

BRB Nos. 13-0030 BLA
and 13-0031 BLA

VALLA JEAN LOUDERMILK)
(On behalf of, and Widow of, HAROLD)
LOUDERMILK))
)
Claimant-Respondent)
)
v.)
)
LAFAYETTE SPRINGS ENTERPRISE) DATE ISSUED: 08/29/2013
)
and)
)
WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
Petitioners)
)
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 Adele H. Odegard,
Administrative Law Judge, United States Department of Labor.

Tiffany B. Davis and Ashley M. Harman (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer/carrier.

Richard A. Seid (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: SMITH, McGRANERY and HALL, Administrative Appeals
Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2007-BLA-05832 and 2007-BLA-05833) of Administrative Law Judge Adele H. Odegard awarding benefits on a miner's claim and a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ This case is before the Board for the second time. In our prior Decision and Order, we vacated Administrative Law Judge Janice K. Bullard's denial of benefits in the miner's claim and the survivor's claim, and remanded the case to her for reconsideration of her finding that employer established rebuttal of the amended Section 411(c)(4) presumption, by demonstrating that the miner's totally disabling impairment and death did not arise out of, or in connection with, his coal mine employment.² *Loudermilk v. Lafayette Springs Enterprise*, BRB Nos. 11-0272 BLA and 11-0273 BLA (Dec 1, 2011) (unpub.). On remand, due to Judge Bullard's unavailability, the case was reassigned to Judge Odegard (the administrative law judge). In a Decision and Order on Remand dated September 18, 2012, the administrative law judge found that employer did not rebut the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim and found that claimant was derivatively entitled to benefits under amended Section 932(l).³

¹ Claimant, Valla Jean Loudermilk, is the widow of the deceased miner, Harold E. Loudermilk, and is pursuing the miner's claim on behalf of his estate. Survivor's Claim (SC) Director's Exhibits 26, 46. The miner filed his claim for benefits on April 5, 2006, Miner's Claim (MC) Director's Exhibit 1, and died on July 26, 2006. SC Director's Exhibit 7. Claimant filed her survivor's claim on August 18, 2006. SC Director's Exhibit 1.

² Relevant to the miner's claim and the survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and made it applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under amended Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

³ Relevant to the survivor's claim, the amendments to the Act revived 30 U.S.C. §932(l) and made it applicable to survivor's claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under amended Section 932(l), a survivor of a

In the present appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to these claims. On the merits of entitlement, employer argues that the administrative law judge applied an incorrect standard for determining whether employer established rebuttal of the presumption under amended Section 411(c)(4), and did not properly weigh the medical opinion evidence relevant to rebuttal. Regarding the survivor's claim, employer contends that, because the administrative law judge erred in awarding benefits in the miner's claim, claimant is not entitled to survivor's benefits pursuant to amended Section 932(l). Alternatively, employer argues that the award of benefits in the survivor's claim is premature.⁴ Claimant has not responded. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contentions that Section 411(c)(4) may not be applied to employer in this case, and that the administrative law judge applied an improper rebuttal standard. The Director takes no position on the merits of the claims.

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).

miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits. 30 U.S.C. §932(l).

⁴ Employer also contends that the amended Section 411(c) rebuttal provisions do not apply to coal mine operators and that the amended Section 411(c)(4) presumption is not valid until implementing regulations are issued. In setting forth these arguments, however, employer concedes that the Board has rejected them in other cases and states that it has raised these issues to preserve them for appeal. Employer's Brief in Support of Petition for Review at 24 n. 5, 29 n. 6. We will not, therefore, address them herein. In addition, employer's related request that this case be held in abeyance pending a decision on appeal from *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), is moot. *Mingo Logan Coal Co. v. Owens*, F.3d , 2013 WL 3929081 (4th Cir. July 31, 2013) (No. 11-2418) (Niemeyer, J. concurring).

⁵ 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 West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

I. THE MINER'S CLAIM

Employer initially asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. This contention is without merit, as the administrative law judge properly explained that, because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); Decision and Order on Remand at 6-11. The administrative law judge also properly stated that, in order to satisfy the second method of rebuttal, employer must effectively rule out any contribution to claimant's pulmonary impairment by coal mine dust exposure. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard.

In evaluating whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, the administrative law judge considered the opinions of Drs. Castle and Fino, who concluded that the miner had a totally disabling respiratory condition.⁶ Decision and Order on Remand at 4-5, 7-9. Dr. Castle opined that the miner's disabling respiratory condition was caused by smoking, bronchial asthma, congestive heart failure and previous thoracotomy. Dr. Fino concluded that the miner's disability was due to his history of smoking-related chronic obstructive pulmonary disease and lung cancer, as well as his cardiac condition. Drs. Castle and Fino each opined that the miner's pulmonary impairment was unrelated to his coal mine dust exposure. The administrative law judge discounted the opinions of Drs. Castle and Fino because they failed to adequately explain how they eliminated the miner's 27.15 years of coal dust exposure as a contributor to his disabling pulmonary impairment. Decision and Order on Remand 7-9. The administrative law judge, therefore, found that employer failed to prove that the miner's total disability "did not arise out of, or in connection with," coal mine employment. *Id.* at 11.

⁶ The administrative law judge determined correctly that employer could not rebut the amended Section 411(c)(4) presumption by proving that the miner did not have pneumoconiosis, based on the finding in the prior Decision and Order that the preponderance of the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4). 30 U.S.C. §921(c)(4); Decision and Order on Remand at 6.

Employer maintains that the opinions of Drs. Castle and Fino are sufficient to affirmatively rebut the amended Section 411(c)(4) presumption and that the administrative law judge erred in discrediting these opinions. Employer alleges that the administrative law judge selectively analyzed these opinions and ignored the multiple factors that the physicians relied upon to conclude that the miner's coal dust exposure was not a cause of his disabling impairment. In so doing, employer asserts that the administrative law judge substituted her opinion for that of the physicians. Employer's arguments lack merit.

A review of the Decision and Order on Remand reveals that the administrative law judge provided a comprehensive discussion of both Dr. Castle's opinion, contained in narrative reports dated October 5, 2007 and January 10, 2010, and Dr. Fino's opinion, contained in narrative reports dated October 30, 2007 and January 7, 2010, and in deposition testimony dated July 9, 2008. Decision and Order on Remand at 4-5, 7-9; Miner's Claim (MC) Employer's Exhibits 3, 4, 9, 10, 18, 28, 29, 30. In so doing, the administrative law judge fully delineated the physicians' findings and the underlying bases for their conclusions that smoking was the sole cause of claimant's disabling impairment. Decision and Order on Remand at 4-5, 7-9. The administrative law judge noted that both Drs. Castle and Fino relied, in part, on the partial reversibility of the miner's impairment after bronchodilator administration to exclude coal mine dust exposure as a cause of the miner's obstructive impairment. *Id.* at 7-8. The administrative law judge then acted within her discretion as fact-finder in determining that neither Dr. Castle, nor Dr. Fino, adequately explained why the irreversible portion of the miner's impairment was unrelated to coal mine dust exposure or why the miner's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of the miner's disabling pulmonary impairment.⁷ See 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal*

⁷ Drs. Castle and Fino referred to a February 18, 2003 pulmonary function study included in the miner's treatment records. See MC Employer's Exhibits 3, 9. Both physicians noted that the study reflected a twelve-percent improvement in the miner's FEV1 and FVC, after the administration of a bronchodilator. *Id.* As the administrative law judge accurately noted, Drs. Castle and Fino each cited bronchoreversibility as a basis for their opinions that the miner's disability was not occupational in origin, but neither of these physicians addressed the pulmonary function test results of September 21, 2004 and May 24, 2006, which did not show a significant bronchodilator response, and the residual impairment in each test was qualifying for disability. Decision and Order on Remand at 8.

Co. v. Swiger, 98 F. App'x 227, 237 (4th Cir. 2004). Accordingly, we affirm the administrative law judge's discrediting of the opinions of Drs. Castle and Fino.⁸

As substantial evidence supports the administrative law judge's credibility determinations, we further affirm her finding that employer did not rebut the amended Section 411(c)(4) presumption by affirmatively proving that the miner did not have pneumoconiosis or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment.⁹ 30 U.S.C. §921(c)(4); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). Accordingly, we affirm the award of benefits in the miner's claim.

II. THE SURVIVOR'S CLAIM

Employer asserts that the administrative law judge erred in applying amended Section 932(l) to determine that claimant is automatically entitled to receive benefits as a consequence of the award of benefits in the miner's claim. Employer maintains that the prerequisites for the application of amended Section 932(l) were not met, as the award of benefits in the miner's claim has not become final. We reject employer's allegation of error, as the application of amended Section 932(l) does not depend upon whether the award of benefits in the miner's claim has become final. Rather, it provides that a survivor is derivatively entitled to receive benefits if the miner "was determined to be *eligible* to receive benefits . . . at the time of his or her death[.]" 30 U.S.C. §932(l) (emphasis added).

Because the survivor's claim was filed after January 1, 2005 and was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death, we affirm the administrative law judge's award of benefits in the survivor's claim pursuant to amended Section 932(l). Decision and Order on Remand at 12-13.

⁸ Because the administrative law judge provided a valid rationale for according less weight to the opinions of Drs. Castle and Fino, we need not address employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

⁹ Based on our affirmation of the administrative law judge's finding that employer did not carry its burden on rebuttal, we need not address employer's arguments regarding the weight that the administrative law judge accorded the opinions of Drs. Othman and Rasmussen, which were submitted by claimant. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge