

BRB No. 12-0588 BLA

ELLA F. HAYES )  
(Widow of HOWARD C. HAYES) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
DRUMMOND COMPANY ) DATE ISSUED: 07/23/2013  
 )  
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 Denying Modification of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

John A. Smyth III, Will A. Smith, and Katherine A. Collier (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Denying Modification (2011-BLA-05325) of Administrative Law Judge Ralph A. Romano with respect to a survivor's claim filed on June 20, 2007, pursuant to the provisions of the Black Lung Benefits Act, as

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<sup>1</sup> Claimant is the widow of the miner, Howard C. Hayes, who died on March 7, 2007. Director's Exhibit 7. The miner was not receiving federal black lung benefits at the time of his death.

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Initially, the claim was denied by Administrative Law Judge Adele Higgins Odegard in a Decision and Order issued on May 8, 2009, based on her finding that claimant did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 39. Claimant filed a request for modification on April 15, 2010, which was denied by the district director. Director's Exhibit 40. Claimant challenged the district director's decision and the case was transferred to the Office of Administrative Law Judges and assigned to Judge Romano (the administrative law judge).

The administrative law judge accepted the parties' stipulation to thirty-one years of underground coal mine employment and considered claimant's modification request pursuant to 20 C.F.R. §725.310. The administrative law judge initially found that there was no mistake in a determination of fact in the previous denial of benefits. The administrative law judge stated that he was required next to consider "whether claimant established a change in a condition of entitlement." Decision and Order at 3. The administrative law judge found that the newly submitted evidence was sufficient to establish total disability and invocation of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further determined, however, that employer rebutted the presumption by establishing that the miner's death was not due to pneumoconiosis.<sup>2</sup> Accordingly, the administrative law judge found that claimant failed to establish entitlement to benefits.

On appeal, claimant argues that the administrative law judge applied an incorrect standard when considering whether employer rebutted the amended Section 411(c)(4) presumption. In the alternative, claimant asserts that the administrative law judge erred in finding that employer established rebuttal, as the evidence was insufficient to prove that the miner's death was not due to legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.<sup>3</sup>

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<sup>2</sup> Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had fifteen or more years of underground coal mine employment or employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

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

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.<sup>4</sup> 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).

As a preliminary matter, we note that the administrative law judge's application of 20 C.F.R. §725.310 to claimant's request for modification was not entirely correct. Under the circumstances of this case, involving the denial of a survivor's claim in which the relevant issues pertain to the miner's physical condition at the time of his death, the only available basis for modification is a mistake in a determination of fact, including the ultimate fact of entitlement. *See* 20 C.F.R. §725.310; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). Thus, the question before the administrative law judge on rebuttal of the amended Section 411(c)(4) presumption was whether employer proved that the miner's death was not due to pneumoconiosis, such that claimant was precluded from establishing a mistake in a determination of fact in the denial of her claim. We will review the administrative law judge's findings on rebuttal in this context.

In addressing the issue of death causation, the administrative law judge considered the medical opinions of Drs. Datnow, Caffrey, Cohen, Russakoff, and Hasson. Dr. Datnow found that the miner's death was due to chronic obstructive pulmonary disease (COPD) caused by coal dust exposure. Director's Exhibit 8. In contrast, Dr. Caffrey opined that the miner's COPD was more likely due to smoking and that simple pneumoconiosis did not contribute to his death. Director's Exhibit 12. Dr. Cohen concluded that the miner's COPD was due to a combination of coal dust exposure and cigarette smoking and that COPD significantly hastened his death. Director's Exhibit 50. Dr. Russakoff also diagnosed COPD but opined that it was due to a combination of emphysema caused by cigarette smoke, asthma and cardiac disease, and was not due to his minimal clinical pneumoconiosis. Director's Exhibit 44. In addition, Dr. Russakoff stated that the miner's death was not due to pneumoconiosis. Employer's Exhibit 1. Dr. Hasson concluded that the miner's simple pneumoconiosis and dust exposure in coal mine employment did not contribute to his COPD or hasten his death. Employer's Exhibit 2.

After summarizing the relevant medical opinions, the administrative law judge noted: "[i]n her May 2009 Decision and Order, Judge Odegard found Dr. Datnow's

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<sup>4</sup> The record indicates that the miner's coal mine employment was in Alabama. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

report to be not well-reasoned and inconsistent, while according significant weight to that of Dr. Caffrey. As I stated above, after review of the medical records[,] I find that the evidence supports Judge Odegard's determination." Decision and Order at 8. The administrative law judge further indicated that he "accord[ed] probative weight to the reports of Drs. Cohen, Russakoff, and Hasson, as each doctor is well-qualified to render a decision in this case and each doctor's report is well-reasoned, well-documented, and based upon a thorough review of the record." *Id.* Based on these findings, the administrative law judge concluded, "[e]mployer has put forth sufficient medical evidence to rebut the . . . presumption that the [m]iner's death was due to pneumoconiosis." *Id.*

Claimant asserts that the standard applied by the administrative law judge on rebuttal was erroneous, as "[t]he burden is not met by showing that the miner's pneumoconiosis did not substantially contribute to his death[,] but rather employer must establish that the miner did not have pneumoconiosis or that his totally disabling respiratory impairment was not due to pneumoconiosis. Claimant's Brief at 3. In addition, claimant contends that because the presumption includes both clinical and legal pneumoconiosis,<sup>5</sup> employer has to prove that the miner did not suffer from either. Regarding whether employer proved that neither clinical nor legal pneumoconiosis caused the miner's death, claimant states that none of the physicians hired by employer sufficiently explained why the miner's lengthy coal mine employment history would not have contributed to the miner's COPD. Further, claimant argues that, even assuming the administrative law judge applied the correct burden of proof, employer failed to establish that the miner's death was not due to legal pneumoconiosis. Claimant asserts that the

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<sup>5</sup> Pursuant to 20 C.F.R. §718.201(a)(1):

"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). Under 20 C.F.R. §718.201 (a)(2), "legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

administrative law judge did not properly weigh the opinions of Drs. Hasson, Russakoff and Cohen.

We reject claimant's contention that the administrative law judge applied the incorrect standard on rebuttal. The party opposing entitlement in a survivor's claim can rebut the amended Section 411(c)(4) presumption by proving either that the miner did not have pneumoconiosis *or* that his *death* did not arise from his coal mine employment. *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,475 (Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305)(In a survivor's claim, the party opposing entitlement may rebut the presumption by establishing that the miner did not have pneumoconiosis or that the miner's death did not arise in whole, or in part, out of dust exposure in the miner's coal mine employment). In this case, the administrative law judge noted that employer stipulated to the existence of pneumoconiosis arising out of coal mine employment before Judge Odegard and determined that this stipulation is binding on modification. Decision and Order at 2 n.3, *citing* Director's Exhibit 34 at 10; *see* 20 C.F.R. §725.309(d)(4). In light of these findings, we hold that the administrative law judge rationally focused his evaluation on whether employer rebutted the presumed fact that the miner's death was due to pneumoconiosis. *See Copley*, 25 BLR at 1-89.

In addition, contrary to claimant's contention, Dr. Hasson reviewed the death certificate, Dr. Datnow's autopsy report and deposition, the opinions of Drs. Caffrey, Russakoff and Cohen, and treatment records from other physicians in addition to his own records. *See* Employer's Exhibit 2. Therefore, we reject claimant's argument that Dr. Hasson's opinion is not credible, as it was based on a review of the evidence of record and addressed the miner's cause of death, including any contribution from legal pneumoconiosis. *Id.* Consequently, the administrative law judge acted within his discretion in assigning it "probative weight." Decision and Order at 8; *see U.S. Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004).

However, there is merit in claimant's assertion that the administrative law judge did not adequately explain his findings that Dr. Russakoff's opinion was well-reasoned and that the opinions of Drs. Caffrey, Hasson and Russakoff outweighed Dr. Cohen's opinion. Dr. Russakoff stated that the miner's death was due to COPD/emphysema caused by cigarette smoking, arteriosclerotic cardiovascular disease, and obstructive sleep apnea. Director's Exhibit 44; Employer's Exhibit 1. In contrast, Dr. Cohen found that COPD, related to a combination of coal dust exposure and cigarette smoking, caused the miner's death. Director's Exhibit 50. When discussing Dr. Russakoff's opinion, Dr. Cohen indicated that he "wonder[ed] how 31 years of work in an underground coal mine, 15 years or so before 1970, could be considered minimal inhalation of coal mine dust." *Id.* Further, Dr. Cohen noted that:

Dr. Russakoff also makes much of [the miner's] cardiac status, however he ignored, or at least did not refer to, the autopsy report where both pathologists, the original prosecutor and the consultant, Dr. Caffrey, noted only "mild" atherosclerotic heart disease, only mild chamber dilation, and no evidence of an acute myocardial infarction.

*Id.* The administrative law judge did not resolve the conflict between the opinions of Drs. Russakoff and Cohen. In addition, claimant argues correctly that the administrative law judge did not determine whether Drs. Caffrey, Hasson and Russakoff adequately explained why the miner's thirty-one years of underground coal dust exposure could not have been a contributing cause of his COPD. Absent these findings, we cannot discern whether the administrative law judge permissibly determined that employer carried its burden of establishing that the miner's death was not due to pneumoconiosis.

Because the administrative law judge did not resolve all of the relevant issues of fact and did not identify the rationale underlying his rebuttal finding, his Decision and Order does not comply with the Administrative Procedure Act (APA).<sup>6</sup> *See Wojtowicz*, 12 BLR at 1-162. Consequently, we must vacate the administrative law judge's finding that employer rebutted the amended Section 411(c)(4) presumption by proving that the miner's death was not due to pneumoconiosis. We must also vacate, therefore, the denial of benefits and remand this case to the administrative law judge for reconsideration.

On remand, the administrative law judge must determine whether employer has established rebuttal of the presumed fact that the miner's death was due to pneumoconiosis. The administrative law judge must independently review the relevant medical evidence of record, including the opinions of Drs. Caffrey and Datnow, and address the physicians' explanations for their conclusions, the documentation underlying their medical judgments and the sophistication of, and bases for, their diagnoses. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238. The administrative law judge must also set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165. If the administrative law judge finds rebuttal established, claimant will have failed to demonstrate a basis for modification under 20 C.F.R. §725.310, thereby precluding an award of benefits. *See Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

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<sup>6</sup> The Administrative Procedure Act 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 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge