

BRB No. 12-0438 BLA

SANDRA A. RIFFE)
(Widow of EDGAR RIFFE))
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 Claimant-Respondent)
)
 v.)
)
 ROCKY 1, INCORPORATED) DATE ISSUED: 04/26/2013
)
 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 on Remand Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2008-BLA-06018) of Administrative Law Judge Robert B. Rae, rendered on a survivor's claim filed on December 12, 2007, pursuant to the provisions of 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.¹ The Board previously affirmed the administrative law judge's finding that claimant was entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² *Riffe v. Rocky I, Inc.*, BRB No. 10-0687 BLA, slip op. at 3 (Sept. 28, 2011) (unpub). However, the Board vacated the award of benefits because the administrative law judge's finding, that employer failed to rebut the presumption, was based on an error in weighing the conflicting autopsy evidence regarding the existence of pneumoconiosis. Specifically, the Board held that the administrative law judge "failed to properly characterize Dr. Tomashefski's opinion and explain why it was not credible." *Id.* at 6. The Board further held that the administrative law judge erred in crediting the opinion of the autopsy prosector, Dr. Dy, "solely because Dr. Dy conducted a gross examination of the miner's lungs." *Id.* The Board instructed the administrative law judge, on remand, to address the credentials of the physicians and to determine whether their opinions were reasoned and documented. In determining whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge was also instructed to explain the bases for his credibility determinations in accordance with the Administrative Procedure Act.³ *Id.* at 6-7.

In his Decision and Order on Remand Awarding Benefits, dated April 26, 2012, the administrative law judge again found that employer failed to disprove that the miner suffered from clinical pneumoconiosis,⁴ based on the autopsy findings of Dr. Dy. The

¹ We incorporate the procedural history and summaries of the medical evidence as set forth in our prior decision. *Riffe v. Rocky I, Inc.*, BRB No. 10-0687 BLA (Sept. 28, 2011) (unpub).

² Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis in cases where fifteen or more years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

³ The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 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).

⁴ The regulations state:

"Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized

administrative law judge further found that employer failed to satisfy its burden to disprove a causal relationship between the miner's death and his coal mine employment. Accordingly, the administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption and awarded benefits.

On appeal, employer argues that the administrative law judge repeated his prior errors, mischaracterized Dr. Tomashefski's opinion and did not provide a valid reason for crediting the autopsy findings of Dr. Dy. Employer also asserts that the administrative law judge did not discuss all the evidence relevant to the issue of death causation and, thus, erred in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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

In order to rebut the amended Section 411(c)(4) presumption, employer must establish either that the miner did not have pneumoconiosis, or that his death did not arise out of, or in connection with, 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). Based on our review of the administrative law judge's Decision and Order on Remand, the evidence of record,

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).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

and employer's arguments on appeal, we conclude that substantial evidence supports the administrative law judge's award of benefits.

In reconsidering the autopsy evidence, the administrative law judge noted that both Dr. Dy and Dr. Tomashefski are Board-certified pathologists. The administrative law judge found that Dr. Dy's protocol "leaves no doubt about the diagnosis of coal workers' pneumoconiosis in the left and right lungs." Decision and Order on Remand at 6. Dr. Dy "plainly saw the presence of micromacular anthracotic pneumoconiosis" and that "[t]his gross finding was followed up by a confirmation through his microscopic findings showing 'anthracotic dusts' and 'fibrosis with dispersed dusts.'" *Id.* at 6-7; see Director's Exhibit 7.

In contrast, the administrative law judge noted that Dr. Tomashefski identified "*a mild degree of black pigment* distributed around blood vessels and bronchi" along with "one miniscule (sub-millimeter sized) peribronchiolar black pigment deposit that is possibly consistent with a coal macule." Decision and Order on Remand at 7, *quoting* Employer's Exhibit 8. The administrative law judge also noted, however, that Dr. Tomashefski stated that, "[o]ther than this one equivocal lesion, I found no definitive coal macules or nodular lesions[.]" Decision and Order on Remand at 9, *quoting* Employer's Exhibit 8. Dr. Tomashefski specifically stated that the miner "did not have [coal workers'] pneumoconiosis," and that the simple pigment "is not sufficient for a diagnosis of simple [coal workers'] pneumoconiosis." *Id.*

The administrative law judge observed that while Dr. Tomashefski opined that the miner did not have sufficient microscopic findings to support a diagnosis of pneumoconiosis, "[t]here was clearly some amount of black pigment, silica and interstitial fibrosis found by Dr. Tomashefski during his slide review."⁶ Decision and Order on Remand at 7. The administrative law judge stated:

As in any case involving experts who review the same x-ray slide or other test or study that requires interpretation, we have in this case two almost "polarized" opinions. One physician was able to do a more complete "whole body" review and examination while the other was limited to reviewing nine specimen slides. In this case, I believe it is within my judicial discretion to find one opinion more credible than the other based on my thorough review and re-review of both reports. I must still find that Dr. Dy's report and opinion is more credible than that of Dr.

⁶ The administrative law judge set forth all of Dr. Tomashefski's microscopic findings, highlighting certain words, such as black pigment, pigmented, interstitial fibrosis, silica and silicates. Decision and Order on Remand at 7-8.

Tomashefski. I found his thorough gross and microscopic descriptions to be well reasoned and well documented. He was not equivocal but was specific, articulate and precise in his findings. I [do] not find Dr. Tomashefski to be persuasive enough to overcome the findings of Dr. Dy. He admitted to the presence of the entities associated with a finding of the presence of pneumoconiosis but then qualified it by saying there was not enough for him to make such a diagnosis. It is the burden of the employer in this case to overcome the invoked presumption. The [e]mployer did not meet its burden.

Id. at 8-9.

Employer asserts that the administrative law judge repeated his prior error and credited Dr. Dy's opinion solely because he performed a gross examination.⁷ We disagree. The administrative law judge did not mechanically credit Dr. Dy's opinion based on his status as the autopsy prosector. Rather, the administrative law judge carefully reviewed the rationales underlying the findings of both pathologists in an attempt to resolve the conflict in the evidence, as he was instructed to do. Decision and Order on Remand at 8-9. In accordance with the Board's directive, the administrative law judge permissibly found that Dr. Dy's opinion was reasoned and documented, and that his gross and microscopic descriptions of "circular anthracosis, dense interstitial scarring, black dust deposits, and confluent nodular fibrosis" satisfied the definition of clinical pneumoconiosis under the regulatory criteria. *Id.* at 9, 16; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc). The administrative law judge also acted within his discretion in determining that Dr. Tomashefski's microscopic findings did not persuasively refute the gross and microscopic findings of Dr. Dy, and in finding that Dr. Tomashefski's opinion was insufficient to satisfy employer's burden to "overcome the invoked presumption" that the miner had pneumoconiosis. Decision and Order on Remand at 9; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

⁷ The administrative law judge noted that he was aware of the applicable law pertaining to the weight that may be accorded an autopsy prosector's opinion when he issued his prior decision, and stated: "I obviously did not articulate my rationale as well as I should have and can only hope that this decision on remand suffices. There are indeed many reasons why I gave Dr. Dy's report more credence than Dr. Tomashefski's report." Decision and Order on Remand at 4. Employer's primary argument in this appeal is that while the administrative law judge may have found Dr. Dy's opinion more credible for a variety of reasons, "[they] all seem to revolve around the fact that Dr. Dy had access to the entire body while Dr. Tomashefski did not." Employer's Brief at 13.

Furthermore, contrary to employer's argument, the administrative law judge rationally determined that the opinions of Drs. Castle and Morgan, that the miner did not suffer from pneumoconiosis, were "severely compromised by the fact that they were issued without the benefit of autopsy results, many years prior to the miner's death." Decision and Order on Remand at 16; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151. Thus, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to rebut the presumption at amended Section 411(c)(4), by establishing that the miner did not have pneumoconiosis.

With respect to the issue of death causation, we reject employer's argument that the administrative law judge did not consider all of the relevant evidence.⁸ The administrative law judge properly assigned only "some weight" to the death certificate, which did not list pneumoconiosis as a contributing factor in the miner's death, "as there is no indication that the autopsy findings were available prior to the completion of the cause of death." Decision and Order on Remand at 15; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151. The administrative law judge also permissibly assigned less weight to Dr. Tomashefski's opinion, that the miner's death was unrelated to pneumoconiosis, as the physician was not of the opinion that the miner had the disease, contrary to the administrative law judge's finding. Decision and Order on Remand at 17, *see Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

We also specifically reject employer's contention that the case should be remanded for consideration of the report by the West Virginia Occupational Pneumoconiosis Board. Although the Board instructed the administrative law judge to address the weight he accorded that report on remand, his failure to do so constitutes harmless error, as the record fails to indicate the specific legal and medical criteria the

⁸ We reject employer's assertion that the administrative law judge failed to weigh the credentials of the physicians as directed by the Board. The administrative law judge identified the Board-certification of each doctor in summarizing their opinions. He was not required to give more weight to Dr. Tomashefski's opinion over that of Dr. Dy, as the administrative law judge found that they were both Board-certified in Pathology. The administrative law judge had discretion to consider other credentials relevant in resolving the conflict in the evidence, but he was not required to do so. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc).

state board relied upon in reaching its finding that the miner's death was unrelated to pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Schegan v. Waste Management and Processors, Inc.*, 18 BLR 1-41, 1-46 (1994) (findings of a state board are not binding). The report by the West Virginia Occupational Pneumoconiosis Board identifies as evidence only the death certificate and Dr. Dy's autopsy report, which have been independently weighed by the administrative law judge in this case.

Thus, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to rebut the presumption at amended Section 411(c)(4) by establishing that the miner's death did not arise out of, or in connection with, his coal mine employment.⁹ We, therefore, affirm the award of benefits.

As an additional matter, claimant's counsel has filed a fee petition for services he performed before the Board in *Riffe*, BRB No. 10-0687 BLA. Claimant's counsel requests a fee of \$750.00 for the period of September 14, 2010 through January 10, 2011, representing three hours of legal services that he performed at an hourly rate of \$250.00. No objections to the fee petition have been received.

An award of attorney fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a), will be ordered if the requested fee reflects services necessary to the proper conduct of the case and the time requested for such work is reasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Claimant's counsel is entitled to an attorney fee payable by employer for successfully prosecuting the claim. *See* 33 U.S.C. §928; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *see generally Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (en banc); *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

After reviewing counsel's fee petition, we approve the hourly rate and services performed as they are reasonable in this case. Accordingly, we hold that counsel is entitled to receive a fee, payable directly to counsel by employer, of \$750.00 for legal

⁹ Because we affirm the administrative law judge's finding that employer's evidence fails to establish affirmatively that the miner's death was unrelated to pneumoconiosis, it is not necessary that we address arguments regarding the weight accorded claimant's evidence on the issue of death causation. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

services performed before the Board in BRB No. 12-0438 BLA. *See* 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed, and claimant's counsel is awarded a fee of \$750.00, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge