



BRB No. 14-0326 BLA

GUINELINE E. LESTER	)	
(Widow of JIMMY E. LESTER)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/23/2015
	)	
ISLAND CREEK COAL 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 – Award of Survivor Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Survivor Benefits (2012-BLA-5272) of Administrative Law Judge Richard T. Stansell-Gamm, rendered on a survivor’s claim filed on September 17, 2010, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act).<sup>1</sup> The administrative law judge determined that claimant established that the miner had at least fifteen years of

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<sup>1</sup> Claimant is the widow of the miner, who died on July 3, 2010. Decision and Order at 4; Director’s Exhibit 10. There is no evidence in the record that the miner filed a claim for black lung benefits during his lifetime.

underground coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) of the Act.<sup>2</sup> 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge's finding, that claimant established total disability, must be reversed or vacated, as the medical opinion on which he relied did not include the requisite finding, pursuant to 20 C.F.R. §718.204(b)(2), that the miner was totally and permanently disabled due to a respiratory or pulmonary impairment. Employer also asserts that the administrative law judge applied the incorrect burden of proof concerning the presumed existence of legal pneumoconiosis, and erred in finding that employer failed to rebut the presumed facts that the miner had legal pneumoconiosis and that his death was due to pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.<sup>3</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.<sup>4</sup> 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).

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<sup>2</sup> Under amended Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had at least thirty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>4</sup> The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

## **I. Invocation of the Presumption – Totally Disabling Respiratory Impairment at 20 C.F.R. §718.204(b)(2)**

Based on his finding that claimant did not invoke the irrebuttable presumption at 20 C.F.R. §718.304, the administrative law judge considered whether claimant established total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 12. The administrative law judge determined that the record does not contain any pulmonary function studies relevant to 20 C.F.R. §718.204(b)(2)(i), and contained insufficient evidence to establish that the miner had right-sided congestive heart failure due to cor pulmonale at 20 C.F.R. §718.204(b)(2)(iii). *Id.* at 15. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge indicated that the blood gas studies conducted by Dr. Stefanini on June 30, 2010 and July 1, 2010 produced qualifying results. *Id.*; Director’s Exhibit 11. However, the administrative law judge determined that, because both studies were conducted in the hospital, shortly before the miner’s death, they “do not represent a valid assessment of his ‘fixed’ or ‘baseline’ oxygenation capacity.” Decision and Order at 15. Consequently, the administrative law judge found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*

After examining the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that Drs. Sutherland, Stefanini, and Fino did not render specific diagnoses concerning whether the miner’s respiratory symptoms were totally disabling. Decision and Order at 16. In contrast, the administrative law judge found that, based “upon a thorough review of the medical record, Dr. Tuteur reached a probative conclusion that in the last year of his life, [the miner] was ‘totally and permanently disabled’ due [to] a respiratory impairment to the ‘extent that he could not perform his usual coal mine work.’” *Id.*, quoting Employer’s Exhibit 3. Relying on Dr. Tuteur’s opinion, the administrative law judge concluded that claimant established total disability based on a preponderance of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and, therefore, invoked the rebuttable presumption that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.305. Decision and Order at 16.

Employer contends that the administrative law judge’s finding must be reversed, or vacated, because Dr. Tuteur did not indicate that the miner had a totally disabling respiratory or pulmonary impairment, but rather reported that the miner was disabled by the effects of metastasizing kidney cancer. Additionally, employer notes that, in his report, Dr. Tuteur relied upon the blood gas studies in evidence to support his opinion that the miner had a respiratory impairment shortly before his death; however, the administrative law judge determined that these studies were insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Employer’s contentions have merit. In his report, Dr. Tuteur commented that the miner “did have respiratory impairment in the days prior to his death. This impairment

was manifested by arterial blood gas analysis demonstrating both alveolar hypoventilation and impairment of oxygen gas exchange.” Employer’s Exhibit 3. Dr. Tuteur also indicated that “[o]ver the last year of his life, it is clear that [the miner] was totally and permanently disabled to such an extent that he could not perform his usual coal mine work,” and attributed this disability solely to renal cell carcinoma. *Id.* Therefore, we agree with employer that the administrative law judge mischaracterized Dr. Tuteur’s opinion by concluding that he diagnosed the miner with a totally disabling respiratory impairment. Further, the administrative law judge did not explain, as required by the Administrative Procedure Act (APA),<sup>5</sup> his crediting of Dr. Tuteur’s opinion, when Dr. Tuteur relied on the blood gas studies that the administrative law judge determined did not provide a valid basis for the assessment of the miner’s baseline respiratory condition. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Therefore, we vacate the administrative law judge’s finding that claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and the administrative law judge’s determination that claimant invoked the rebuttable presumption pursuant to 20 C.F.R. §718.305(b).

On remand, the administrative law judge must reconsider Dr. Tuteur’s opinion to assess whether it constitutes a diagnosis of “a *pulmonary or respiratory impairment* which, standing alone, prevents or prevented the miner: (i) From performing his or her usual coal mine work; and (ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.” 20 C.F.R. §718.204(b)(1) (emphasis added). If the administrative law judge again determines that Dr. Tuteur diagnosed a permanent and totally disabling respiratory or pulmonary impairment, he must explain his finding, in compliance with the APA. Specifically, the administrative law judge must reconcile his crediting of Dr. Tuteur’s opinion with his determination that the blood gas studies did not provide the basis for a valid assessment of the miner’s fixed oxygenation capacity under 20 C.F.R. §718.204(b)(2)(ii).

If the administrative law judge determines that claimant is unable to establish total disability, invocation of the amended Section 411(c)(4) presumption is precluded. 20 C.F.R. §718.305(b)(1)(iii), and the administrative law judge must consider whether claimant has established entitlement to survivor’s benefits, without relying on the

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<sup>5</sup> 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).

presumption. However, if the administrative law judge finds that the evidence is sufficient to establish total disability, then he may reinstate his finding that claimant invoked the rebuttable presumption under 20 C.F.R. §718.305(b).

## **II. Rebuttal of the Presumption**

In the interest of judicial economy, and to avoid the repetition of any error on remand, we will also address employer's contentions concerning the administrative law judge's finding that employer did not establish rebuttal of the presumption under 20 C.F.R. §718.305(d)(2). Once the administrative law judge determines that claimant has invoked the presumption that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.305(b), the burden of proof shifts to employer to rebut the presumption by establishing that the miner did not have legal pneumoconiosis,<sup>6</sup> or clinical pneumoconiosis,<sup>7</sup> or by establishing that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201(a). 20 C.F.R. §718.305(d)(2); *see Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

### **A. The Presumed Existence of Pneumoconiosis**

The administrative law judge determined that employer established, by a preponderance of the evidence, that the miner did not have clinical pneumoconiosis. Decision and Order at 17. Concerning legal pneumoconiosis, the administrative law judge found that Dr. Sutherland did not address the cause of the miner's respiratory

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<sup>6</sup> "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).

<sup>7</sup> The regulation at 20 C.F.R. §718.201(a)(1) provides:

"Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

conditions.<sup>8</sup> *Id.* at 23. The administrative law judge noted that, as the miner's treating physician at the end of his life, Dr. Stefanini "was exceptionally well positioned to provide a probative assessment of his pulmonary condition." *Id.* Nevertheless, he gave Dr. Stefanini's opinion, that the miner had legal pneumoconiosis, less weight because Dr. Stefanini relied on radiological evidence of coal workers' pneumoconiosis, which was contrary to the administrative law judge's finding, and he was not aware of the dust conditions of the miner's coal mine work. *Id.* at 24. The administrative law judge also gave less weight to Dr. Fino's opinion, that the miner did not have legal pneumoconiosis, because he found that Dr. Fino did not adequately address whether the miner may have had the disease prior to the onset of metastatic kidney cancer. *Id.* at 25. The administrative law judge emphasized the fact that Dr. Fino reviewed Dr. Sutherland's treatment notes from 2004 to 2006, which documented the presence of shortness of breath, chronic bronchitis and chronic obstructive pulmonary disease (COPD). *Id.* Similarly, the administrative law judge gave less weight to Dr. Tuteur's opinion, that the miner did not have legal pneumoconiosis, because he focused on the more recent medical evidence and did not sufficiently explain how he excluded coal dust as a contributing factor in the miner's respiratory impairment prior to the onset of metastatic kidney cancer. *Id.* Further, the administrative law judge discredited Dr. Tuteur's opinion, based on his reliance on abnormal chest x-rays that were taken after the miner's cancer spread to his lungs. *Id.* at 26. The administrative law judge observed that the lack of clinical pneumoconiosis does not preclude the presence of legal pneumoconiosis, and Dr. Tuteur did not account for the pre-cancer radiographic studies showing evidence of COPD and chronic bronchitis. *Id.*

Employer contends that, in considering whether employer rebutted the presumed existence of legal pneumoconiosis, the administrative law judge erred in requiring employer to establish that "no part" of the miner's respiratory impairment was due to coal dust exposure, as this is contrary to the definition at 20 C.F.R. §718.201(b), providing that the respiratory impairment must be "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Additionally, employer argues that the administrative law judge erred in concluding that the opinions of Drs. Fino and Tuteur were insufficient to rebut the presumed existence of legal pneumoconiosis.<sup>9</sup> Employer asserts that, contrary to the administrative law judge's

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<sup>8</sup> In various treatment records, Dr. Sutherland noted that the miner was having respiratory symptoms like shortness of breath, and listed diagnoses of chronic bronchitis, emphysema, and chronic obstructive pulmonary disease but did not provide an opinion on the cause of these ailments. Director's Exhibit 11.

<sup>9</sup> Employer argues that the administrative law judge improperly treated Dr. Stefanini's statement, that the miner's respiratory failure was due, in part, to coal dust exposure, as a diagnosis of legal pneumoconiosis because the statutory definition requires

findings, both physicians reviewed all of the medical evidence in the record, including Dr. Sutherland's treatment records from 2004 to 2006, and explained why they were not consistent with a significant respiratory impairment due, in part, to coal dust exposure. Employer also states that Dr. Sutherland's treatment records do not establish that the miner had a significant respiratory impairment prior to the diagnosis of his renal cell carcinoma, as Dr. Sutherland included a diagnosis of a respiratory disease on only six out of twenty-three office visits between July 26, 2004 and April 9, 2009. Further, employer argues that the administrative law judge selectively analyzed Dr. Tuteur's opinion in finding that he emphasized the x-ray evidence when excluding the existence of legal pneumoconiosis, as Dr. Tuteur also relied on the clinical data.

There is merit to employer's argument that, in weighing the medical opinion evidence concerning whether employer rebutted the presumed existence of legal pneumoconiosis, the administrative law judge did not apply the correct legal standard. In explaining the standard that he employed, the administrative law judge indicated that employer had to prove the absence of legal pneumoconiosis by a preponderance of the evidence or, alternatively, that a physician's opinion had to establish that no part of the miner's respiratory impairment was due to his coal dust exposure. *See* Decision and Order at 18, 25, 26. Neither of these formulations is in accordance with law. To disprove the presence of legal pneumoconiosis, employer must demonstrate, by a preponderance of the evidence, that claimant's obstructive impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A).

Therefore, we vacate the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis. On remand, the administrative law judge must reconsider the medical opinion evidence relevant to this issue while applying the correct legal standard. Further, the administrative law judge must explain why he gave more weight to the diagnoses of a respiratory impairment appearing in Dr. Sutherland's 2004 to 2006 treatment records, particularly in light of the intermittent nature of the diagnoses and Dr. Sutherland's silence as to the cause of the miner's

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coal dust to significantly contribute to, or substantially aggravate, a respiratory or pulmonary impairment. Employer also contends that the blood gas studies, relied on by Dr. Stefanini, are insufficient to support a finding a total disability because they were drawn when "the Miner was in an acute state." Employer's Petition for Review at 11 n.5. However, employer states that these errors are harmless because the administrative law judge determined that Dr. Stefanini's opinion was not probative for other reasons.

respiratory symptoms.<sup>10</sup> See Director's Exhibit 11; Employer's Petition for Review at 13-14.

## **B. The Presumed Causal Relationship Between Pneumoconiosis and Death**

Employer also alleges error in the administrative law judge's finding that employer failed to rebut the presumed fact of death causation at 20 C.F.R. §718.305(d)(2)(ii). In considering the medical opinions of record, the administrative law judge determined that Dr. Sutherland did not address the cause of the miner's death. Decision and Order at 26. The administrative law judge gave little weight to Dr. Stefanini's opinion, that pneumoconiosis played a role in the miner's death, because Dr. Stefanini relied on his radiographic findings of clinical pneumoconiosis, which were contrary to the administrative law judge's finding that the miner did not have clinical pneumoconiosis. *Id.* In addition, the administrative law judge gave less weight to the opinions of Drs. Fino and Tuteur, that the miner's death was not related in any way to pneumoconiosis or coal dust exposure, because neither addressed whether the miner's pre-cancerous pulmonary condition, which could have been contributed to by coal dust, could have hastened the miner's death. *Id.* at 27. Further, the administrative law judge gave less weight to their opinions because neither physician diagnosed legal pneumoconiosis, contrary to the presumed existence of the disease. *Id.*

Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Fino and Tuteur for failing to diagnose legal pneumoconiosis because he applied the wrong standard and mischaracterized the physicians' opinions. In addition, employer states that there is no reliable evidence in the record suggesting that chronic bronchitis or COPD played any role in the miner's death, and that there is no support for the administrative law judge's finding that, even if the miner's presumed legal pneumoconiosis was insufficient to contribute to the miner's respiratory impairment, it could have hastened the miner's death.

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<sup>10</sup> Dr. Sutherland's treatment records document twenty-three office visits. Director's Exhibit 11. On seven occasions, Dr. Sutherland diagnosed the miner with chronic obstructive pulmonary disease, chronic bronchitis, or emphysema. *Id.* Dr. Sutherland did not identify the cause of the respiratory impairments that he diagnosed. On four occasions, Dr. Sutherland observed that the miner's breath sounds were normal. *Id.* Dr. Sutherland reported the presence of abnormal breath sounds on the remaining office visits, without setting forth a respiratory diagnosis. Rather, he listed a number of nonrespiratory conditions from which the miner suffered. *Id.*

Because the administrative law judge primarily relied on his findings on the issue of legal pneumoconiosis to discredit employer's experts on the issue of death due to pneumoconiosis, we also vacate his determination that employer failed to rebut the presumed fact of death causation. If the administrative law judge again finds that employer has failed to affirmatively disprove the presumed existence of legal pneumoconiosis, he must reconsider whether employer has rebutted the presumed fact of death causation at 20 C.F.R. §718.305(d)(2)(ii), in light of his findings at 20 C.F.R. §718.305(d)(2)(i). In doing so, the administrative law judge must place the burden on employer to prove that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). If employer proves that the miner does not have legal and clinical pneumoconiosis, or that the miner's death was not caused by pneumoconiosis, employer has rebutted the presumption. 20 C.F.R. §718.305(d)(2); *see Copley*, 25 BLR at 1-89. The administrative law judge must then address whether claimant can establish entitlement under 20 C.F.R. Part 718, without benefit of the presumption. Finally, the administrative law judge must consider the opinions of the physicians in their entirety, and set forth his findings on remand in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order – Award of Survivor Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge