

BRB Nos. 11-0366 BLA
and 11-0439 BLA

SANDRA J. GODDARD)	
(o/b/o and Widow of BENJAMIN F. GODDARD))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ANTELOPE COAL COMPANY)	DATE ISSUED: 02/29/2012
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (2004-BLA-6682 and 2004-

¹ Claimant is the widow of the miner. The miner filed a claim for black lung benefits on April 8, 2002. Director's Exhibit 2. While his claim was pending, the miner died on October 12, 2003. Director's Exhibit 41. Subsequently, claimant filed a survivor's claim for benefits on November 12, 2003. Director's Exhibit 40. These claims have been consolidated for decision.

BLA-6683) of Administrative Law Judge Richard K. Malamphy denying benefits in both a miner's claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).² This case is before the Board for the third time.³ When this case was most recently before the

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as both the miner's claim and the survivor's claim were filed prior to January 1, 2005. *See* Pub. L. No. 111-148, §1556(c); Director's Exhibits 2, 40.

³ In his original Decision and Order, the administrative law judge credited the miner with at least ten years of coal mine employment, found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the miner's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b); that the miner was totally disabled by a respiratory impairment that was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c); and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits in both the miner's claim and the survivor's claim, and remanded the case for further consideration of the medical evidence. *S.G. [Goddard] v. Antelope Coal Co.*, BRB No. 07-0750 BLA (May 29, 2008)(unpub.). While affirming the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1), as well as his finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b), the Board further noted that, ordinarily, consideration of the administrative law judge's findings of the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) would not be necessary, in light of the affirmance of Section 718.202(a)(1), but that because the administrative law judge's findings that the miner's total disability and death were due to pneumoconiosis rest on his finding pursuant to Section 718.202(a)(4), these findings must be reviewed. *Goddard*, BRB No. 07-0750 BLA, slip op. at 3. Upon review of his findings, the Board vacated the administrative law judge's Section 718.202(a)(4) finding and remanded the case, with specific instructions, for the administrative law judge to more fully explain his weighing of the conflicting medical evidence pursuant to Section 718.202(a)(4). *Goddard*, BRB No. 07-0750 BLA, slip op. at 5-6. The Board also vacated the administrative law judge's finding that claimant's clinical pneumoconiosis arose out of

Board,⁴ pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits, holding that the administrative law judge failed to follow the remand instructions set forth in the Board's 2008 Decision and Order and, therefore, did not properly weigh the conflicting evidence of record pursuant to 20 C.F.R. §718.202(a)(4). *Goddard v. Antelope Coal Co.*, BRB Nos. 09-0299 BLA and 09-0494 BLA (Jan. 8, 2010)(unpub); *S.G. [Goddard] v. Antelope Coal Co.*, BRB No. 07-0750 BLA (May 29, 2008)(unpub.). Specifically, the Board held that the administrative law judge failed to address whether the medical opinions he credited were adequately reasoned, as the Board instructed. The Board also held that the administrative law judge failed to consider the entirety of Dr. Repsher's medical opinion concerning the etiology of the miner's idiopathic pulmonary fibrosis (IPF). *Goddard*, BRB Nos. 09-0299 BLA and 09-0494 BLA, slip op. at 4-5. The Board further held that the administrative law judge failed to explain the weight he accorded Dr. Rosenberg's medical opinion, or the opinions of Drs. Portnoy and Brown, and also that the administrative law judge erred in mechanistically deferring to the opinions of Drs. Bennett and Smith, based solely on their status as treating physicians. *Id.* The Board also held that the administrative law judge did not consider the physicians' respective qualifications in weighing the medical opinion evidence pursuant to Section 718.202(a)(4), as instructed. *Id.* at 6. Additionally, the

his coal mine employment pursuant to 20 C.F.R. §718.203(b), and remanded the case for the administrative law judge to consider the conflicting evidence regarding the source of the miner's clinical pneumoconiosis. *Id.* at 6-7. Further, in light of the holding vacating the administrative law judge's finding of legal pneumoconiosis, the Board vacated his findings that the miner's total disability and death were due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(c) and 718.205(c), and instructed him to reconsider these issues on remand. *Id.* at 7-8.

⁴ In his 2008 Decision and Order on Remand, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), based on his determination that idiopathic pulmonary fibrosis (IPF) falls within the definition of pneumoconiosis. 2008 Decision and Order on Remand at 6. The administrative law judge further found that employer did not rebut the presumption that the miner's clinical pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b). *Id.* The administrative law judge then reiterated his finding that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), but he did not address disability causation pursuant to Section 718.204(c). *Id.* With regard to the survivor's claim, the administrative law judge found that the weight of the medical evidence established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). *Id.* at 7. Accordingly, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim.

Board vacated the administrative law judge's finding that the miner's clinical pneumoconiosis was due to his coal mine employment pursuant to Section 718.203(b) and instructed the administrative law judge, on remand, to provide a more detailed explanation of his weighing of the conflicting evidence. *Id.* The Board further noted that the administrative law judge failed to render a specific disability causation finding pursuant to Section 718.204(c) and, therefore, instructed the administrative law judge to address this element of entitlement on remand, as previously instructed by the Board. *Id.* at 6. With respect to the survivor's claim, the Board vacated the administrative law judge's Section 718.205(c) finding, in light of the holding vacating the Section 718.202(a)(4) finding, and instructed the administrative law judge to reconsider the evidence and resolve the conflicts in the evidence as to whether pneumoconiosis caused or hastened the miner's death, setting forth a rationale explaining his credibility determinations. *Id.* at 7.

On remand, the administrative law judge set forth an abbreviated procedural history of this case, noting specifically that the Board, in its 2008 Decision and Order, affirmed his finding that clinical pneumoconiosis was established by x-ray evidence at 20 C.F.R. §718.202(a)(1),⁵ but that the Board vacated his finding of the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remanded the case for further consideration of the evidence.⁶ 2011 Decision and Order on Remand at 3. Noting that, in his 2008 Decision and Order on Remand, he found that usual interstitial pneumonia/

⁵ The Board also affirmed the administrative law judge's finding of ten years of coal mine employment and his finding of the presence of total respiratory disability pursuant to 20 C.F.R. §718.204(b), as unchallenged on appeal. *S.G. [Goddard] v. Antelope Coal Co.*, BRB No. 07-0750 BLA, slip op. at 2 n.2 (May 29, 2008)(unpub.).

⁶ The Board, in its 2008 Decision and Order, stated that:

Ordinarily, affirmance of the administrative law judge's finding that the existence of pneumoconiosis was established by the chest x-rays at Section 718.202(a)(1) would obviate the need to review his finding that the medical opinions established the existence of pneumoconiosis at Section 718.202(a)(4). *See [Dixon v. North Camp Coal Co., 8 BLR 1-344, 1-345 (1985)]*. However, in this case, the administrative law judge's findings that the miner's total disability and death were due to pneumoconiosis rest on his finding pursuant to Section 718.202(a)(4) that the miner's idiopathic pulmonary fibrosis constituted legal pneumoconiosis.

Goddard, BRB No. 07-0750 BLA, slip op. at 3.

idiopathic pulmonary fibrosis (UIP/IPF) falls within the definition of pneumoconiosis, the administrative law judge stated that he again found that legal pneumoconiosis was established at Section 718.202(a)(4). *Id.* The administrative law judge noted, however, that the Board vacated this finding in its 2010 Decision and Order, holding that he had not followed the Board's prior remand instructions, and again remanded the case for further consideration under Section 718.202(a)(4). *Id.* Setting forth excerpts from the medical opinion evidence regarding the cause of the miner's IPF, the administrative law judge found that the medical evidence does not demonstrate an occupational lung disease resulting from the miner's coal dust exposure and, therefore, determined that the miner's claim must be denied. 2011 Decision and Order on Remand at 7. With regard to the survivor's claim, the administrative law judge found that, similarly, death due to an occupational lung disease has not been shown. *Id.* Accordingly, the administrative law judge denied benefits on both the miner's claim and the survivor's claim.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge failed to follow the Board's remand instructions in weighing the medical opinion evidence, and committed additional errors in his consideration of the medical evidence as a whole. In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, the miner had to demonstrate by a preponderance of the evidence, that he was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement to survivor's benefits, 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). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death,

⁷ Because claimant was last employed in the coal mining industry in Wyoming, we will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or 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). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 874, 20 BLR 2-334, 2-340 (10th Cir. 1996).

Claimant contends that the administrative law judge again failed to follow the Board's remand instructions in weighing the medical opinion evidence pursuant to Section 718.202(a)(4), arguing that the administrative law judge was instructed to conduct a complete and thorough analysis of the medical opinion evidence and provide specific findings. Claimant contends that the administrative law judge did not adhere to the Board's instructions, but rather rendered an even more conclusory decision, without any explanation for his conclusions. Claimant's Brief at 30-31. Claimant further contends that, in failing to properly weigh the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge also erred in selectively analyzing the conflicting medical opinion evidence.

We agree with claimant that the administrative law judge's 2011 Decision and Order on Remand does not comply with the remand instructions set forth in the Board's two prior decisions. Therefore, we vacate the administrative law judge's 2011 Decision and Order on Remand and remand the case for further consideration of the conflicting medical evidence.

Pursuant to Section 718.202(a)(4), the administrative law judge set forth a summary of the medical opinion evidence regarding the miner's IPF and its etiology, noting the conflicting interpretations of the x-ray and biopsy evidence underlying these opinions. 2011 Decision and Order on Remand at 6. Noting that he found the statements in Dr. Rosenberg's opinions "to be illuminating where [Dr. Rosenberg] described changes in upper and lower lobes[.]" the administrative law judge stated that:

The medical reports which include a review of the [biopsy] slides are more persuasive than the [x]-ray reports alone. The conclusion that occupational lung disease is not shown under [Section 718.202](a)(4) overrules the finding at [Section 718.202](a)(1).

Therefore, as occupational lung disease due to coal dust exposure is not demonstrated the living miner's claim for benefits must be denied. Similarly death due to occupational lung disease has not been shown.

Id. at 6-7. As claimant contends, the administrative law judge did not adequately explain his findings in concluding that an occupational lung disease is not shown and, therefore,

does not comport with basic tenets of the Administrative Procedure Act (APA), 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). The administrative law judge, in stating that the “medical reports which include a review of the [biopsy] slides are more persuasive than the [x]-ray reports alone,” as support for his determination that “occupational lung disease [was] not shown under [Section 718.202](a)(4) overrules the finding at [Section 718.202](a)(1),” fails to provide any true description of the specific medical evidence on which he relied, in contravention of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1988); 2011 Decision and Order on Remand at 6-7. Specifically, the administrative law judge did not provide a sufficient explanation of his consideration of the conflicting evidence upon which the Board may review his findings. *Wojtowicz*, 12 BLR at 1-165. Moreover, the administrative law judge did not address whether the medical opinions on which he relied were adequately reasoned, discuss the respective qualifications of the physicians, or provide an adequate discussion of which opinions he credited, as the Board instructed him to do previously. *Goddard*, BRB Nos. 09-0299 BLA and 09-0494 BLA, slip op. at 4-6. Further, contrary to the administrative law judge’s conclusions, it was not proper for him to weigh his finding regarding the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), that an “occupational dust disease [was] not shown” against his finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1), because these are two separate inquiries.⁸ *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Goddard*, BRB No. 07-0750 BLA, slip op. at 3. Consequently, because the administrative law judge failed to provide an adequate rationale for his conclusions and also failed to comply with the Board’s instructions in analyzing the conflicting medical evidence regarding the existence of legal pneumoconiosis, we must vacate his findings at Section 718.202(a)(4), and again remand the case for consideration of this issue consistent with our prior instructions, as it will affect the administrative law judge’s findings concerning disability causation pursuant to Section 718.204(c) in the miner’s claim and death causation pursuant to Section

⁸ The Board, in its 2008 Decision and Order, rejected employer’s argument that all forms of evidence must be weighed together in determining whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), holding that the Board has long held that Section 718.202 provides four alternative methods for establishing the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and has declined to extend the holdings in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), cited by employer, outside of the Third and Fourth Circuits, respectively. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*); *Goddard*, BRB No. 07-0750 BLA, slip op. at 3.

718.205(c) in the survivor's claim.⁹

Finally, in light of the Board's two previous remands of this case and the administrative law judge's repetition of error on remand, we conclude that "review of this claim requires a fresh look at the evidence...." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); see *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992); 20 C.F.R. §§802.404(a), 802.405(a). Thus, we reluctantly direct that it is in the interest of justice and judicial economy, the case be assigned to a different administrative law judge on remand for a fresh look at the evidence and proper application of the law.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is vacated, and the case is remanded to the Office of Administrative Law Judges for reassignment to a different administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁹ In light of the decision to vacate the entirety of the administrative law judge's findings at Section 718.202(a)(4), we need not address the claimant's additional contentions regarding the administrative law judge's consideration of Dr. Oesterling's opinion.