

BRB No. 11-0394 BLA

JEANETTE BLANKENSHIP)
(o/b/o BILLY BLANKENSHIP))
)
 Claimant-Petitioner)
)
 v.)
)
 KEDCO, INCORPORATED)
)
 and)
) DATE ISSUED: 02/28/2012
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits and Decision on Motion for Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Susan J. Van Zant, Williamson, West Virginia, for claimant.

Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits and Decision on Motion for Reconsideration (2009-BLA-5659) of Administrative Law Judge Daniel L. Leland rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a miner's claim filed on July 17, 2008.

In a Decision and Order dated November 12, 2010, the administrative law judge credited the miner with twenty-six years and nine months of underground coal mine employment,² and further found that the miner had at least a twenty pack-year smoking history. The administrative law judge correctly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner'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 a miner establishes 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 he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. The administrative law judge determined, however, that employer rebutted the presumption by proving that the miner did not have either clinical or legal pneumoconiosis, and that his pulmonary impairment did not arise out of, or in connection with, coal mine employment. Accordingly, the administrative law judge denied benefits.

¹ Claimant is the miner's widow, and is pursuing his claim on his behalf. The miner died on February 8, 2009. Director's Exhibits 8, 22.

² The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

The Director, Office of Workers Compensation Programs (the Director), moved for reconsideration on December 15, 2010, asserting that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Fino in finding that employer established the absence of clinical and legal pneumoconiosis. The Director argued that Dr. Zaldivar's opinion was based on premises contrary to the findings of the Department of Labor, as set forth in the preamble to the revised regulations, regarding emphysema and coal mine dust exposure. The Director also argued that Dr. Fino had conceded the possible existence of clinical pneumoconiosis, and that his opinion was inadequately reasoned.

On January 20, 2011, the administrative law judge issued a Decision on Motion for Reconsideration in which he agreed with the Director that Dr. Zaldivar's opinion was contrary to the definition of legal pneumoconiosis contained in the revised regulations, and was thus entitled to no weight. Regarding the opinion of Dr. Fino, the administrative law judge acknowledged Dr. Fino's concession that nodules seen on the miner's x-rays and computerized tomography scans "could be consistent with coal workers' pneumoconiosis." The administrative law judge concluded, however, that as Dr. Fino lacks the specialized radiological qualifications of Drs. Wiot and Spitz, Dr. Fino's opinion as to the possible existence of clinical pneumoconiosis did not alter the administrative law judge's earlier conclusion that employer established, through the weight of x-ray, CT scan, biopsy, and medical opinion evidence, that the miner did not have clinical pneumoconiosis. Decision and Order at 7; Decision on Reconsideration at 4. The administrative law judge continued to credit, however, Dr. Fino's opinion that the miner did not have legal pneumoconiosis, finding it to be well-reasoned and documented. Decision on Reconsideration at 7. Therefore, the administrative law judge declined to disturb his earlier determination to credit the opinion of Dr. Fino over the contrary opinion of Dr. Rasmussen, as based on more extensive documentation, including the miner's treatment and hospital records, which Dr. Rasmussen did not review. Decision on Reconsideration at 4; Decision and Order at 7. Accordingly, the administrative law judge again found that employer rebutted the presumption by establishing that the miner did not have clinical or legal pneumoconiosis and that his pulmonary impairment did not arise out of, or in connection with, coal mine employment.

On appeal, claimant contends that the administrative law judge should have awarded benefits because "Dr. Rasmussen opined . . . that [the miner] suffered from legal and clinical pneumoconiosis" which "contributed to his disabling lung condition." Claimant's Brief at 3. Employer/carrier responds in support of the administrative law judge's denial of benefits. The Director has filed a letter indicating that he will not submit a substantive response unless 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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

The Board's circumscribed scope of review requires that the party challenging the Decision and Order below address that Decision and Order with specificity, identifying any errors made by the administrative law judge and citing evidence and legal authority that support these allegations. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Uncontested findings of the administrative law judge will generally not be addressed by the Board. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Here, other than asserting that Dr. Rasmussen diagnosed both clinical and legal pneumoconiosis, claimant does not challenge the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption because the weight of the medical evidence establishes that the miner did not suffer from clinical or legal pneumoconiosis and that his pulmonary impairment did not arise out of, or in connection with, coal mine employment. Consequently, we affirm the administrative law judge's decision denying benefits on this claim under Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4); *see Sarf*, 10 BLR at 1-120-21; *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge