BRB No. 12-0321 BLA

JUDY L. HALL (Widow of EARL HALL) Claimant-Petitioner v. AGIPCOAL USA, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/12/2013 DECISION and ORDER

Appeal of the Decision and Order on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (2008-BLA-5763) of

[1] Claimant is the widow of the miner, who died on February 7, 2007. Director's

Administrative Law Judge Thomas M. Burke denying benefits on a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Daniel L. Leland found that the miner had 21 years and seven months of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although Judge Leland found that the evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he found that the autopsy evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b). However, Judge Leland found that the autopsy evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Judge Leland also found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R §718.205(c). Accordingly, Judge Leland denied benefits.

In response to claimant's appeal, the Board affirmed Judge Leland's finding that the autopsy evidence did not establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b). *Hall v. Agipcoal USA, Inc*., BRB No. 10-0332 BLA, slip op. at 6 (Feb. 15, 2011)(unpub.). However, the Board vacated Judge Leland's findings under 20 C.F.R. §§718.202(a)(2), 718.203(b) and 718.205(c), and remanded the case for Judge Leland to consider whether claimant is entitled to the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *Hall*, BRB No. 10-0332 BLA, slip op. at 7-8. The Board instructed Judge Leland, on remand, to determine whether the medical evidence rebutted the presumption, if reached. *Hall*, BRB No. 10-0332 BLA, slip op. at 8. The Board also instructed Judge Leland to allow all parties the opportunity to submit evidence in compliance with the evidentiary limitations set forth at 20 C.F.R. §718.414, noting that, under 20 C.F.R. §725.456(b)(1), the offer of evidence exceeding those limitations had to be justified by a showing of good cause. *Id*. Further, the Board declined to address claimant's contention that the miner should have been credited with 26.23 years of qualifying coal mine employment, as Judge Leland's finding that the miner had 21 years and seven months of coal mine employment was sufficient to qualify claimant for consideration under the amended Section 411(c)(4) presumption. *Hall*, BRB No. 10-0332 BLA, slip op. at 7, n.7. The Board also denied employer's request to hold the case in abeyance until the Department of Labor issued guidelines or promulgated new regulations implementing the statutory amendments. *Hall*, BRB No. 10-0332 BLA, slip op. at 7, n.8. Additionally, the Board denied employer's request to hold the case in abeyance based on the challenges to

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Exhibit 9. The miner's claims were previously denied. Claimant filed her survivor's claim on August 24, 2007. Director's Exhibit 2. However, she died on December 16, 2008, and her daughter, Bonnie Estep, has been appointed the representative of her estate. Hearing Tr. at 15, 20-21.

the constitutionality of the new statutory amendments. *Id*.

On remand, the case was reassigned to Judge Burke (the administrative law judge), who found that claimant is not entitled to the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the amended Section 411(c)(4) presumption was not invoked because the evidence did not establish total respiratory disability. Claimant also contends that employer has not rebutted the amended Section 411(c)(4) presumption. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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, is rational, and is in accordance with applicable law.[3] 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).

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).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his

[2] Because the administrative law judge's findings that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record indicates that the miner was last employed in the coal mining industry in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. 30 U.S.C. §921(c)(4).

Claimant contends the administrative law judge erred in finding that the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) was not invoked. Specifically, claimant argues that the administrative law judge erred in finding that the arterial blood gas study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge considered the arterial blood gas studies dated December 13, 2005, March 13, 2006, August 9, 2006, August 25, 2006 and November 4, 2006, and found that they produced non-qualifying values. Decision and Order on Remand at 5; Director's Exhibit 11. The administrative law judge also considered the April 17, 1998 arterial blood gas study administered by Dr. Ranavaya from a prior living miner's claim, and found that it produced qualifying values. Decision and Order on Remand at 6; Living Miner's Exhibit 7. Based on his determination that Dr. Ranavaya's April 17, 1998 study was entitled to little weight because the recent studies were more probative, the administrative law judge found that the arterial blood gas study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii).

Claimant asserts that the administrative law judge erred by relying on the non-qualifying arterial blood gas studies dated December 13, 2005, March 13, 2006, August 9, 2006, August 25, 2006 and November 4, 2006 because, claimant alleges, "[e]ach of the hospitalizations during which [the miner] had an arterial blood gas study done, [he] was prescribed oxygen for his breathing problems." Claimant's Brief at 15. In considering the arterial blood gas studies from the treatment records that were conducted during the miner's hospitalization, the administrative law judge noted that "[t]he treatment records do show that the miner was being treated with breathing medications about the time he underwent testing." Decision and Order on Remand at 6. The administrative law judge additionally stated, "[n]evertheless, not a single administering physician noted that the tests were unreliable as a result of breathing medications and each physician relied on the results as part of their (sic) diagnoses." *Id*. Claimant does not point to any medical evidence in the record indicating that, at the time these arterial blood gas studies were performed, the miner's "breathing medications" positively affected the values the studies produced. Without medical evidence establishing the unreliability of arterial blood gas studies, neither an administrative law judge nor the Board has the requisite medical expertise to make such a determination. *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Jeffries v. Director, OWCP*, 6 BLR 1-1013 (1984). Thus, we reject claimant's assertion that the administrative law judge erred by relying on the non-qualifying arterial blood gas studies dated December 13, 2005, March 13, 2006, August 9, 2006, August 25, 2006 and November 4, 2006 because they were unreliable.

Claimant also asserts that the administrative law judge erred by failing to accord dispositive weight to Dr. Ranavaya's qualifying arterial blood gas study dated April 17, 1998. Contrary to claimant's assertion, the administrative law judge permissibly found that "[the qualifying arterial blood gas study dated April 17, 1998] is entitled to little weight as the more recent and more probative 2001,[4] 2005, and 2006 arterial blood gas studies all failed to produce qualifying results." Decision and Order on Remand at 6; *see Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc). Thus, we reject claimant's assertion that the administrative law judge erred by failing to accord dispositive weight to Dr. Ranavaya's qualifying arterial blood gas study dated April 17, 1998.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the arterial blood gas study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(ii).

Claimant next argues that the administrative law judge erred in finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the reports of Drs. Basheda and Hussain, as well as the treatment records from William Memorial Hospital and Williamson-ARH Hospital.[5] In a report dated October 29, 2008, Dr. Basheda opined that the miner did not have a respiratory impairment or disability. Employer's Exhibit 3. By contrast, in a report dated August 24, 2001, Dr. Hussain opined that the miner had a moderate impairment and that he did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Living Miner's Exhibit 8. The administrative law judge gave greater weight to Dr. Basheda's

[4] The administrative law judge noted that "Dr. Hussain's medical report from 2001 was part of the miner's eighth lifetime benefits claim" and that "Dr. Hussain's report included pulmonary function tests and arterial blood gas tests that did not yield results qualifying to establish a total pulmonary disability." Decision and Order on Remand at 6.

[5] After noting that the record contains the treatment records from William Memorial Hospital and Williamson-ARH Hospital dated 1997 to 2007, the administrative law judge stated that "although such records do not specifically address the issue of total disability, they support a finding of a significant pulmonary impairment because the miner was consistently documented as suffering from severe breathlessness and was diagnosed with acute exacerbations of COPD." Decision and Order on Remand at 3. The administrative law judge further stated, "[h]owever, [that] such records do not address whether those breathing problems would prevent him from returning to his previous coal mine employment and as such do not prove that the miner was totally and permanently disabled from a pulmonary condition." *Id*. The parties do not contest the administrative law judge's findings regarding the treatment records.

opinion than to Dr. Hussain's contrary opinion because Dr. Basheda's opinion was based on the more recent medical evidence. The administrative law judge also found that Dr. Hussain's opinion was not reasoned. Hence, the administrative law judge found that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

Claimant asserts that the administrative law judge erred in failing to accord dispositive weight to Dr. Hussain's opinion. Contrary to claimant's assertion, the administrative law judge permissibly discounted Dr. Hussain's opinion because "[t]he basis of Dr. Hussain's finding is unclear as Dr. Hussain does not provide an explanation for his finding." Decision and Order on Remand at 6; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Thus, we reject claimant's assertion that the administrative law judge erred in failing to accord dispositive weight to Dr. Hussain's opinion. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

Furthermore, because the administrative law judge properly found that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that claimant is not entitled to the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). We, therefore, affirm the administrative law judge's denial of benefits.[6] *Trumbo*, 17 BLR at 1-88.

[6] Claimant asserts that the administrative law judge erred in crediting Dr. Basheda's opinion. In view of our holding that the administrative law judge permissibly discounted Dr. Hussain's opinion because it is not reasoned, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc), we need not address claimant's assertion regarding Dr. Basheda's opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Additionally, in light of our disposition of the case at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we need not address claimant's assertion that employer has not rebutted the presumption thereunder. *Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge