



BRB No. 17-0158 BLA

DONNA L. SHORT)
(Widow of DAVID L. SHORT))

Claimant-Respondent)

v.)

KEYSTONE COAL MINING)
CORPORATION)

DATE ISSUED: 01/25/2018

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
Richard A. Morgan, Administrative Law Judge, United States Department
of Labor.

Lynda Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter LLC), Pittsburgh,
Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2014-BLA-5320) of Administrative Law Judge Richard A. Morgan, rendered on a survivor's claim filed on October 12, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time. In the initial decision, the administrative law judge credited the miner with eleven years of underground coal mine employment and found that claimant¹ could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² Considering whether claimant could establish entitlement to survivor's benefits under 20 C.F.R. Part 718, without the Section 411(c)(4) presumption, the administrative law judge found that claimant failed to establish that the miner had clinical pneumoconiosis³ at 20 C.F.R. §718.202(a). He further found, however, that claimant proved that the miner had legal pneumoconiosis⁴ and that his death was due to legal pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's determination that the medical opinion evidence established the existence of legal

¹ Claimant is the surviving spouse of the miner, who died on August 10, 2012. Director's Exhibit 9.

² Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

³ Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized 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." 20 C.F.R. §718.201(a)(1).

⁴ Legal pneumoconiosis is "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

pneumoconiosis and remanded the case to the administrative law judge for reconsideration of this evidence. The Board also vacated the administrative law judge's finding that claimant established that the miner's death was due to legal pneumoconiosis at 20 C.F.R. §718.205(b), and instructed the administrative law judge to reconsider the issue of death due to pneumoconiosis if he determined that claimant established the existence of legal pneumoconiosis on remand. *Short v Keystone Coal Mining Corp.*, BRB No. 15-0196 BLA (Feb 24, 2016) (unpub.).

On remand, the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also determined that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). The administrative law judge awarded benefits accordingly.

Employer contends on appeal that the administrative law judge did not properly weigh the medical opinions relevant to legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and death due to legal pneumoconiosis at 20 C.F.R. §718.205(b). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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).

In a survivor's claim, where no statutory presumptions apply, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of death, or if pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989).

⁵ Because the miner's coal mine employment was in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

On remand, the administrative law judge initially reconsidered the medical opinions of Drs. Sood, Houser, Oesterling and Tomaszewski to determine whether claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4).⁶ Decision and Order on Remand at 10-13. The administrative law judge noted Dr. Sood's statement that it would be "unusual" to diagnose chronic obstructive pulmonary disease (COPD)/emphysema related to coal dust exposure without a significant amount of coal dust detected on microscopic examination of the miner's lung tissue.⁷ *Id.* at 11, *quoting* Claimant's Exhibit 2 at 6. The administrative law judge further noted that Dr. Sood relied on the detection of coal dust deposits on gross examination of the miner's lungs by Dr. Nine,⁸ the autopsy prosector, to conclude that coal dust inhalation was a significant contributing cause of the miner's COPD/emphysema. Decision and Order on Remand at 11. The administrative law judge also described Dr. Sood's belief that the "widely divergent" views of Drs. Oesterling and Tomaszewski were attributable to "sampling bias," in that the tissue slides that they reviewed did not accurately represent the miner's lung tissue. *Id.*, *quoting* Claimant's Exhibit 2 at 6.

⁶ Dr. Sood, a Board-certified pulmonologist, reviewed medical records and autopsy reports of Drs. Nine and Oesterling. Claimant's Exhibit 2. Dr. Sood diagnosed clinical and legal pneumoconiosis, opining that the miner suffered from chronic obstructive pulmonary disease (COPD)/emphysema due to coal mine dust exposure and cigarette smoking. *Id.* Dr. Houser, also a Board-certified pulmonologist, reviewed the same evidence and diagnosed clinical pneumoconiosis and COPD/emphysema, identifying coal dust exposure and cigarette smoking as contributing causes. Claimant's Exhibit 1. Drs. Oesterling and Tomaszewski, who are Board-certified pathologists, opined that the miner did not have clinical pneumoconiosis, but suffered from COPD/emphysema due solely to cigarette smoking. Employer's Exhibits 1-3.

⁷ Dr. Sood's full statement is as follows: "In my opinion, it would be unusual for coal mine dust lung disease, including its COPD component to be seen in the presence of [an] 'insignificant' amount of coal dust visualized on microscopy on autopsy." Claimant's Exhibit 2 at 6. Dr. Sood also commented on 1983 and 1994 medical journal articles by Leigh, et al., documenting a relationship between the coal content of the lungs and emphysema, and stated, "[b]ased on this data, I would expect 'significant' amounts of coal dust to be microscopically visualized on autopsy." Claimant's Exhibit 2 at 6; 65 Fed.Reg. 79,920, 79,941-42 (Dec. 20, 2000).

⁸ Dr. Nine described the miner's lungs on gross examination as showing grey and black pleural surfaces, multiple areas of sub-centimeter anthracotic pigmentation bilaterally in all lobes, and multiple anthracotic subcarinal and paratracheal lymph nodes. Director's Exhibit 11. Dr. Nine diagnosed clinical pneumoconiosis and COPD. *Id.*

The administrative law judge credited the opinions of Drs. Sood and Houser, finding that their diagnoses of legal pneumoconiosis were consistent with the amount of coal dust deposition Dr. Nine described in his autopsy report and the scientific views adopted by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order on Remand at 11-12. In contrast, the administrative law judge determined that the opinions of Drs. Oesterling and Tomashefski were unexplained, inconsistent with Dr. Nine's autopsy report, and contrary to the premises the DOL relied on in the preamble. *Id.* at 12-13. The administrative law judge therefore found that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id.* at 13.

Employer argues that the administrative law judge erred in applying the preamble to the 2001 regulatory revisions to find that the diagnoses of legal pneumoconiosis made by Drs. Sood and Houser were sufficient to satisfy claimant's burden to establish the existence of legal pneumoconiosis. Employer also alleges that the administrative law judge did not accurately characterize Dr. Sood's opinion and did not provide valid rationales for discrediting the opinions of Drs. Oesterling and Tomashefski. These contentions have merit.

When considering the medical opinion evidence in conjunction with the preamble, the administrative law judge noted correctly that the DOL recognized that smoking and coal dust cause COPD/emphysema by similar mechanisms, that their respective contributions to COPD/emphysema are difficult to quantify, and that the severity of emphysema increases as the amount of coal dust deposition increases. Decision and Order on Remand at 12, *citing* 65 Fed.Reg. 79,920, 79,941, 79,943 (Dec. 20, 2000). The administrative law judge also stated correctly that all of the physicians agreed that coal dust exposure can cause COPD/emphysema and that Drs. Sood, Oesterling and Tomashefski agreed that identifying coal dust exposure as a causal factor required significant coal dust deposition in the miner's lungs. Decision and Order on Remand at 11, 12. The administrative law judge credited the opinions of Drs. Sood and Houser as consistent with these preamble passages, while giving less weight to the opinions of Drs. Oesterling and Tomashefski for failing to explain why coal dust exposure could not be a contributing cause of the miner's obstructive lung disease. *Id.* at 12-13. The administrative law judge's application of the preamble in this way cannot be reconciled with his determination that the credibility of the physicians' opinions as to whether the miner's COPD/emphysema was legal pneumoconiosis turned on the amount of coal dust deposition in the miner's lungs. *Id.* at 11-12, 13.

The administrative law judge noted the physicians' agreement that the miner had COPD/emphysema and that Drs. Sood, Oesterling and Tomashefski indicated that there must be a certain level of coal dust deposition for coal dust to be a sufficient causal

factor.⁹ *Id.* at 11-12. He further found that Drs. Sood, Oesterling and Tomaszewski disagreed as to whether the autopsy evidence established the required amount of coal dust in the miner's lungs. *Id.*

As employer asserts, contrary to the administrative law judge's finding, Dr. Sood did not unequivocally state that the tissue slides reviewed by Drs. Oesterling and Tomaszewski reflected "sampling bias." Rather, Dr. Sood stated, "it is . . . *possible* that Dr. Oesterling's assessment of coal dust lung burden in the case of [the miner] was underestimated due to sampling bias." Claimant's Exhibit 2 at 6 (emphasis added). Employer is also correct in maintaining that Dr. Nine described anthracotic pigmentation on gross examination of the miner's lungs, not coal dust deposits, and that Dr. Nine did not characterize the extent of the anthracotic pigmentation. Director's Exhibit 11.

Based on the foregoing, we hold that the administrative law judge did not comply with the Administrative Procedure Act (APA), which requires that every decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 30 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore vacate the administrative law judge finding that the opinions of Drs. Sood and Houser were entitled to greatest probative weight and were sufficient to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Wojtowicz*, 12 BLR at 1-165. We remand this case to the administrative law judge to reconsider the relevant medical evidence to determine whether claimant has affirmatively established that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Because the administrative law judge relied on his legal pneumoconiosis finding to conclude that claimant established death due to pneumoconiosis at 20 C.F.R. §718.205(b), we vacate that finding and further vacate the award of benefits.

When reconsidering the medical opinion evidence relevant to legal pneumoconiosis on remand, the administrative law judge must address the comparative credentials of the physicians,¹⁰ and the extent to which their opinions are documented and

⁹ The administrative law judge referred to the preamble to the 2001 regulations, observing that the Department of Labor (DOL) cited studies showing that the severity of emphysema in a miner's lungs increases as the amount of coal dust deposition increases. Decision and Order at on Remand 12, *citing* 65 Fed.Reg. 79,920, 79,941 (Dec. 20, 2000).

¹⁰ If the administrative law judge again determines that the status of Drs. Sood and Houser as Board-certified pulmonologists makes them "the most qualified of those presenting evidence in this case," he must reconcile this finding with his prior determination that the opinions of Drs. Oesterling and Tomaszewski are entitled to

reasoned.¹¹ See *Balsavage v. Director, OWCP*, 295 F.3d 390, 397, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge may also consider the physicians' opinions in conjunction with the preamble to the 2001 revised regulations. See *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011). Finally, the administrative law judge must comply with the APA by identifying the relevant evidence, making findings as to its credibility and probative value, and setting forth these findings in detail, including his underlying rationales. See *Wojtowicz*, 12 BLR at 1-165.

If the administrative determines that claimant has not established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) on remand, an award of survivor's benefits is precluded. *Trumbo*, 17 BLR at 1-87-88. Should the administrative law judge find that claimant has satisfied her burden at 20 C.F.R. §718.202(a)(4), he must reconsider whether claimant has established death due to legal pneumoconiosis at 20 C.F.R. §718.205(b).

greatest weight, based on their status as Board-certified pathologists. Decision and Order on Remand at 11; 2015 Decision and Order on Remand at 15-16; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 3.

¹¹ This must include a consideration of the extent to which the physicians addressed the miner's eleven years of underground coal mine employment *and* the miner's smoking history of between forty and sixty pack-years. See *Lango v. Director, OWCP*, 104 F.3d 573, 577-78, 21 BLR 2-12, 2-20-21 (3d Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); 2015 Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge