

BRB No. 14-0026 BLA

NOVELLA SUE MULLINS)
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 Claimant-Respondent)
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 v.)
)
 GOLDEN OAK MINING COMPANY, L.P.) DATE ISSUED: 10/31/2014
)
 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 Awarding Benefits of John M. Sellers, III, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5818) of Administrative Law Judge John M. Sellers, III rendered on a survivor's claim filed on June 25, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2012)(the Act).¹ The administrative law judge credited the miner with twenty-three years of underground coal mine employment, and found, pursuant to 20 C.F.R. §718.204(b)(2), that the miner was totally disabled from a respiratory or pulmonary impairment prior to his death, as stipulated by the parties, and supported by the record. Therefore, the administrative law judge found that claimant was entitled to invocation of the rebuttable 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)(2012).² The administrative law judge further found that employer failed to rebut the presumption at amended Section 411(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that, pursuant to the doctrine of collateral estoppel, the administrative law judge was precluded from addressing the issue of death causation in this survivor's claim, in light of the finding in the miner's claim that disability causation was not established. Further, employer argues that the administrative law judge erred in relying on the studies set forth in the preamble to the 2001 revised regulations to evaluate the medical opinion evidence. Employer also argues that the administrative law judge failed to apply the proper rebuttal standard in evaluating the medical opinion evidence relevant to the issues of legal pneumoconiosis and death causation. Additionally, employer avers that the administrative law judge mischaracterized the evidence, and substituted his own opinion for the opinions of the medical experts. In response to employer's appeal, claimant argues that the administrative law judge's award

¹ Claimant is the widow of the miner, who died on June 9, 2009. Director's Exhibit 8. The miner's claim for benefits, filed on May 8, 2003, was finally denied on January 15, 2009. Miner's Claim Exhibit 1; Decision and Order at 2.

² Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, amended Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his death was caused by pneumoconiosis. 30 U.S.C. §921(c)(4)(2012); as implemented by 20 C.F.R. §718.305(d)(2)(i), (ii).

In this case, the administrative law judge's finding, that the presumption at amended Section 411(c)(4) was invoked, is affirmed, as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); see Employer's Brief at 16.

of benefits should be affirmed. The Director, Office of Workers' Compensation Programs (the Director), in a limited response to employer's appeal, contends that the administrative law judge applied the correct rebuttal standard to death causation, and appropriately considered the medical opinion evidence for consistency with the studies set forth in the preamble to the 2001 revised regulations. The Director also urges the Board to reject, as meritless, employer's argument that "the finding of no disability causation in [the miner's] lifetime claim was binding in [this] survivor's claim under collateral-estoppel principles." Director's Response at 3-4. In a combined reply brief, employer reiterates its contentions regarding the administrative law judge's evaluation of the evidence.

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer's Procedural Arguments: Collateral Estoppel, and Reliance on the Preamble

Employer argues that, in light of the finding that disability causation was not established in the miner's claim, the administrative law judge erred in finding that the doctrine of collateral estoppel did not preclude consideration of the issue of death causation in the survivor's claim. We disagree. First, as the Director points out, disability causation is not an element of entitlement in a survivor's claim. Rather, employer's burden on rebuttal at amended Section 411(c)(4) in a survivor's claim is to disprove either the existence of pneumoconiosis or death causation. Thus, we agree with the Director that the doctrine of collateral estoppel does not preclude the administrative law judge from considering whether the miner's death was due to pneumoconiosis in this survivor's claim, an issue that was not previously litigated.⁴ *See* 30 U.S.C. §921(c)(4);

³ The record reflects that the miner's last coal mine employment was in Kentucky. *See* Director's Exhibit 3; Hearing Tr. at 13; Decision and Order at 3. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

⁴ Employer's contention that the "identical issue" of disability causation was "dispositive" in the miner's claim conflates findings respecting the existence and causation of disease, with causation of disability and death. *See* Employer's Reply Brief at 4; Employer's Brief at 25. In the miner's claim, Administrative Law Judge Thomas F. Phalen, Jr. determined that, although the miner was totally disabled from a pulmonary standpoint, the evidence failed to establish the existence of pneumoconiosis. Thus, Judge Phalen found: "[b]ecause there is no pneumoconiosis, I find there is no causation." Judge

Hughes v. Clinchfield Coal Co., 21 BLR 1-134, 1-137 (1999); *see also Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-394, 2-401 (4th Cir. 2006), *quoting Newport News Shipbldg. & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 1279 (4th Cir. 1978).

Next, we reject employer's argument that the administrative law judge erred in relying on the studies cited by the Department of Labor in the preamble to the 2001 revised regulations, in evaluating the credibility of the medical opinion evidence. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir., 2012); *see also Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Employer's Brief at 19-23, 30; Employer's Reply Brief at 1-3, 8-9. Rather, the administrative law judge properly consulted the preamble as a statement of the studies found credible by the Department of Labor (DOL) in promulgating the 2001 revised regulations, and permissibly evaluated the medical opinions of record in light of those studies. *Adams*, 694 F.3d at 801, 25 BLR at 2-210. Further, contrary to employer's contention, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams*, 694 F.3d at , 25 BLR at 2- ; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990). Thus, the administrative law judge properly considered the studies set forth in the preamble in weighing the conflicting medical opinions without giving employer specific notice of his intent to do so. *Id.* Further, to the extent that employer argues that the administrative law judge's reference to studies in the preamble ignores other more recent studies not contained in the preamble, employer fails to identify how such studies are more reliable than the studies found credible by the DOL. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-265 (4th Cir. 2013)(Traxler, C.J., dissenting); Employer's Reply Brief at 11-12.

Phalen also found that the miner did not establish total disability due to pneumoconiosis. *J.M. [Mullins] v. Golden Oak Mining Co.*, 2004-BLA-6238 (Jan. 30, 2008). As Judge Phalen found no pneumoconiosis, an essential element of entitlement, his corresponding finding of no total disability due to pneumoconiosis was not essential to his denial of the miner's claim. Employer's argument is, therefore, unfounded. *See* Decision and Order at 29-30; Employer's Brief at 24-25; Employer's Reply Brief at 3-5.

The issue of whether claimant would be collaterally estopped from relitigating the existence of pneumoconiosis in the absence of invocation of the Section 411(c)(4) presumption is not before the Board and, therefore, we do not address it.

Amended Section 411(c)(4) Rebuttal: Clinical Pneumoconiosis

Under the implementing regulations, to rebut the presumption at amended Section 411(c)(4) employer must show that the miner did not suffer from pneumoconiosis, either clinical or legal, or that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i), (ii); *see Big Branch Resources, Inc., v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-480, 25 BLR 2-1, 2-8-9 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method. Employer conceded the existence of clinical pneumoconiosis. Decision and Order at 24; Hearing Tr. at 10-11. Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the presumption at amended Section 411(c)(4) by disproving the existence of pneumoconiosis.⁵ 20 C.F.R. §718.305(d)(2)(i); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Death Causation

The administrative law judge found that employer failed to rebut the presumption at amended Section 411(c)(4) by showing that no part of the miner's death was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). In so finding, the administrative law judge considered the opinion of Dr. Alam,⁶ that the miner's pneumoconiosis contributed to, or hastened his death, and the opinions of Drs. Vuskovich,⁷ Westerfield,⁸ and Caffrey,⁹ that it did not. The administrative law judge

⁵ We need not address employer's arguments challenging the administrative law judge's finding that it failed to disprove the existence of legal pneumoconiosis, as employer must rebut the existence of both clinical *and* legal pneumoconiosis to satisfy the first prong of rebuttal under amended Section 411(c)(4)(2012). 20 C.F.R. §718.305(d)(2)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁶ Dr. Alam, a Board-certified pulmonologist and the miner's treating physician from 2004 until the miner's 2009 death, issued a report dated February 23, 2012, diagnosing clinical and legal pneumoconiosis, severe emphysema, diabetes, hyperlipidemia, lung cancer, and a history of bladder cancer. He identified "two major factors" in the miner's death, namely, that pneumoconiosis strained his heart and caused cor pulmonale, which hastened his death, and that the miner's tobacco abuse caused lung cancer, which also contributed to his death. Decision and Order at 11-12; Claimant's Exhibit 4.

⁷ Dr. Vuskovich, who is Board-certified in Occupational Medicine, in a report dated October 31, 2010 and a Supplemental report dated May 12, 2012, conducted a

records review, and stated that lung cancer, radiation therapy for lung cancer, pulmonary infection, pulmonary emboli, heart disease, and immune deficiency from diabetes, all reduced the miner's lifespan. He stated that the miner had simple coal workers' pneumoconiosis, and developed chronic obstructive infectious bronchitis and emphysema following a streptococcal infection in April 1996. He ascribed the miner's death to lung cancer, and stated that coal workers' pneumoconiosis does not cause, significantly contribute to, or substantially aggravate lung cancer. He opined that the "infectious bronchitis," from which the miner suffered, was not severe enough to be disabling, and that a substantial portion of the miner's mild obstructive impairment was caused by smoking. Finally, he opined that the miner's clinical pneumoconiosis did not reduce his lifespan by a definable period of time through a specific pathophysiological mechanism. By supplemental report, he agreed with Dr. Rasmussen that the miner's "pulmonary oxygen transfer deficit" shown on blood gas studies was due to a vascular abnormality of a "right to left blood shunt" of undetermined location, and was not caused by, significantly contributed to, or aggravated by coal dust exposure. Thus, he concluded that the vascular abnormality was unrelated to pneumoconiosis or emphysema, and that lung cancer, and the radiation therapy therefor, caused the miner's death. Decision and Order at 14-16; Director's Exhibit 24; Employer's Exhibit 1.

⁸ Dr. Westerfield, a Board-certified pulmonologist, issued a supplemental report dated May 11, 2012. He reviewed medical and pathological records, and opined that the miner's death was caused by pneumonia "most likely" due to lung cancer, which developed from smoking and "ha[d] no relationship" to his coal dust exposure. Employer's Exhibit 2. He also identified "incidental" simple coal workers' pneumoconiosis and "underlying emphysema from smoking," and stated that neither condition contributed to the miner's death. Decision and Order at 13-14; Director's Exhibit 25; Employer's Exhibit 2.

⁹ Dr. Caffrey, who is Board-certified in Anatomical and Clinical Pathology, reviewed autopsy slides, the death certificate and Dr. Dennis's autopsy report, and found mild to moderate anthracotic pigment and a moderate amount of centrilobular emphysema. In a consultation report dated September 2, 2010, he diagnosed: diffuse adenocarcinoma with hemorrhage and necrosis involving the right lung with metastasis to the left lung, acute bronchopneumonia, mild simple coal workers' pneumoconiosis, anthracotic pigment, and moderate bilateral centrilobular emphysema. He opined that the miner's simple coal workers' pneumoconiosis did not cause, contribute to, or hasten his death. Rather, he opined that "[t]he immediate cause of death was bronchopneumonia with abscess formation in an individual who had diffuse adenocarcinoma of his right lung which metastasized to the left lung." Decision and Order at 4-5; Director's Exhibit 14.

rejected the opinions of Drs. Vuskovich, Westerfield and Caffrey because they were not as credible as the opinion of Dr. Alam, and found, therefore, that employer failed to carry its burden of showing that *no part* of the miner's death was caused by pneumoconiosis.

Employer contends, however, that the administrative law judge erred in his evaluation of its medical opinion evidence. We disagree. Evaluation of medical evidence, including the determination of whether physicians' opinions are adequately reasoned and documented, is for the administrative law judge as the fact-finder to decide. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); see *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013). Moreover, the administrative law judge has broad discretion to assess the reliability of medical evidence, and need not accept any particular medical theory. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); see also *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Owens*, 724 F.3d at 557, 25 BLR at 2-350-51.

In this case, contrary to employer's argument, the administrative law judge, as fact-finder, permissibly found Dr. Alam's death causation opinion more credible than the contrary opinion of Dr. Vuskovich, because he determined that Dr. Alam's credentials were superior to those of Dr. Vuskovich.¹⁰ This was a factor the administrative law judge

¹⁰ Specifically, the administrative law judge stated that he "[did] not consider [Dr. Vuskovich's] [B]oard-certification in occupational medicine the equal of [Dr. Alam's] [B]oard-certification in pulmonary medicine when it comes to the issues before me." Decision and Order at 35, 37.

The administrative law judge further stated:

As noted, Dr. Alam, the [m]iner's treating pulmonologist, thought that the [m]iner's pneumoconiosis had caused sufficient strain on the [m]iner's heart to have caused him to develop cor pulmonale, or right-sided congestive heart failure, which was another factor that hastened his death.... As previously noted, Dr. Vuskovich took the position that the [m]iner's normal [electrocardiogram] ... and normal ejection fraction precluded heart failure from cor pulmonale. Dr. Alam, however, apparently felt differently as he noted that the [m]iner's cardiac work-up was normal with a normal ejection fraction but still believed that the [m]iner showed signs of cor pulmonale. As I have discussed previously, I have no way to determining whether one opinion is entitled to more than the

could reasonably rely upon, as fact-finder, in assessing the credibility of the opinions of Drs. Alam and Vuskovich. See 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.2d 486, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988); see *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 34, 36. The administrative law judge also permissibly accorded less weight to Dr. Westerfield’s opinion, even though he is a Board-certified pulmonologist, because he dismissed the miner’s emphysema and coal workers’ pneumoconiosis as “only incidentally present” and “not contribut[ing] to his death,” without explaining how this could be the case in view of the evidence that the miner’s pulmonary condition was impaired.¹¹ See *Martin*, 400 F.3d at 307, 23 BLR at 2-286; *Clark*, 12 BLR at 1-155. Similarly, while acknowledging Dr. Caffrey’s credentials as a pathologist, Decision and Order at 33, the administrative law judge permissibly accorded his opinion little weight because Dr. Caffrey failed to consider whether the miner’s emphysema could be related to coal mine employment and because Dr. Caffrey did not consider any of the miner’s medical records other than his autopsy slides. These were factors the administrative law judge could reasonably consider, within his purview as fact-finder, in assessing the credibility of Dr. Caffrey’s opinion. See *Martin*, 400 F.3d at 307, 23 BLR at 2-286; *Beeler*, 521 F.3d at 726, 24 BLR at 1-103; *Clark*, 12 BLR at 1-155.

In conclusion, the administrative law judge permissibly determined in his role as fact-finder, that the death causation opinions of Drs. Vuskovich, Westerfield and

other, except to note that Dr. Alam is a board-certified pulmonologist whereas Dr. Vuskovich is not.

Decision and Order at 37.

¹¹ In addition, the administrative law judge reasonably found Dr. Westerfield’s death causation opinion troubling because “his only familiarity with the [m]iner’s treatment records was as a result of reviewing Dr. Vuskovich’s ... own summary of [those] records.” Decision and Order at 34. Dr. Westerfield “never personally examined nor personally reviewed the [m]iner’s treatment records.” Decision and Order at 34; see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003).

In contrast, the administrative law judge reasonably found Dr. Alam’s death causation opinion credible because Dr. Alam treated the miner from 2004 until his death in 2009 and “saw [him] on thirty-three different occasions.” 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d at 513, 22 BLR at 2-647; Decision and Order at 34.

Caffrey¹² were not as credible as the death causation opinion of Dr. Alam. He found, therefore, that they were insufficient to carry employer's burden on rebuttal of showing that *no part* of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); *Copley*, 25 BLR at 1-89.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

¹² We reject employer's assertion that the administrative law judge substituted his own opinion for that of the medical experts, as the administrative law judge fully discussed the doctors' opinions and his reasons for discrediting them. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).