

BRB Nos. 12-0239 BLA
and 13-0064 BLA

BEATRICE DOTSON)
(Widow of and on behalf of CHARLES)
DOTSON))
)
Claimant-Respondent)
)
v.)
)
McCOY ELKHORN COAL) DATE ISSUED: 01/30/2013
CORPORATION)
)
and)
)
JAMES RIVER COAL COMPANY)
)
Employer/Carrier-)
Petitioners)
)
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 in Miner's and Survivor's Claims of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2010-BLA-5749 and 2011-BLA-5749) of Administrative Law Judge

Linda S. Chapman, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The relevant procedural history of this case is as follows: The miner filed a subsequent claim on September 23, 2009.¹ Director's Exhibit (DX) 3. The district director issued a Proposed Decision and Order awarding benefits on April 27, 2010. DX 25. Pursuant to employer's request, the miner's claim was forwarded to the Office of Administrative Law Judges (OALJ) for a hearing. DXs 25, 26. On July 6, 2010, the miner died and claimant, the miner's widow, filed a survivor's claim on August 18, 2010. Survivor's Claim Director's Exhibit (SDX) 1. The district director issued a Proposed Decision and Order awarding benefits in the survivor's claim on December 16, 2010. SDX 11. Employer requested a hearing, and the survivor's claim was forwarded to the OALJ for consolidation with the miner's claim. SDX 17. A formal hearing was held on both claims on June 23, 2011. Thereafter, the administrative law judge issued her Decision and Order on January 9, 2012, which is the subject of this appeal.

Based on the filing date of the miner's subsequent claim, the administrative law judge considered the miner's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² The administrative law judge credited the miner with twenty-nine years of underground coal mine employment, and found that the newly submitted evidence was sufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Therefore, the administrative law judge found that claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), and that she satisfied her burden to demonstrate a change in an applicable condition of entitlement

¹ The miner filed an initial claim for benefits on July 30, 1998, which was denied by the district director on November 8, 2002. Director's Exhibit 1. On May 3, 2004, the miner filed a second claim, and it was denied by Administrative Law Judge Richard T. Stansell-Gamm on September 19, 2007, based upon the miner's failure to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. No further action was taken by the miner until he filed his September 23, 2009 subsequent claim.

² On March 23, 2010, amendments to the Black Lung Benefits Act, contained in Section 1556 of the Patient Plan and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), were enacted, which affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to the miner's subsequent claim, amended Section 411(c)(4) provides for a rebuttable presumption of total disability due to pneumoconiosis, if 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 he also suffered from a totally disabling respiratory impairment.

under 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut the amended Section 411(c)(4) presumption. Accordingly, benefits were awarded in the miner's claim. Additionally, based on the filing date of the survivor's claim, and because the miner was found entitled to benefits on his lifetime claim, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).³

On appeal, employer argues that the administrative law judge erred in discounting the opinions of Drs. Vuskovich and Broudy, and by not finding that employer rebutted the amended Section 411(c)(4) presumption by a preponderance of the evidence. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.⁴

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

In order to establish rebuttal of the presumption at amended Section 411(c)(4), employer must affirmatively establish either that the miner did not have clinical or legal pneumoconiosis or that his respiratory disability did not arise out of, or in connection with, coal mine employment. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal*

³ Section 1556 of the PPACA also revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis.

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-nine years of underground coal mine employment, a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that she invoked the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's most recent coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 1.

Co., 644 F.2d 478, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011). The administrative law judge determined that a preponderance of the positive readings of the most recent x-ray of record, along with the medical opinions of Drs. Mettu and Vuskovich, established that the miner suffered from clinical pneumoconiosis. We affirm as unchallenged by employer, the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 15.

In addressing the etiology of the miner's respiratory disability, the administrative law judge required employer to "affirmatively *rule out* a causal relationship between [the miner's] disabling respiratory impairment and his coal mine employment." Decision and Order at 15 (citations omitted). Relevant to this analysis, the administrative law judge considered the opinions of Drs. Mettu, Broudy, and Vuskovich. Dr. Mettu opined that the miner was totally disabled as a result of coal dust exposure, while Drs. Broudy⁶ and Vuskovich⁷ opined that the miner's disabling respiratory impairment was unrelated to his coal mine employment. DXs 14, 15; Employer's Exhibit 1.

⁶ Dr. Broudy reviewed certain medical records and in a report dated February 10, 2010, opined that the miner suffered from a "very severe disabling respiratory impairment apparently due to severe chronic obstructive pulmonary disease, which in the United States is most likely related to cigarette smoking or less likely due to heredity [sic] emphysema." Director's Exhibit 15. In the absence of complicated pneumoconiosis, Dr. Broudy opined that, "ordinarily," obstructive airways disease of the severity demonstrated by the miner is "far more likely related to the inhalation of smoke." *Id.* Dr. Broudy also identified asthma as another possible explanation for the miner's impairment, noting that it is a condition of the general public and not associated with coal dust exposure. *Id.*

⁷ In his January 12, 2011 report, Dr. Vuskovich concluded that the miner had "low category simple clinical coal workers' pneumoconiosis" and stated that, in the absence of progressive massive fibrosis, "it would be very unlikely that low category simple coal workers' pneumoconiosis would cause such a severe degree of spirometry-measured pulmonary impairment[,] as documented" by pulmonary function tests performed on November 23, 2009. Employer's Exhibit 1. Dr. Vuskovich also cited to evidence indicating that the miner did not have cor pulmonale to support his opinion that the miner's disabling chronic obstructive pulmonary disease (COPD) was not caused by coal dust exposure. *Id.* Dr. Vuskovich concluded, based on the pattern of the miner's flow volume loops, that it was "likely" that the miner's upper airway obstruction was due to a tumor. *Id.* In his May 22, 2011 report, Dr. Vuskovich attributed the miner's disabling respiratory impairment to a "chronic infectious COPD" and again stated that the fact that the miner did not have pulmonary hypertension or cor pulmonale "weighed against his having clinically significant clinical or legal pneumoconiosis," thereby excluding coal

The administrative law judge determined that Dr. Mettu's causation opinion was not sufficiently reasoned to be credible, but she recognized that the burden was on employer to establish rebuttal. Decision and Order at 15; Director's Exhibit 14. The administrative law judge rejected Dr. Broudy's opinion because she found that it was "speculative" and lacked "supporting rationale or authority" for excluding coal dust exposure as a causative factor for the miner's respiratory disability. Decision and Order at 16; *see* DX Exhibit 15. In weighing Dr. Vuskovich's opinion, the administrative law judge found that he offered "no support for his claim that, in order for pneumoconiosis, clinical or legal, to be disabling, a miner must also have cor pulmonale or pulmonary hypertension." Decision and Order at 16; *see* Employer's Exhibit 1. Thus, the administrative law judge concluded that employer failed to rebut the amended Section 411(c)(4) presumption by disproving a causal relationship between the miner's coal mine employment and his respiratory disability. Decision and Order at 17.

On appeal, employer asserts that the administrative law judge erred in failing to find the opinions of Drs. Vuskovich and Broudy sufficient to satisfy employer's rebuttal burden. Employer contends that if the administrative law judge was "unconvinced" by Dr. Mettu's opinion that coal dust exposure contributed to the miner's impairment, then the reports submitted by employer from Drs. Broudy and Vuskovich established by a preponderance of the evidence that coal dust exposure was not the cause of the miner's pulmonary impairment. Employer's Petition for Review and Brief to the Benefits Review Board at 8-9. Contrary to employer's argument, however, the sufficiency of claimant's evidence is not at issue on rebuttal since employer bears the burden of proof and must *affirmatively* establish that the miner did not have pneumoconiosis or that his disability did not arise out of or in connection with his coal mine employment. *See Morrison*, 644 F.2d at 479, 25 BLR at 2-8.

We consider employer's general assertion, that the administrative law judge erred in discounting the opinions of Drs. Broudy and Vuskovich, to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge permissibly concluded that employer's experts did not rule out a causal relationship between the miner's respiratory disability and his coal mine employment. *Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Because the administrative law judge acted within her discretion in rendering her credibility determinations with respect to Drs. Broudy and Vuskovich, we defer to her rational findings. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-

dust exposure as a cause of the miner's respiratory disability. Employer's Exhibit 3 at 17.

714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002). We, therefore, affirm the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption, and we affirm the award of benefits in the miner's subsequent claim.

The Survivor's Claim

Pursuant to amended Section 932(l), the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l). In this case, it is uncontested on appeal that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is entitled to benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l); *see* Decision and Order at 20.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge