BRB No. 13-0105 BLA

FLORENCE WARD (Widow of DAVID WARD) Claimant-Respondent v. ISLAND CREEK COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/20/2013 DECISION and ORDER

Appeal of the Decision and Order of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Micah S. Blankenship (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-05349) of Administrative Law Judge Christine L. Kirby, rendered on a claim filed pursuant to the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a survivor's claim filed on March 30, 2010. Director's Exhibit 2.

At the hearing, employer submitted the deposition testimony of Drs. Dennis and Bush, who prepared autopsy reports, and of Dr. Oesterling, who prepared an autopsy rebuttal report. Employer's Exhibits 4, 6, 7. Without further discussion, or any objection from claimant, the administrative law judge admitted the testimony of all three physicians into the record. Hearing Tr. at 10.

In her Decision and Order issued on November 20, 2012, the administrative law judge excluded the depositions of Drs. Dennis, Bush, and Oesterling, ruling that, because these physicians did not prepare medical reports, their testimony was not admissible under the evidentiary limitations at 20 C.F.R. §725.414. The administrative law judge then credited the miner with twenty-four years of coal mine employment,[1] pursuant to the parties' stipulation and the evidence of record, and noted that 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.

Relevant to this survivor's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established.[2] 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that the miner's death did not arise from his coal mine employment. 30 U.S.C. §921(c)(4); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305).

Applying amended Section 411(c)(4), the administrative law judge found that claimant established that the miner had at least fifteen years of qualifying coal mine

[1] The miner'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, 1-202 (1989) (en banc).

[2] Congress also reinstated Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), providing that a survivor is automatically entitled to benefits if the miner was determined to be eligible to receive benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's claim for benefits was denied. Decision and Order at 2 n.2.

employment. Additionally, the administrative law judge found that claimant established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to amended Section 411(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in excluding the deposition testimony of Drs. Dennis, Bush, and Oesterling. Employer also challenges the application of amended Section 411(c)(4) to this claim. Further, employer contends that the administrative law judge applied an improper rebuttal standard, and erred in her analysis of the evidence in finding that employer failed to rebut the Section 411(c)(4) presumption by proving that the miner's death did not arise from his coal mine employment. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments that Section 411(c)(4) may not be applied to this claim, and that the administrative law judge applied an improper standard on rebuttal. Employer filed a combined rely brief, reiterating its arguments.[3]

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. 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc).

Exclusion of the Deposition Testimony of Drs. Dennis, Bush, and Oesterling

Employer contends that the administrative law judge erred in excluding the deposition testimony of Drs. Dennis, Bush, and Oesterling as inadmissible under the evidentiary limitations set forth at 20 C.F.R. §§725.414(a), (c), 725.457(c). Employer's Reply Brief at 8-17. Employer also argues that the administrative law judge erred in rendering her evidentiary ruling in the Decision and Order, thus depriving employer of

[3] Employer does not challenge the administrative law judge's findings that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4), or that employer failed to rebut the presumption by disproving the existence of pneumoconiosis. These findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the opportunity to establish good cause for the submission of the testimony, pursuant to 20 C.F.R. §725.456, or to redesignate its evidence. *Id*. at 2, 29.

Initially, we agree with employer's assertion that the administrative law judge erred in determining that the deposition testimony of Drs. Dennis, Bush, and Oesterling is inadmissible under the evidentiary limitations because these physicians did not prepare medical reports. Decision and Order at 8 n.3. The regulations governing the development of evidence provide that a physician who has prepared a "medical report" may testify with respect to a claim. 20 C.F.R. §§725.414(c), 725.457(c)(2). If a party has submitted fewer than two medical reports as part of its affirmative case, a physician who did not prepare a medical report may testify in lieu of such a medical report, and the testimony will be considered a medical report for the purposes of the evidentiary limitations. 20 C.F.R. §§725.414(c), 725.457(c)(2).

Drs. Dennis, Bush, and Oesterling prepared autopsy reports. Decision and Order at 8; Employer's Reply Brief at 9-12. Therefore, the depositions of Drs. Dennis, Bush, and Oesterling are considered medical reports for the purposes of the evidentiary limitations. Further, as employer asserts, because employer had submitted only one of its two affirmative medical reports, specifically from Dr. Lockey,[4] employer could have submitted one of the three depositions without exceeding the evidentiary limitations on medical reports.[5] Employer's Reply Brief at 9-10. Moreover, we agree with employer that the administrative law judge should have rendered her evidentiary ruling prior to the issuance of her decision, consistent with the principles of fairness and administrative efficiency. *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008)(en banc). The administrative law judge's failure to render a preliminary evidentiary ruling precluded employer from redesignating its evidence to conform to the evidentiary limitations, or

[4] Claimant designated Dr. Dennis's report as her affirmative autopsy report. Claimant's Evidence Summary Form dated April 24, 2012. On its evidence summary form, employer designated Dr. Lockey's report as its affirmative medical report, Dr. Bush's report as its affirmative autopsy report, and Dr. Oesterling's report as its autopsy rebuttal report. Employer's Evidence Summary Form dated March 12, 2012.

[5] We reject, however, employer's assertion that due process requires the admission of Dr. Dennis's deposition testimony. Citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57 (2008)(en banc), employer contends that it was entitled to cross-examine Dr. Dennis. Employer's Reply Brief at 9 n.1. Employer's reliance upon *Preston* is misplaced. In *Preston*, the Board "recognized only a right to cross-examine a [treating] physician whose report is admissible under Section 725.414(a)(4)" and to admit his testimony into the record. *Preston*, 24 BLR at 1-63. The administrative law judge noted accurately that Dr. Dennis was not a treating physician, but is the autopsy prosector who prepared an autopsy report. Decision and Order at 7-9.

from presenting a good cause argument for exceeding those limitations. *See Preston*, 24 BLR at 1-63. Consequently, we vacate the administrative law judge's evidentiary ruling excluding the depositions of Drs. Dennis, Bush, and Oesterling. Therefore, we also vacate her finding that employer failed to rebut the amended Section 411(c)(4) presumption by proving that the miner's death did not arise from his coal mine employment, and her award of benefits. On remand, prior to issuing her decision on the merits of entitlement, the administrative law judge must rule on the admissibility of the evidence submitted, advise the parties of her ruling, and provide them with an opportunity to respond appropriately.

In the interest of judicial economy, we will also address employer's challenges to the application of amended Section 411(c)(4) to this case, and to the administrative law judge's finding that employer failed to prove that the miner's death did not arise from his coal mine employment.

Application of Amended Section 411(c)(4)

Employer objects to the application of amended Section 411(c)(4) to this claim brought against a responsible operator, as the language of this section only addresses claims filed against the Secretary of Labor. Employer's arguments are substantially similar to those rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *aff'd on other grounds*, F.3d , 2013 WL 3929081 (4th Cir. July 31, 2013)(No. 11-2418)(Niemeyer, J., concurring), and we reject them for the reasons set forth in that decision. *See also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). We also reject employer's objection to the application of amended Section 411(c)(4) because the Department of Labor has not yet promulgated implementing regulations. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We, therefore, affirm the administrative law judge's application of amended Section 411(c)(4) to this claim.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) in this survivor's claim, the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's death did not arise from his coal mine employment. 30 U.S.C. §921(c)(4); *Copley*, 25 BLR at 1-89; *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305). The administrative law judge found that employer did not establish rebuttal under either method. Decision and Order at 4-13. Employer contends that the administrative law judge erred in her evaluation of

the opinions of Drs. Dennis, Bush, and Oesterling relevant to the existence of legal pneumoconiosis.[6]

Initially, we note employer's concession that, because claimant established the existence of clinical pneumoconiosis,[7] employer cannot rebut the presumption by disproving the existence of pneumoconiosis. *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose*, 614 F.2d at 938-40, 2 BLR at 2-43-44; Employer' Brief at 6 n.1. Employer asserts, however, that the administrative law judge's findings regarding the pathology opinions as to the existence of legal pneumoconiosis remain relevant, because they affected her later findings regarding whether employer could prove that the miner's death did not arise from his coal mine employment.

Specifically, employer asserts that "the administrative law judge erred where she determined that the pathologists' opinions were not probative concerning legal pneumoconiosis." Employer's Brief at 6. The administrative law judge discounted the opinions of Drs. Dennis, Bush, and Oesterling as based on limited medical evidence:

> In rendering their opinions, the three pathologists in this claim only examined histologic slides and did not examine other evidence which would be relevant to a finding of legal [coal workers' pneumoconiosis] such as physical examinations, symptoms, diagnostic testing, etc. I therefore find that the autopsy evidence is not probative on the issue of whether Miner had legal pneumoconiosis and does not assist Employer in rebutting the presence of legal [coal workers' pneumoconiosis].

Decision and Order at 10.

An administrative law judge may accord diminished weight to a medical opinion she finds to be based on a less complete review of the medical evidence. *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.

---

[6] "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).

[7] "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." 20 C.F.R. §718.201(a)(1).

1997); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). However, in this case, having excluded the deposition testimony of all three pathologists, the administrative law judge has not considered whether the physicians' testimony may have provided additional support for their conclusions regarding whether pneumoconiosis caused, or contributed to, the miner's death.[8] On remand, if the administrative law judge admits the deposition testimony of any of the three pathologists, the administrative law judge should consider the entirety of the physician's opinion, together with the other medical evidence of record, in determining whether employer has rebutted the amended Section 411(c)(4) presumption by proving that the miner's death did not arise out of, or in connection with, dust exposure in the miner's coal mine employment.[9] 30 U.S.C. §921(c)(4); *see Copley*, 25 BLR at 1-89.

[8] Both Drs. Bush and Oesterling indicated that they were provided with additional information in preparation for their testimony. Employer's Exhibits 6 at 20-21; 7 at 8-9 (excluded).

[9] In light of our determination to vacate the administrative law judge's exclusion of the deposition testimony of Drs. Dennis, Bush, and Oesterling, and her finding that employer failed to rebut the amended Section 411(c)(4) presumption by proving that the miner's death did not arise from his coal mine employment, we decline to address employer's additional allegations of error regarding the administrative law judge's weighing of the medical opinions and autopsy evidence relevant to the cause of the miner's death.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, and vacated in part, and the case is remanded 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