

BRB No. 12-0621 BLA

DANA JO VAUGHN)
(Widow of VIRGIL L. VAUGHN))
)
Claimant-Petitioner)
)
v.)
)
ISLAND CREEK COAL COMPANY) DATE ISSUED: 08/23/2013
)
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 on Remand - Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand – Denial of Benefits (2008-BLA-5666) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a survivor’s claim, filed on July 9, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).

¹ Claimant is the surviving spouse of the miner, who died on February 15, 1999. Decision and Order on Remand at 4; Director’s Exhibit 11.

On May 20, 2009, Administrative Law Judge Jeffrey Tureck issued a denial of this survivor's claim, and claimant appealed, challenging Judge Tureck's evaluation of the medical evidence. Thereafter, on March 23, 2010, while claimant's appeal was pending before the Board, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if claimant establishes that the miner had at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and that the miner had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption, by establishing either that the miner did not have pneumoconiosis, or that the miner's death was unrelated to his coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Consequently, after considering the parties' statements that the case was affected by amended Section 411(c)(4), the Board vacated Judge Tureck's Decision and Order, and remanded the case for further consideration.² The Board instructed Judge Tureck, on remand, to consider whether claimant was entitled to invocation of the rebuttable presumption at amended Section 411(c)(4). The Board further instructed Judge Tureck that if he determined that the presumption was applicable to the survivor's claim, he was to allow the parties the opportunity to submit additional evidence addressing the change in law, in compliance with the evidentiary limitations at 20 C.F.R. §725.414.³ *Vaughn v. Island Creek Coal Co.*, BRB No. 10-0355 BLA (Feb. 18, 2011)(unpub.).

On remand, this case was reassigned to Judge Stansell-Gamm (the administrative law judge), who reopened the record for the submission of evidence in response to the change in law.⁴ The administrative law judge applied amended Section 411(c)(4), and

² Because the Board remanded this case for consideration in light of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), it did not address the merits of the appeal.

³ The Board further determined that, because the miner's lifetime claim was finally denied, claimant could not benefit from another amendment to the Act, which reinstated the automatic entitlement provision of 30 U.S.C. §932(l) for eligible survivors. *Vaughn v. Island Creek Coal Co.*, BRB No. 10-0355 BLA, slip op. at 3. n.4 (Feb. 18, 2011)(unpub.).

⁴ Subsequently, the administrative law judge admitted supplemental reports from Drs. Castle and Repsher into the record as Employer's Exhibits 10 and 11. The administrative law judge excluded claimant's submission of a March 1, 2012 report from Dr. Houser from the record. Decision and Order on Remand at 3.

found that claimant established that the miner worked for twenty-five years in underground coal mine employment, and was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).⁵ Thus, the administrative law judge determined that claimant was entitled to invocation of the presumption at amended Section 411(c)(4), but further found that employer established rebuttal of the presumption with proof that the miner did not have clinical or legal pneumoconiosis. In addition, the administrative law judge found that entitlement pursuant to 20 C.F.R. Part 718 was precluded because the preponderance of the evidence established that the miner did not suffer from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that his death was not due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's exclusion of Dr. Houser's medical report from the record, and contends that the administrative law judge erred in finding rebuttal of the amended Section 411(c)(4) presumption established.⁶ Employer has responded in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.⁷

⁵ The administrative law judge found that the miner retained average exercise capability in December 1998, and therefore was not totally disabled due to a pulmonary or respiratory impairment prior to 1999. However, the administrative law judge determined that treatment and hospitalization notes from the miner's cardiac surgery established that between February 3, 1999, and his death on February 15, 1999, his lungs "were so impaired that he needed mechanical breathing assistance and supplemental oxygen," demonstrating that the miner had a totally disabling pulmonary impairment. Decision and Order on Remand at 18. The administrative law judge credited the opinions of Drs. Castle and Repsher, identifying "surgical traumatic injury to [the miner's] lungs as the precipitating event that [] triggered the pulmonary complications, including subcutaneous emphysema and subsequent bilateral pneumothoraxes, which led to organ failures and death." Decision and Order on Remand at 28.

⁶ Claimant additionally challenges the administrative law judge's findings regarding the exertional requirements of the miner's coal mine employment, and his finding that the pulmonary function study evidence was insufficient to establish total respiratory disability. Claimant's Brief at 3-4; Claimant's Reply Brief at 2. However, in view of the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b), and was entitled to invocation of the amended Section 411(c)(4) presumption, we need not address claimant's arguments regarding these issues.

⁷ We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of the miner's coal mine employment, and his finding that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b), and invocation of the presumption at amended Section 411(c)(4). *See* Decision and

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.⁸ 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).

Claimant first challenges the administrative law judge's exclusion from the record of Dr. Houser's medical report of March 1, 2012. Claimant asserts that the report should have been admitted "in the interest of justice" as a supplemental report to the report of Dr. Bentsen,⁹ a partner in Dr. Houser's medical office, and/or as a supplemental report to Dr. Houser's 1990 pulmonary evaluation obtained by another counsel for the miner's state claim. Claimant's Brief at 2, 11, 13; Claimant's Reply Brief at 1-2. We disagree. In sustaining employer's objection to the admission of this evidence, the administrative law judge explained that, because claimant designated the reports of Drs. Rasmussen and Bentsen as her two affirmative medical reports, Dr. Houser's report exceeded the evidentiary limitations allowed at 20 C.F.R. §725.414. Decision and Order on Remand at 3. As claimant made no showing of good cause for the admission of Dr. Houser's report pursuant to 20 C.F.R. §725.456(b)(1), we affirm the administrative law judge's evidentiary ruling.

Turning to the merits, claimant contends that the administrative law judge erred in finding that employer established rebuttal of the amended Section 411(c)(4) presumption with proof that the miner did not have either clinical or legal pneumoconiosis. Claimant maintains that numerous x-rays showing pneumoconiosis, chronic obstructive lung disease (COPD) or fibrosis, combined with the miner's employment history and the best reasoned medical opinions of record, establish both clinical and legal pneumoconiosis. Claimant additionally argues that various physicians and the administrative law judge failed to consider the dual effects of smoking and coal dust exposure on the lungs, as

Order on Remand at 4, 6-7, 18; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁸ The record indicates that the miner's coal mine employment was in Kentucky. See Director's Exhibit 1 at 118. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

⁹ Claimant incorrectly refers to Dr. Bentsen as "Dr. Benson." Claimant's Brief at 5, 6, 10; see Claimant's Exhibit 2 at 3; Director's Exhibits 14, 19, 21.

discussed in the preamble to the revised regulations.¹⁰ Thus, claimant maintains that the administrative law judge should have credited the opinions of Drs. Bentsen and Rasmussen, that the miner had legal pneumoconiosis, and should have rejected the contrary opinions of Drs. Anderson, Repsher and Castle as “biased,” “tainted” and unreasoned for failure to address the impact of the miner’s coal mine dust exposure, and the additive effects of smoking and coal dust exposure. Claimant’s arguments lack merit.

On the issue of clinical pneumoconiosis, the administrative law judge reviewed the x-ray evidence of record, dating from June 2, 1982 through February 15, 1999, and reasonably found that although fifteen x-rays taken between February 3, 1999 and February 15, 1999 did not diagnose pneumoconiosis, they had diminished probative value, as they were taken after the miner’s open heart surgery with post-operative pulmonary complications. Decision and Order on Remand at 19-21. The administrative law judge further determined that the x-rays taken on June 2, 1982, January 20, 1989, December 24, 1996 and December 31, 1996 were inconclusive for the presence of pneumoconiosis because the readers found interstitial changes or fibrosis, but did not associate these changes with pneumoconiosis or coal dust exposure. *Id.* Of the remaining x-rays, the administrative law judge determined that the January 31, 1990 and October 5, 1990 x-rays were interpreted as positive for pneumoconiosis by physicians with no particular radiological qualifications in the record, while the March 12, 1991 x-ray was interpreted as negative by a Board-certified radiologist and B reader, and the January 27, 1989, May 10, 1989, July 12, 1990, September 12, 1991, August 16, 1995, January 27, 1999, and February 2, 1999 x-rays were interpreted as negative for pneumoconiosis by other physicians with no particular radiological qualifications in the record. Thus, the administrative law judge reasonably concluded that, “setting aside the inconclusive readings and the post-surgery films, the preponderance of the probative chest x-ray evidence is negative for the presence of clinical pneumoconiosis.” *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); Decision and Order on Remand at 19-21. The administrative law judge also properly found that the CT scan evidence was negative for pneumoconiosis, since neither interpretation of the two CT scans of record included a diagnosis of pneumoconiosis.

¹⁰ Contrary to claimant’s suggestion, the administrative law judge is not empowered to rely on the miner’s history of coal dust exposure and the preamble to the revised regulations to credit any physician’s finding of chronic obstructive pulmonary disease (COPD), or any type of emphysema, as a reasoned diagnosis of legal pneumoconiosis. *See* Claimant’s Brief at 4-13; Claimant’s Reply Brief at 2-4.

Considering the medical opinions of record, the administrative law judge assigned diminished probative value to the clinical pneumoconiosis diagnoses of Drs. Pandit,¹¹ Shultz,¹² Anderson¹³ and Bentson,¹⁴ on the grounds that Dr. Pandit failed to render an independent assessment as to whether the objective evidence before him supported a diagnosis of pneumoconiosis; Dr. Shultz's finding of "probable black lung" was equivocal and unexplained; and Drs. Anderson and Bentson relied on positive x-ray interpretations, contrary to the administrative law judge's determination that the preponderance of the x-ray evidence was negative for pneumoconiosis. Decision and Order on Remand at 22-24. In contrast, the administrative law judge credited the opinions of Drs. Rasmussen,¹⁵ Repsher¹⁶ and Castle,¹⁷ that the miner did not have clinical

¹¹ Dr. Pandit conducted a pre-cardiac surgery pulmonary evaluation of the miner on February 1, 1999, and noted a medical history of black lung. He found clear lungs on examination, and reviewed a "late January 1999" x-ray and CT scan showing healed inflammatory process and bilateral COPD. Dr. Pandit stated that the miner's "pulmonary status is clinically stable," clearing him for scheduled coronary artery bypass surgery. Claimant's Exhibit 3 at 20; Decision and Order on Remand at 10.

¹² Dr. Shultz examined the miner on February 11, 1999, and diagnosed respiratory failure with bilateral pneumothoraces, COPD, and "probable" black lung disease. Director's Exhibits 14 at 10-11, 20 at 11-12; Decision and Order on Remand at 14-15.

¹³ Dr. Anderson evaluated the miner on October 5, 1990, and diagnosed clinical pneumoconiosis based on a positive x-ray and the miner's coal mine employment. Dr. Anderson also diagnosed mild pulmonary emphysema due to smoking, which produced a mild obstructive defect. Director's Exhibit 23 at 7; Decision and Order on Remand at 10.

¹⁴ Dr. Bentsen treated the miner from February 1995 to February 1999, through his open heart surgery and the development of "sudden subcutaneous emphysema" caused by lung rupture and air leakage, as well as a condition of post-operative unhealed tear in his lung bulla, and post-operative respiratory failure. On a questionnaire, Dr. Bentson noted legal pneumoconiosis "by history," but did not check the box regarding clinical pneumoconiosis; he later testified that the miner had clinical and legal pneumoconiosis. Director's Exhibits 14 at 18-19, 19, 21; Claimant's Exhibit 2 at 4-8, 15, 21-28, 47; Decision and Order on Remand at 13-14, 18, 24.

¹⁵ Dr. Rasmussen conducted a medical records review, and concluded that "even though the 1991 pulmonary function test showed no significant abnormality," the miner suffered from chronic obstructive lung disease caused by smoking and coal dust exposure, with both factors "contributing significantly." Claimant's Exhibit 1 at 1, 5; Decision and Order on Remand at 15, 24.

pneumoconiosis, finding them well-reasoned and supported by the underlying documentation. *Id.* at 24; Claimant’s Exhibit 1; Employer’s Exhibits 1, 2, 3, 4, 10, 11.

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. *See 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). Thus, as claimant’s arguments largely comprise disagreement with the administrative law judge’s findings, without identifying, with specificity, any substantive error of law or fact, her arguments essentially constitute a request to reweigh the evidence and overturn the administrative law judge’s credibility determinations, which is beyond the Board’s scope of review. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff’g* 7 BLR 1-610 (1984); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *see also* Claimant’s Brief at 5, 9, 10. Consequently, the administrative law judge’s determination that employer has rebutted the presumption of clinical pneumoconiosis is affirmed. 20 C.F.R. §718.202(a); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2002); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002).

¹⁶ Dr. Repsher found no evidence of clinical or legal pneumoconiosis and no pulmonary impairment, but diagnosed clinically insignificant COPD and bullous emphysema unrelated to coal dust exposure but “overwhelmingly most likely related” to the miner’s long and heavy smoking habit of up to eighty-eight pack years. Dr. Repsher indicated that the miner had normal lung function prior to his cardiac surgery; his bullous emphysema “did not impair his lung function;” and he “never suffered from any clinically significant lung disease from any cause.” Employer’s Exhibits 3 at 4-5, 4 at 13, 16-19, 11 at 1-2; Decision and Order on Remand at 17-18, 24.

¹⁷ Dr. Castle conducted a medical evidence review, and assessed a “very mild, markedly reversible airway obstruction” that was not disabling, and was due to smoking with an asthmatic component. He opined that the miner was not disabled by lung disease, and would have been able to perform his usual coal mine work prior to his February 1999 heart surgery. Following the February 1999 coronary artery bypass grafting for severe coronary artery disease, complications necessitated a second surgery, resulting in bilateral pneumothoraces requiring chest tubes, followed by multi-organ failure, including renal failure, whereupon post-operative bleeding started a chain of events resulting in a complete heart block and cardiac death twelve days later, which was not caused by, or hastened by, pneumoconiosis. Dr. Castle concluded that the miner did not have clinical or legal pneumoconiosis. Employer’s Exhibits 1, 2 at 13-14, 30, 10 at 2, 3-4; Decision and Order on Remand at 15-16.

On the issue of legal pneumoconiosis, the administrative law judge weighed the conflicting medical opinions and concluded that only the opinion of Dr. Castle was entitled to full probative weight. Decision and Order on Remand at 22-24. As an initial matter, claimant's principal contention, that the administrative law judge failed to evaluate the medical opinion evidence in light of the dual effects of smoking and coal dust exposure on the lungs, is belied by his analysis of the opinions of Drs. Anderson and Repsher. See Claimant's Brief at 4, 7, 9, 11, 13; Claimant's Reply Brief at 3. The administrative law judge discounted Dr. Anderson's opinion, that the miner's mild pulmonary obstruction and emphysema were solely due to his extensive smoking, because the physician failed to explain how he determined that the miner's long term exposure to coal mine dust played no role in the development of his pulmonary obstruction. Decision and Order on Remand at 23. The administrative law judge also found that Dr. Repsher attributed the miner's clinically insignificant COPD and bullous emphysema to smoking "without explaining the basis for his apparent assessment that [the miner's] extensive exposure to coal mine dust was not also a contributing factor." *Id.* at 24. Hence, the administrative law judge rationally determined that the opinions of Drs. Anderson and Repsher failed to account for the miner's coal dust exposure, and warranted "diminished probative value" on that basis. *Id.* at 23-24; see *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009).

Similarly, we reject claimant's assertion that the administrative law judge should have credited Dr. Bentsen's opinion, that the miner had legal pneumoconiosis, because it was based on the miner's "exposure history to the coal dust and the presence of severe obstructive disease and history of black lung," Claimant's Brief at 5, and because Dr. Bentsen, the miner's treating physician, "not only made physical examination but did objective testing," Claimant's Brief at 10. The administrative law judge acknowledged Dr. Bentsen's status as the miner's treating physician for four years, but permissibly discounted his opinion as insufficiently reasoned because Dr. Bentsen relied on an assumption, based on exposure histories, that the miner's two adverse exposures to cigarette smoke and coal mine dust both contributed to his COPD "without any discussion of whether the specific underlying objective medical evidence supports a diagnosis of legal pneumoconiosis." Decision and Order on Remand at 23; see 20 C.F.R. §718.204(d); *Williams*, 338 F.3d at 501, 22 BLR at 2-647; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Clark*, 12 BLR at 1-155.

Next, the administrative law judge identified two examples of inadequate reasoning that undercut the probative value of Dr. Rasmussen's opinion. First, while acknowledging that the objective evidence failed to show a significant pulmonary abnormality,¹⁸ Dr. Rasmussen relied on the progressive nature of pneumoconiosis to

¹⁸ Dr. Rasmussen stated that "there were no apparent significant respiratory problems prior to [the miner's] last hospitalization," but that "[i]t is known, however, that

opine that the miner “eventually suffered a chronic obstructive lung disease,” without explaining how he determined that the miner’s “exposure to coal mine dust actually did later cause a lung disease.” Decision and Order on Remand at 23; Claimant’s Exhibit 1 at 4; *see* Claimant’s Brief at 7, 10, 11, 12-13. Likewise, Dr. Rasmussen relied on the miner’s two health hazard exposures to conclude that both significantly contributed to his COPD, “in the absence of a discussion regarding the underlying objective medical evidence.” Decision and Order on Remand at 23; Claimant’s Exhibit 1 at 3-4. Contrary to claimant’s assertions, the administrative law judge rationally determined that Dr. Rasmussen’s failure to adequately explain his conclusions rendered his opinion unreasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Finally, substantial evidence supports the administrative law judge’s determination that Dr. Castle “conducted an extensive evidence review,” and provided a well-reasoned and documented medical opinion that the miner did not have legal pneumoconiosis. Decision and Order on Remand at 24; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Dr. Castle explained that the miner’s blood gas studies produced normal results; his pulmonary function studies demonstrated a very mild, markedly reversible airways obstruction attributable to smoking with an asthmatic component but not pneumoconiosis, which causes a fixed, irreversible ventilatory defect; and his x-rays showed mild bullous emphysema solely attributable to smoking. Dr. Castle concluded that the miner’s post-operative disabling respiratory impairment during the last twelve days of his life resulted from ultimately terminal post-operative complications from repeat cardiac surgeries, and that coal dust exposure was not a causative factor in any respiratory disease. Employer’s Exhibits 1, 10 at 3-4. As the administrative law judge acted within his discretion as fact-finder in according greatest weight to Dr. Castle’s opinion, *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and substantial evidence supports his credibility determinations, we affirm his finding that employer rebutted the presumption at amended Section 411(c)(4) with affirmative proof that the miner did not suffer from either clinical or legal pneumoconiosis. Decision and Order on Remand at 24-25; 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d 473, 25 BLR 2-1; *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553. Consequently, we affirm the administrative law judge’s denial of benefits.¹⁹

inflammatory changes in lung destruction caused by coal mine dust continues [sic] indefinitely...” Claimant’s Exhibit 1 at 2, 4-5.

¹⁹ Absent the application of amended Section 411(c)(4), claimant’s entitlement to benefits is precluded, as she cannot establish that the miner had either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); Decision and Order on Remand at 24-25.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge