U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0154 BLA
and 14-0155 BLA

GENEVA F. WILLS (o/b/o/ and Widow of EDDIE R. WILLS) Claimant-Respondent v. CONSOLIDATION COAL COMPANY and CONSOL ENERGY INCORPORATED Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/28/2015 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Geneva F. Wills, Moundsville, West Virginia, *pro se*.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jonathan P. Rolfe (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-5360 and 2013-BLA-5409) of Administrative Law Judge Drew A. Swank rendered on a miner's subsequent claim[1] and a survivor's claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge adjudicated these claims pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725, and credited the miner with 27.37 years of coal mine employment, finding that at least fifteen of those years were spent either underground or on the surface in substantially similar dust conditions. The administrative law judge found that the new evidence submitted in support of the miner's subsequent claim was sufficient to establish clinical pneumoconiosis, thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Finding that employer failed to

[1] The miner's initial claim for benefits, filed on April 16, 1986, was finally denied by the district director on July 30, 1986. Director's Exhibit 1. The miner's second claim, filed on June 5, 2008, was finally denied by the district director on January 6, 2009, because claimant failed to establish any element of entitlement. Director's Exhibit 2.

[2] Claimant is the widow of the miner, who died on August 20, 2012. Director's Exhibit 35. In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate. By letter dated August 20, 2013, claimant stated that she would be proceeding without representation before the administrative law judge on both claims. *See* Decision and Order at 2, n.2. The parties agreed to cancel the hearing and requested a decision on the record. Director's Exhibit 35; Decision and Order at 2.

[3] In 2010, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The amendments also revived Section 422(*l*) of the Act, which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). The Department of Labor revised the regulations to

establish rebuttal of the presumption, the administrative law judge awarded benefits in the miner's claim. Because the administrative law judge found that the miner was entitled to benefits at the time of his death, he found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), without having to establish that the miner's death was due to pneumoconiosis.

On appeal, employer challenges the administrative law judge's finding in the miner's claim that claimant established at least fifteen years of underground coal mine employment or comparable surface coal mine employment. Employer also contends that claimant is not entitled to invocation of the presumption at amended Section 411(c)(4), arguing that the administrative law judge failed to properly evaluate the pulmonary function study evidence and medical opinion evidence in finding total disability established at Section 718.204(b). Employer also challenges the administrative law judge's determination that employer failed to rebut the presumption. Claimant has not filed a response brief. The Director has filed a limited response, urging the Board to reject employer's argument that claimant failed to establish fifteen years of underground coal mine employment.[4] Employer has filed a reply brief in support of its position.

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.[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).

Employer first challenges the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment and was entitled to invocation of the rebuttable presumption under amended Section 411(c)(4). While employer does not dispute that it employed the miner for more than fifteen years,

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implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725.

[4] The Director also asserts that the administrative law judge applied an incorrect rebuttal standard, but that any error is harmless. The Director argues that if the award of benefits is vacated, the administrative law judge should be instructed to apply the correct rebuttal standard on remand. Director's Brief at 2, n.1.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 4, 7; Employer's Brief at 9, n.4.

employer argues that claimant failed to meet her burden of demonstrating that the miner's work, either with employer or with previous coal mine operators, was performed underground or in comparable dust conditions on the surface. Employer's Brief at 14-17. Employer's argument lacks merit.

The record reflects that the miner indicated on his employment history form that he worked for employer from 1968 to 1986 at a "deep mine."[6] Director's Exhibit 5. Employer's records confirm the length of employment, and specifically note that the miner worked as a mechanic from March 4, 1968 to July 31, 1974, and then worked as a general foreman in the preparation plant until December 31, 1985.[7] Director's Exhibits 5, 7. The Board has held that a surface worker at an underground mine is not required to show comparability of environmental conditions in order to take advantage of the Section 411(c)(4) presumption, as it is the type of mine (underground or surface), rather than the location of the particular worker (surface or below the ground), which determines whether a claimant is required to show comparability of conditions. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-9 (2011), citing *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979)(Smith, Chairman, dissenting); *see Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an aboveground employee at an underground coal mine). Because the miner's work with employer alone spanned over fifteen years and took place at an underground coal mine, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the

[6] The miner specified that his jobs with employer included work as "mechanic, welder, picking table underground and prep plant." Director's Exhibit 5. The miner also listed work with Gauley Coal & Coke from 1964 to 1968 at a deep mine as a mechanic and assistant plant operator. *Id.*

[7] The miner described his work as a general foreman as follows:

> I was responsible for making sure the prep plant, seven stories outside, and the picking table and dump area, underground, were all running properly. I had to circle the area throughout the day, up and down all floors of the prep plant and 1200 feet up and down a steep slope to the underground picking table and dump area. I spent little if any time sitting. I had three foremen under me and had to give them their job responsibilities and oversee them.

Director's Exhibit 6.

statutory requirement of at least fifteen years of underground coal mine employment. Decision and Order at 6.

Employer next contends that the administrative law judge erred in weighing the evidence relevant to total respiratory disability pursuant to Section 718.204(b). Employer argues that while the administrative law judge found the pulmonary function study evidence to be insufficient to establish total disability, his use of the table values set out in Appendix B to 20 C.F.R. Part 718 skewed the results of Dr. Basheda's study, which, employer contends, reflect non-qualifying[8] values both before and after bronchodilation. Employer asserts that the administrative law judge failed to adequately analyze the medical opinion evidence and failed to weigh all relevant evidence together prior to finding total respiratory disability established. Employer's Brief at 14-22. Some of employer's arguments have merit.

In evaluating the newly submitted pulmonary function studies of record at Section 718.204(b)(2)(i), the administrative law judge determined that the pre-bronchodilation and post-bronchodilation studies administered by Dr. Rasmussen on December 14, 2010, and the April 7, 2011 pre-bronchodilation study administered by Dr. Fino,[9] yielded qualifying values. The administrative law judge determined that the study administered by Dr. Basheda on November 16, 2011 yielded non-qualifying pre-bronchodilation values and qualifying post-bronchodilation values, but Dr. Basheda questioned the miner's cooperation on the qualifying study.[10] Finding that the post-bronchodilation results were unreliable, the administrative law judge credited "the miner's most recent, reliable testing" of November 16, 2011, i.e., the pre-bronchodilation study, which "yielded non-qualifying results." Decision and Order at 15-16. Thus, the administrative law judge found that the pulmonary function study evidence failed to establish total

[8] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] Dr. Fino did not administer a bronchodilator. Director's Exhibit 35, Tab 1; Decision and Order at 15.

[10] In his medical opinion, Dr. Basheda stated that "the reduction in the FVC on the post-bronchodilator spirometry represents decreased effort." Director's Exhibit 35, Tab 8 at 6. The administering technician noted, however, that the "patient seemed to understand and follow instructions well and gave good effort on all trials. . . Patient was able to produce acceptable and reproducible data." Director's Exhibit 35, Tab 8; Decision and Order at 15.

respiratory disability at Section 718.204(b)(2)(i). The administrative law judge further determined that the blood gas studies of record, conducted by Drs. Rasmussen, Fino, and Basheda, failed to establish total respiratory disability at Section 718.204(b)(2)(ii), as none of the studies produced qualifying results. Decision and Order at 17. After determining that the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii), the administrative law judge considered the medical opinions of Drs. Rasmussen,[11] Fino,[12] and Basheda at Section 718.204(b)(2)(iv). The administrative law judge initially noted that Drs. Rasmussen and Fino opined that the miner could not perform his usual coal mine work from a pulmonary or respiratory standpoint, whereas Dr. Basheda[13] opined that the miner was not disabled

[11] Dr. Rasmussen performed the Department of Labor examination on December 14, 2010, and provided a deposition. Initially, Dr. Rasmussen diagnosed clinical and legal pneumoconiosis. He noted a moderately severe, partially reversible restrictive ventilatory impairment due to the miner's "elevated right diaphragm (paralysis not excluded)," but thought that the elevated diaphragm was not sufficient to cause all of the restriction. He opined that "coal mine dust would likely be a minimal component, but must be considered sufficient to rise to a level of significance." Director's Exhibit 11. During his deposition, Dr. Rasmussen stated that his opinion had changed, and that "there is enough abnormality with his diaphragm and whatever else was going on, atelectasis or fibrotic changes, in that lung, that I don't think you need to explain it any other way." Director's Exhibit 35, Tab 7 at 35. Thus, Dr. Rasmussen diagnosed a totally disabling respiratory impairment due to an elevated right diaphragm.

[12] Dr. Fino examined the miner on April 7, 2011, provided a deposition, and provided a supplemental report dated August 13, 2013. Director's Exhibit 35, Tabs 1, 13; Employer's Exhibit 2. He stated that there was insufficient objective evidence to justify a diagnosis of clinical or legal pneumoconiosis. He diagnosed a disabling restrictive impairment with an etiology that was unclear. He noted that the elevated diaphragm and significant pleural thickening along the entire right chest wall was restricting the expansion of the lung, but observed that the restriction could also be due to an infectious process that occurred years ago. He stated that the miner's neurological problems could cause abnormalities in lung function, making it difficult to take a deep breath. Director's Exhibit 35, Tab 13 at 11. He opined that coal dust does not cause pleural thickening, does not cause collapse of the lower 1/3 of the lung, and does not cause change in the diaphragm. Director's Exhibit 35, Tab 13 at 12.

[13] Dr. Basheda examined the miner on November 16, 2011, provided a deposition, and provided a supplemental report dated August 11, 2013. Director's Exhibit 35, Tabs 8, 12; Employer's Exhibit 1. He found no objective evidence to diagnose clinical or legal pneumoconiosis. He diagnosed a moderate restrictive lung disease secondary to weight gain, neurologic disease, and elevation of the right hemidiaphragm, and a moderate

from a respiratory standpoint, but rather, that the miner could not return to his usual coal mine work because of his age and underlying neurologic illness. Decision and Order at 20. The administrative law judge noted that Dr. Basheda, at his deposition, acknowledged "a mild impairment of the whole person," based on the miner's pulmonary function testing, and stated in his report that the miner suffered a mild pulmonary impairment, but that any pulmonary impairment he experienced was not significant enough to prevent him from performing his usual coal mine employment or comparable work. Decision and Order at 20; Director's Exhibit 35, Tabs 8, 12; Employer's Exhibit 1. The administrative law judge concluded that, "based upon a totality of this evidence . . . Claimant has met her burden of proof of establishing a total pulmonary or respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv)." Decision and Order at 20.

We find no merit to employer's argument that the administrative law judge's use of the table values at Appendix B skewed the results of the pulmonary function studies, as employer presented no evidence, other than Dr. Basheda's unsupported opinion, that the qualifying values for a miner aged 71 are actually normal values for the miner in this case, who was 81 at the time the studies were performed.[14] *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40 (2008). However, we agree with employer that in finding that the weight of the medical opinion evidence established the presence of a totally disabling respiratory or pulmonary impairment, the administrative law judge violated the Administrative Procedure Act (APA)[15] by failing to explain his determination to credit the opinions of Drs. Rasmussen and Fino, who diagnosed a totally disabling respiratory impairment, over the contrary opinion of Dr. Basheda, who opined that the miner's disability was non-respiratory in nature. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge is required to examine the validity of a physician's reasoning on each element of entitlement in light of the studies conducted and the underlying bases for the physician's conclusions. *See Lane v.*

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airway obstruction related possibly to intermittent asthma. He opined that the miner was disabled due to his age and his neurologic disease, but not from a pulmonary impairment, explaining that the pulmonary function study results are normal values for an 81-year-old of the miner's height. Director's Exhibit 35, Tabs 8, 12.

[14] The table values at Appendix B end at age 71. *See* 20 C.F.R. Part 718, Appendix B.

[15] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Union Carbide Corp., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). In the present case, the administrative law judge failed to explain why he found that the opinions of Drs. Rasmussen and Fino were more credible than that of Dr. Basheda, even though he credited Dr. Basheda's non-qualifying, pre-bronchodilation pulmonary function study as the most probative and found that the objective pulmonary function testing did not support a finding of total respiratory disability. Decision and Order at 16. Furthermore, the administrative law judge failed to explain how Dr. Basheda's diagnosis of a mild pulmonary impairment undermined his conclusion that the impairment would not prevent the miner from performing his usual coal mine employment or job of similar effort, in light of the fact that the administrative law judge made no finding regarding the exertional requirements of the miner's coal mine employment. Decision and Order at 20; Director's Exhibit 35 at tabs 8, 12; Employer's Exhibit 1. We also cannot affirm the administrative law judge's weighing of the pulmonary function study evidence, as he failed to explain why he credited Dr. Basheda's opinion, that the miner's qualifying post-bronchodilation values on the most recent test of November 16, 2011 represented decreased effort, over the opinion of the administering technician, that the miner's effort was good and the results were reproducible.[16] *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Further, the administrative law judge mechanically accorded determinative weight to the most recent non-qualifying pre-bronchodilation study without explaining why it was more reliable than the December 14, 2010 qualifying post-bronchodilation study taken less than a year earlier. *See Allen v. Director, OWCP*, 69 F.3d 532, 20 BLR 2-97 (4th Cir. 1995); *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983). Consequently, we vacate the administrative law judge's finding of total disability at Section 718.204(b), and remand the case for further consideration of the pulmonary function study evidence and the medical opinion evidence. As a result, we must also vacate the administrative law judge's findings that claimant was entitled to invocation of the presumption at amended Section 411(c)(4), and that employer failed to establish rebuttal of the presumption.

On remand, the administrative law judge is directed to reconsider the validity and probative value of the pulmonary function evidence pursuant to Section 718.204(b)(2)(i), and explain the rationale for his determinations. The administrative law judge must also reconsider the opinions of Drs. Rasmussen, Fino, and Basheda pursuant to Section 718.204(b)(2)(iv), compare the medical diagnoses to the exertional requirements of the

[16] The administrative law judge merely indicated that the reliability of the qualifying post-bronchodilation result on the November 16, 2011 test "is questionable in light of the miner's decreased effort and how close the FVC comes to being a non-qualifying result." Decision and Order at 16. The administrative law judge's inference regarding the FVC value, however, represents an impermissible substitution of his own medical expertise. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

miner's usual coal mine employment, and assess whether, in light of the exertional requirements and the objective testing, the physicians rendered reasoned and documented opinions on the issue of total disability. The administrative law judge is required to set forth his findings in detail, including the underlying rationale, in compliance with the APA. *See* Wojtowicz, 12 BLR at 1-162.

In the event that the administrative law judge finds that total disability has been established under Section 718.204(b)(2)(i) and/or (iv), he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc). If the administrative law judge determines that claimant has failed to establish total disability under Section 718.204(b)(2), an award of benefits is precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc). If, on remand, the administrative law judge again determines that claimant has established total disability pursuant to Section 718.204(b), thereby entitling her to invocation of the amended Section 411(c)(4) presumption, he must determine whether employer has met its burden of establishing rebuttal of the presumption with affirmative proof that the miner did not have pneumoconiosis, or that no part of his totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis. *See* 20 C.F.R. §718.305.

In the interest of judicial economy, we will also address employer's arguments relevant to the administrative law judge's weighing of the evidence on the issue of clinical pneumoconiosis,[17] which affected his findings on rebuttal. Employer contends that the administrative law judge erred in failing to note that Drs. Shipley and Tarver are B readers as well as Board-certified radiologists. Employer further asserts that the x-ray interpretations by its physicians should be accorded greater weight than those of claimant's physicians, arguing that Drs. Meyer and Tarver have extensive teaching credentials and Dr. Shipley and Tarver have extensive experience lecturing and publishing in their area of expertise. Lastly, employer maintains that the administrative law judge erred in finding clinical pneumoconiosis established without weighing the CT scan and medical opinion evidence of record.[18] Employer's Brief at 5-13.

[17] No physician diagnosed legal pneumoconiosis in this case. Director's Exhibits 11, 35, Tabs 1, 7, 8, 12, 13; Employer's Exhibits 1, 2.

[18] As part of his examination of the miner, Dr. Basheda interpreted a digital x-ray dated November 16, 2011, which was also interpreted by Dr. Smith on January 28, 2012. Employer's Exhibit 8; Claimant's Exhibit 1. The digital x-ray evidence and the CT scan evidence was admitted into the record as "other medical evidence" pursuant to 20 C.F.R. §718.107.

On rebuttal, with respect to the issue of the existence of pneumoconiosis, employer bears the burden of proof, i.e. to rebut the presumption as to the existence of pneumoconiosis, it must establish by a preponderance of the evidence that the miner did not suffer from pneumoconiosis. However, in weighing the newly submitted x-ray evidence in this case, the administrative law judge put the burden on claimant to establish the existence of pneumoconiosis and a change in an applicable condition of entitlement at Section 725.309. Decision and Order at 11-12. The administrative law judge considered eight readings of three analog x-rays, and determined that five of the readings diagnosed the presence of pneumoconiosis while three of the readings did not. Decision and Order at 11. The administrative law judge noted that two of the physicians who diagnosed pneumoconiosis "are dually qualified as B readers and Board-certified radiologists, while the third is Board-certified in internal medicine," and that, of the physicians who did not diagnose pneumoconiosis, "one . . . is dually qualified," while "the other two reading physicians are Board-certified radiologists." Decision and Order at 12. The administrative law judge did not weigh the conflicting interpretations of each individual x-ray, but found, "[b]ased upon all of the evidence, including the qualifications of the physicians and the fact that the majority of the readings demonstrated clinical pneumoconiosis," that claimant "has proven by a preponderance of the evidence through x-rays that the miner had clinical simple pneumoconiosis as required by 20 C.F.R. §718.202(a)(1)." *Id*.

We agree with employer that the administrative law judge's finding of clinical pneumoconiosis cannot be affirmed. Employer correctly notes that the administrative law judge failed to weigh all relevant evidence of record on the issue of clinical pneumoconiosis, including the medical opinion evidence, the CT scan evidence, and digital x-ray evidence, prior to finding clinical pneumoconiosis established by the newly submitted x-ray evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Director's Exhibits 11, 35, Tabs 1, 7, 8, 12, 13, 15; Claimant's Exhibits 1, 4. But before weighing the CT scan evidence and digital x-ray evidence, the administrative law judge must determine whether it was submitted in accordance with 20 C.F.R. §718.107(b). Employer also correctly notes that the administrative law judge misstated the qualifications of Drs. Shipley and Tarver, who are both dually qualified as Board-certified radiologists and B readers.[19] Director's Exhibit 35, Tabs 2, 4, 5.

[19] Employer also asserts that the opinions of Drs. Meyer, Shipley and Tarver should be granted more weight than the opinions of Drs. Alexander and Smith, based on the "extensive teaching credentials" of Drs. Meyer and Tarver and the "extensive experience lecturing and publishing in their area of expertise" by Drs. Shipley and Tarver. Employer's Brief at 7-8, 24. An administrative law judge may, but is not required to credit teaching credentials, positions held with nationally-recognized associations of radiologists, or extensive lecturing and publishing expertise. *See J.V.S. v.*

Additionally, the record reflects that Dr. Rasmussen is a B reader. Director's Exhibit 11. Consequently, we vacate the administrative law judge's finding of clinical pneumoconiosis, as well as his finding that claimant established a change in an applicable condition of entitlement at Section 725.309.[20] On remand, the administrative law judge must reassess all of the evidence of record relevant to rebuttal, if reached.

Based on our decision to vacate the administrative law judge's award of benefits in the miner's claim, we vacate the administrative law judge's determination that claimant is entitled to derivative benefits pursuant to amended Section 422(l). See 30 U.S.C. §932(l).

Arch of West Virginia/Apogee Coal Co., 24 BLR 1-78, 1-90 n.13 (2008); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004)(en banc); *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

[20] We note, however, that because the miner failed to establish any element of entitlement in his prior claim, a finding by the administrative law judge on remand that the newly submitted evidence establishes total respiratory disability would be sufficient to establish a change in an applicable condition of entitlement in the miner's claim pursuant to 20 C.F.R. §725.309(c). Director's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in the miner's claim and the survivor's claim is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge