BRB Nos. 10-0165 BLA
and 10-0282 BLA

LINDA C. TOLLIVER (o/b/o and Widow of RUFUS W. TOLLIVER)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 12/08/2010
MAPLE MEADOW MINING 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 on Second Remand Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Washington and Lee University Legal Clinic), Lexington, Virginia, for claimant.

Kathy L. Snyder and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Awarding Benefits (2004-BLA-0121 and 2004-BLA-6356) of Administrative Law Judge Richard A. Morgan

rendered on a miner's claim[1] 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).[2] This case is before the Board for the third time. In the original Decision and Order dated August 25, 2005, Administrative Law Judge Gerald M. Tierney credited the miner with at least thirty-four years of coal mine employment, and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718. After noting that the parties stipulated that the miner had clinical pneumoconiosis,[3] Judge Tierney found that the medical opinion evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4) and 718.203(b). Judge Tierney also found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, Judge Tierney awarded benefits in the miner's claim. With regard to the survivor's claim, Judge Tierney noted that claimant had established that the miner had pneumoconiosis arising out of coal mine employment. Further, Judge Tierney found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Tierney awarded benefits in the survivor's claim.

In response to employer's appeal, the Board affirmed Judge Tierney's evidentiary rulings pursuant to 20 C.F.R. §725.414. *Tolliver v. Maple Meadow Mining Co.*, BRB No. 05-0972 BLA, slip op. at 3 (Sept. 29, 2006)(unpub.). The Board also affirmed Judge Tierney's finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b). *Tolliver*, BRB No. 05-0972 BLA, slip op. at 6. However, the Board vacated Judge Tierney's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §§718.201(a)(2) and 718.202(a)(4), and

[1] Claimant is the widow of the miner, who died on April 26, 2003. Director's Exhibit 56. The miner filed his claim on June 1, 2000. Director's Exhibit 2. Claimant filed her survivor's claim on June 26, 2003. Director's Exhibit 52.

[2] As employer and the Director, Office of Workers' Compensation Programs, correctly assert, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant claims, as both the miner's claim and the survivor's claim were filed prior to January 1, 2005.

[3] In addition to noting that the parties stipulated that the miner had clinical pneumoconiosis, Administrative Law Judge Gerald M. Tierney also noted that the parties stipulated that the miner had obstructive lung disease and adequate histories of coal mining and smoking to put him at risk for both diseases. 2005 Decision and Order at 17. Nevertheless, Judge Tierney found that the presence of legal pneumoconiosis was still at issue in this case. *Id.*

remanded the case for Judge Tierney to reweigh the conflicting medical opinions and fully articulate the rationale and underlying support for his credibility determinations. *Tolliver*, BRB No. 05-0972 BLA, slip op. at 4. Further, the Board vacated Judge Tierney's findings that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and death due to pneumoconiosis at 20 C.F.R. §718.205(c), and remanded the case for Judge Tierney to reconsider the evidence in accordance with the Administrative Procedure Act (APA),[4] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). *Tolliver*, BRB No. 05-0972 BLA, slip op. at 5.

On first remand, the case was reassigned to Judge Morgan[5] (the administrative law judge), who found that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §§718.201(a)(2) and 718.202(a)(4). The administrative law judge also found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits in the miner's claim. Regarding the survivor's claim, the administrative law judge found that the evidence established death due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in the survivor's claim.

In disposing of employer's second appeal, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §§718.201(a)(2) and 718.202(a)(4), and remanded the case for the administrative law judge to reconsider all of the relevant evidence. *L.C.T.* [*Tolliver*] *v. Maple Meadow Mining Co.*, BRB No. 08-0195 BLA, slip op. at 5 (Nov. 25, 2008)(unpub.). The Board also vacated the administrative law judge's findings that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and death due to pneumoconiosis at 20 C.F.R. §718.205(c), and remanded the case for the administrative law judge to reconsider the relevant evidence. *Id*.

On remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The

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[4] 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. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[5] The reassignment of the case to Administrative Law Judge Richard A. Morgan (the administrative law judge) was due to Judge Tierney's retirement from the Office of Administrative Law Judges. 2007 Decision and Order on Remand at 2.

administrative law judge also found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge again awarded benefits in the miner's claim. With respect to the survivor's claim, the administrative law judge found that the evidence established death due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge again awarded benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at Section 718.204(c). Lastly, employer challenges the administrative law judge's finding that the evidence established death due to pneumoconiosis at Section 718.205(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits in both claims. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this case.[6]

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.[7] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge noted that Drs. Perper, Koenig, Zaldivar, and Castle attributed the miner's chronic obstructive pulmonary disease (COPD) to his smoking and coal mine dust exposure. 2009 Decision and Order on Second Remand at 9. The administrative law judge also noted that Drs. Crisalli, Fino, Rosenberg, Bush, Caffrey, and Naeye agreed that the miner's COPD was not due to his coal mine dust exposure, but was due to his significant smoking history. *Id*. Further, the administrative law judge noted that Drs. Crisalli, Castle, and Spagnolo agreed that the miner's reversible obstructive impairment, which was shown by objective studies, was inconsistent with a

[6] Employer has filed a brief in reply to claimant's response brief, which reiterates its prior contentions.

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 2, 53.

lung disease induced by coal mine dust. *Id*. Lastly, the administrative law judge stated that "Dr. Tomashefski (BCPath) believed that COPD contributed to the miner's death, but it was not caused by his coal mine dust exposure." *Id*. at 9 n.12.

The administrative law judge determined that, for the most part, the medical opinions were well-reasoned and documented. 2009 Decision and Order on Second Remand at 9. Nevertheless, the administrative law judge gave more weight to the opinions of Drs. Perper and Koenig regarding the issue of legal pneumoconiosis, than to the contrary opinions of employer's experts, because he found that the opinions of Drs. Perper and Koenig were more in accord with the expressed views of the Department of Labor (the Department).[8] *Id*. at 12. The administrative law judge further stated that, "[a]s pointed out above, a number of views held by the [e]mployer's experts diverge from the Department's views and I give them lesser weight."[9] *Id*. Therefore, based on the

[8] The administrative law judge gave no weight to Dr. Perper's opinion that the miner's coal dust exposure could have caused his lung cancer because he found that it was aberrant, as it was refuted by most of the other physicians. 2009 Decision and Order on Second Remand at 9.

[9] The administrative law judge determined that Dr. Bush's opinion, that any coal dust-induced lung disease was far too little to have any effect on the miner's respiratory function, was rejected by the Department of Labor (the Department) in the preamble. 2009 Decision and Order on Second Remand at 10. The administrative law judge also determined that Dr. Bush's opinion, linking the presence of legal pneumoconiosis with the presence of clinical pneumoconiosis, was discredited by the Department in the preamble, as its view is that legal pneumoconiosis can occur independently of clinical pneumoconiosis. *Id*. In addition, the administrative law judge determined that Dr. Naeye's opinion, that bronchitis and bronchiolitis virtually disappear in miners once they retire, whereas smoker's bronchitis never disappears, was at odds with the Department's view that pneumoconiosis is a latent and progressive disease. *Id*. Further, the administrative law judge determined that Dr. Rosenberg's opinions that, absent progressive massive fibrosis, a miner does not get severe obstruction or increased mortality simply from coal dust exposure, and that the miner's bronchitis was not related to his past coal dust exposure because, if it were, it would dissipate months after his coal dust exposure ceased, were inconsistent with the Department's view that pneumoconiosis is a latent and progressive disease. *Id*. Additionally, the administrative law judge determined that Dr. Rosenberg's interpretation of certain scientific studies appeared contrary to the Department's interpretation of the same studies. *Id*. at 11. Moreover, the administrative law judge determined that Dr. Tomashefski's opinion, that there is no spatial relationship between the miner's emphysema and the lesions of coal workers' pneumoconiosis, was contrary to the Department's view that legal pneumoconiosis can occur independently of clinical pneumoconiosis. *Id*. Furthermore, the administrative law

opinions of Drs. Perper and Koenig, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4).

Employer asserts that the administrative law judge erred by relieving claimant of her burden to prove the existence of legal pneumoconiosis. Specifically, employer argues that the opinions of Drs. Perper and Koenig cannot resolve the issue of whether the miner's coal dust exposure significantly contributed to his chronic lung disease, because the doctors could not distinguish between the effects of coal dust exposure and cigarette smoking on this disease. Employer maintains that the opinions of Drs. Perper and Koenig are speculative and do not meet the requirements for legal pneumoconiosis. We disagree.

Dr. Perper opined that the miner's coal dust exposure significantly contributed to his centrilobular emphysema.[10] Employer's Living Miner's Exhibit 50 (Dr. Perper Deposition at 43, 67). Similarly, Dr. Koenig opined that the miner's coal dust exposure caused, or significantly contributed to, his COPD.[11] Claimant's Exhibits 19, 20, 26, 28.

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judge noted that Dr. Tomashefski cited to writings by Dr. Morgan that the Department found to be unreliable. *Id*.

[10] During a February 28, 2005 deposition, Dr. Perper opined that the miner's centrilobular emphysema was the combined result of coal dust exposure and smoking. Employer's Living Miner's Exhibit 50 (Dr. Perper Deposition at 43). Dr. Perper stated that "[t]hey [coal dust exposure and smoking] are both significant, though he didn't smoke in his very last year, and you cannot separate, no one can reasonably separate, there's no method, there's no scientific or otherwise method to separate between the respective contribution of smoking and coal dust exposure except to say that both were significant and both contribute." Employer's Living Miner's Exhibit 50 (Dr. Perper Deposition at 67).

[11] In a report dated July 20, 2002, Dr. Koenig opined that "coal dust exposure alone, independent of smoking and without the presence of radiographically evident simple or complicated coal workers' pneumoconiosis, accounted for or at least significantly contributed to [the miner's chronic obstructive pulmonary disease (COPD)] and consequent respiratory impairment and total and permanent disability." Claimant's Exhibit 19. In a report dated August 26, 2003, Dr. Koenig opined that "coal dust exposure irrefutably caused or at least substantially contributed to [the miner's] simple coal workers' pneumoconiosis, bullous emphysema, chronic bronchitis, pulmonary hypertension and the consequent significant pulmonary impairment and disability." Claimant's Exhibit 20. Dr. Koenig noted that the miner's COPD included his bullous emphysema and chronic bronchitis. *Id*. In reports dated December 12, 2004 and

The administrative law judge stated, "I find that the opinions of Drs. Perper and Koenig have established the existence of 'legal' pneumoconiosis, i.e., COPD consisting of bronchitis and emphysema due to coal mine dust exposure (smoking)." 2009 Decision and Order on Second Remand at 12.

Section 718.201(a)(2) provides that "legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). In addition, Section 718.201(b) provides that, for this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b). Further, the United States Court of Appeals for the Fourth Circuit has held that a physician need not apportion a precise percentage of a miner's lung disease to cigarette smoke and coal dust exposure in order to establish the existence of legal pneumoconiosis, as such particularized findings are not necessary. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). The court emphasized that "the miner is not required to demonstrate that coal dust was the only cause of his current respiratory problems," but need only show that his diagnosed respiratory impairment was "significantly related to, or substantially aggravated by coal mine dust exposure" to establish the existence of legal pneumoconiosis. *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *accord Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); 20 C.F.R. §718.201(b).

In this case, the administrative law judge noted that "Drs. Perper and Koenig explained that it was not possible to distinguish between COPD caused by smoking and COPD caused by coal mine dust exposure, that the symptoms, PFS test [sic] results, and X-ray appearance are the same for both." 2009 Decision and Order on Second Remand at 10. The administrative law judge also noted that "Dr. Koenig…determined that the miner's coal dust[-]induced COPD itself caused his lifetime disability and was sufficiently severe enough [sic] to contribute to and hasten the miner's death." *Id*. Further, the administrative law judge noted that Dr. Perper's opinions concerning the miner's coal dust-induced COPD and the relationship of centrilobular emphysema to coal dust exposure were consistent with the Department's position in the preamble to the 2001 amended regulations. *Id*. The administrative law judge additionally noted that "the Department recognizes that smokers who mine have an 'additive' risk of developing chronic bronchitis. Preamble at 79940." *Id*. Thus, contrary to employer's assertion that

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February 5, 2004, Dr. Koenig opined that the miner's coal dust exposure was the cause, or at least significantly contributed to, his COPD. Claimant's Exhibits 26, 28.

the opinions of Drs. Perper and Koenig were speculative regarding the issue of legal pneumoconiosis, Drs. Perper and Koenig unequivocally opined that the miner's coal dust exposure significantly contributed to his chronic lung disease. As the administrative law judge properly found that the opinions of Drs. Perper and Koenig were sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), 20 C.F.R. §718.201(b); *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Gross*, 23 BLR at 1-18, we reject employer's assertion that these opinions cannot resolve the issue of whether the miner's coal dust exposure significantly contributed to his chronic lung disease.

Employer also asserts that the administrative law judge erred in discounting the opinions of Drs. Crisalli, Fino, Castle, Spagnolo, Rosenberg, Bush, Caffrey, Naeye, and Tomashefski because he found that they were inconsistent with the preamble to the 2001 regulations. Specifically, employer argues that the administrative law judge selectively analyzed the medical opinion evidence and the preamble to these regulations. Employer maintains that the administrative law judge failed to address the inconsistency in his decisions in this case, given that he failed to explain why he found that the opinions of employer's experts were "contrary to the Act" in his most recent decision, even though he made no such finding in his prior decision. Employer's Brief at 19.

Contrary to employer's assertion, the administrative law judge did not discount the opinions of employer's experts because he found that they were contrary to the Act. An administrative law judge may evaluate expert opinions in conjunction with the Department's discussion of sound medical science in the preamble to the revised regulations. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). The preamble sets forth how the Department has chosen to resolve questions of scientific fact. 65 Fed. Reg. 79939-79942 (Dec. 20, 2000). A determination of whether a medical opinion is not supported by accepted scientific evidence, as determined by the Department, is a valid criterion in deciding whether to credit the opinion. Such a determination is different from finding an opinion hostile or contrary to the Act. *See Zeigler Coal Co. v. OWCP* [*Griskell*], 490 F.3d 609, 24 BLR 2-38 (7th Cir. 2007), *citing Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7. If a doctor's opinion is premised on scientific evidence conflicting with the science credited by the Department, the administrative law judge may properly assign that opinion less weight. *See Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7.

Here, as discussed *supra*, the administrative law judge gave greater weight to the opinions of Drs. Perper and Koenig than to the contrary opinions of employer's experts regarding the causes of the miner's emphysema and COPD, because he found that the opinions of Drs. Perper and Koenig were more in accord with the expressed views of the Department. 2009 Decision and Order on Second Remand at 12 (footnote omitted). Fundamentally, this case turns on whether substantial evidence supports the administrative law judge's findings regarding the credibility of the expert witnesses. *See*

generally Piney Mountain Coal Co. v. Mays, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Because the administrative law judge permissibly determined that the opinions of Drs. Bush, Naeye, Rosenberg, and Tomashefski were predicated on medical science at odds with that credited by the Department, *see Shores*, 358 F.3d at 490, 23 BLR at 2-26, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Bush, Naeye, Rosenberg, and Tomashefski because he found that they were inconsistent with the preamble to 2001 regulations. However, because the administrative law judge, in stating that a number of views held by employer's experts diverged from the Department's views, did not explain why he found that the opinions of Drs. Crisalli, Fino, Castle and Spagnolo were inconsistent with the views expressed by the Department in the preamble to the 2001 regulations, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989), we hold that the administrative law judge erred in discounting their opinions on this basis.[12]

In view of the forgoing, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for the administrative law judge to reconsider all of the relevant evidence thereunder.

On remand, when 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 opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Because we herein vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and because his analysis of the evidence does not reflect consideration of legal pneumoconiosis and disability causation as separate issues,[13] we also vacate the

[12] Employer also asserts that the administrative law judge improperly substituted his opinion for those of Drs. Bush and Tomashefski. Contrary to employer's assertion, as discussed *supra*, the administrative law judge permissibly discounted the opinions of Drs. Bush and Tomashefski because they were predicated on medical science at odds with that credited by the Department. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Thus, we reject employer's assertion that the administrative law judge improperly substituted his opinion for those of Drs. Bush and Tomashefski.

[13] As employer contends, the administrative law judge erred by summarily

administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) in the miner's claim and remand the case for further consideration of all the relevant evidence in accordance with the APA, if reach. On remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[14] *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Furthermore, because we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and inasmuch as his analysis of the evidence does not reflect consideration of legal pneumoconiosis and death causation as separate issues, we also vacate the administrative law judge's finding that the evidence established death due to pneumoconiosis at 20 C.F.R. §718.205(c) in the survivor's claim and remand the case for further consideration of all the relevant evidence in accordance with the APA, if reached.

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concluding that the opinions of Drs. Perper and Koenig established disability causation and death causation. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); 2009 Decision and Order on Second Remand at 12. In so doing, the administrative law judge combined the separate and distinct elements of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and death due to pneumoconiosis at 20 C.F.R. §718.205(c). Each of these issues requires an independent weighing of the relevant evidence in the record. *See Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1990).

[14] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

See Shuff v. Cedar Coal Co., 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge