of underground coal mining, fifteen as a top driller working next to a continuous miner, is the "medically probable cause" for the miner's abnormal x-ray and his complicated coal workers' pneumoconiosis. MDX 188. According to Dr. Byers, the miner's *conglomerate lesions* became "superinfected" with tuberculosis, which is "not an uncommon complication." *Id*. He stated that tuberculosis has "a predilection for infecting patients with black lung and can certainly result in worsening of the conglomerate changes." *Id.*

Duquesne Light Co., 12 BLR 1-162, 1-165 (1989). Thus, we vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand this case for further consideration of that issue. Because the administrative law judge's finding of legal pneumoconiosis affected his weighing of the evidence as to the issue of disability causation, we also vacate his findings pursuant to 20 C.F.R. §718.204(c).

On remand, the administrative law judge must determine whether claimant has satisfied her burden of proving either the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), in accordance with *Compton*, and further determine, as necessary, whether she has established that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Compton*, 211 F.3d at 211, 22 BLR at 2-175. In considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In rendering his credibility findings, the administrative law judge must set forth the bases for all of his findings of fact and conclusions of law, as required by the APA.[11]

The Survivor's Claim

In order to establish entitlement to benefits in the survivor's claim, 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. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or

[11] Because claimant is not represented by counsel, we find it necessary to address the administrative law judge's weighing of the x-ray evidence. The administrative law judge made a specific finding that the positive x-ray readings "were more dispositive as of April 9, 2002," but then concluded that the negative readings of the x-rays dated after 2002 outnumbered the earlier positive readings. We instruct the administrative law judge, on remand, to explain the basis for his findings in light of *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992).

the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo*, 17 BLR at 1-87-88; *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd*, 11 BLR at 1-40-41. Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

The administrative law judge found that the evidence was sufficient to establish that the miner's death was hastened by legal pneumoconiosis and explained:

> There is no autopsy evidence in this case. I again note that there is no dispute that the [m]iner died due to tuberculosis. The issue is whether pneumoconiosis played a part in the [m]iner's demise. I find that Dr. Byers' reports set forth in DX 13 establish[es] a nexus between coal mining exposure and tuberculosis in this case. It is reasonable that the tuberculosis was a natural consequence as described by Dr. Byers. He says this is a common occurrence and the fact is not controverted. . . .
>
> When Section 718.205(c)(5) was added to the regulations, the Department of Labor noted [the view] that persons weakened by pneumoconiosis may expire quicker from other diseases is a medical point, with some empirical support. *See* 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000). I accept that tuberculosis and pneumoconiosis combined to hasten death.
>
> Given that I discount Dr. Fino's opinion as to death and I find that Dr. Naeye did not discuss hastening, I accept that Dr. Hareshbhai Patel's opinion as to death as expressed by the Death Certificate is rational.

Decision and Order at 21. Thus, the administrative law judge awarded benefits in the survivor's claim.

Because the administrative law judge applied the rationale that he relied on in the miner's claim to credit Dr. Byers' opinion in the survivor's claim, and we have concluded that his rationale fails to satisfy the APA, we vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) in the survivor's claim. Furthermore, we agree with employer that the administrative law judge erred in omitting a determination of whether Dr. Patel's statements on the death certificate were reasoned and documented. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.205(c), and remand the case for further consideration of whether claimant has satisfied her burden to establish the existence of

pneumoconiosis and that the miner's death was due to pneumoconiosis.[12] *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Shuff*, 967 F.2d at 980, 16 BLR at 2-93;

Amendments to the Act

By Order dated March 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. *Keen v. Koch Carbon, Inc.*, BRB Nos. 09-0603 and 09-0604 BLA (Mar. 30, 2010) (unpub. Order). Claimant, who is not represented by counsel, did not respond. Employer filed a supplemental brief, asserting that the miner's claim is not affected by the amendments because it was filed on February 5, 1993, and the amendments are only applicable to claims filed after January 1, 2005. With respect to the survivor's claim, employer asserts that, because the claim was filed after January 1, 2005, "it would appear to be subject to the amendments if their constitutionality is upheld." Employer's Supplemental Brief at 1. Employer requests that the survivor's claim be "held in abeyance until decisions resolving the legal challenges to Pub. L No. 111-148 and the Secretary has promulgated regulations implementing the amendments in accordance with 30 U.S.C. §921(b)." *Id* at 1-2. In the event that the constitutionality of the amendments is upheld, employer requests that the survivor's claim be remanded to the district director in order to allow employer the opportunity "to develop evidence regarding the degree of the miner's respiratory impairment, if any, and causation." *Id*. at 2. Finally, employer indicates that it wishes to preserve its own challenges to the constitutionality of Pub. L. No. 111-148, and the amendments.

In a letter dated April 29, 2010, employer requests that it be allowed to withdraw its stipulation to the length of the miner's employment in the miner's and survivor's claims and that, in the event that the constitutionality of the amendments is upheld, the survivor's claim be remanded to the district director for the development of additional evidence regarding the length of the miner's coal mine employment, and whether all of his employment was underground.

[12] Employer asserts that the administrative law judge erred in considering, in the survivor's claim, evidence that was not designated by claimant pursuant to 20 C.F.R. §725.414. Because the survivor's claim was filed after the applicable date of the revised regulations, we instruct the administrative law judge to consider, in the survivor's claim, only that evidence which has been designated by the parties and is admissible pursuant to 20 C.F.R. §725.414, or is otherwise admissible based on a showing of good cause. *See* 20 C.F.R. §725.456(b)(1).

The Director has filed a supplemental brief and agrees that the miner's claim is not affected by Section 1556, based on its filing date. The Director asserts that the amendments apply to the survivor's claim but that Section 411(c)(4) is relevant only if the Board vacates the award of benefits. In that event, the Director contends that the Board must remand the case for consideration of whether claimant is entitled to the Section 411(c)(4) presumption. The Director notes that claimant could also conceivably be entitled to benefits pursuant to the amended Section 422(*l*), 30 U.S.C. 932(*l*), which provides that a survivor who filed a claim after January 1, 2005, is entitled to receive benefits based on the lifetime award to the miner, without having to prove that the miner's death was due to pneumoconiosis.

Based upon the parties' responses, and our review, we hold that the miner's claim is not affected by the amendments because it was filed prior to January 1, 2005. MDX 2. Relevant to the survivor's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if claimant establishes that the miner had at least fifteen years of qualifying underground coal mine employment, or work at a surface mine in substantially similar conditions, and also proves that the miner had a totally disabling respiratory impairment, she is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis and that his death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed her claim after January 1, 2005, and the parties stipulated to at least twenty-three years of coal mine employment, although employer has indicated that it wishes to withdraw its stipulation regarding the length of the miner's coal mine employment. On remand, the administrative law judge should make a specific determination as to whether the miner had at least fifteen years of qualifying coal mine employment and was totally disabled, and whether claimant is entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 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).[13]

[13] We deny employer's request to hold this case in abeyance pending the resolution of a lawsuit filed in United States District Courts in Florida and Virginia, as employer does not indicate that any court has yet enjoined the application, or ruled on the validity, of the recent amendments to the Act. In addition, contrary to employer's suggestion, the mandatory language of the amended portions of the Act supports the conclusion that the provisions are 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.*

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, and vacated in part and the case is remanded to the administrative law judge for further proceedings 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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BETTY JEAN HALL
Administrative Appeals Judge

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).