

BRB No. 11-0673 BLA

DOROTHY McMANN)	
(Widow of CLIFFORD C. McMANN))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 07/27/2012
)	
SEWELL COAL COMPANY)	
)	
and)	
)	
PITTSTON COMPANY)	
)	
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 on Second Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Second Remand (06-BLA-5293) of Administrative Law Judge Richard A. Morgan 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 survivor's claim filed on February 8, 2005, and is before the Board for the third time. Director's Exhibit 6.

In the initial decision, the administrative law judge credited the miner with “at least” forty-four years of coal mine employment,¹ pursuant to the parties’ stipulation. Decision and Order, March 3, 2008, at 4. The administrative law judge, however, denied benefits based on his findings that claimant failed to establish the existence of pneumoconiosis or that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.205(c).

Pursuant to claimant’s appeal, the Board vacated the administrative law judge’s determination that claimant did not establish that the miner had legal pneumoconiosis² pursuant to 20 C.F.R. §718.202(a)(4). Specifically, the Board held that the administrative law judge did not adequately explain his reasons for discrediting the opinion of Dr. Koenig, that coal mine dust exposure contributed to the miner’s chronic obstructive pulmonary disease (COPD), or for crediting the medical opinions of Drs. Rosenberg and Spagnolo, that the miner’s COPD was due solely to smoking. The Board therefore remanded the case to the administrative law judge for reconsideration of whether claimant established the existence of legal pneumoconiosis based on the medical opinion evidence under 20 C.F.R. §718.202(a)(4), taking into account the physicians’ comparative credentials, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses.³ *D.M. [McMann] v. Sewell Coal Co.*, BRB No. 08-0487 BLA, slip op. at 3-5 (Feb. 25, 2009)(unpub.). Because the administrative law judge had to reweigh the medical opinion evidence with respect to the existence of legal pneumoconiosis, the Board also vacated his finding pursuant to 20 C.F.R. §718.205(c), and instructed him to reconsider whether the miner’s death was due to pneumoconiosis, if reached. *McMann*, slip op. at 5-6.

¹ The record indicates that the miner’s coal mine employment was in West Virginia. Director’s Exhibits 1, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

² “Legal pneumoconiosis” includes “any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

³ The Board affirmed, as unchallenged, the administrative law judge’s findings that claimant did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and his determination to discount the medical opinion of Dr. Rasmussen, under 20 C.F.R. §718.202(a)(4). *D.M. [McMann] v. Sewell Coal Co.*, BRB No. 08-0487 BLA, slip op. at 2 n.3, 4 n.5. (Feb. 25, 2009)(unpub.).

On remand, the administrative law judge found that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In reconsidering the medical opinions, the administrative law judge discounted Dr. Rosenberg's opinion because the doctor's reasoning was "at odds" with the position of the Department of Labor regarding whether coal mine dust exposure causes a significant reduction in the FEV1 value of coal miners. Decision and Order Denying Benefits on Remand at 5 n.4. Further, the administrative law judge discounted Dr. Koenig's opinion diagnosing legal pneumoconiosis because he found Dr. Koenig's reasoning, that the decline in the miner's lung function could only be attributed to coal mine dust exposure because it developed after the miner quit smoking, to be based on a mistaken belief that the miner quit smoking in 1985, when he smoked until 1993. *Id.* at 6. Further, the administrative law judge found that Dr. Koenig did not adequately explain the impact on the miner's lung function of the pneumonectomy that the miner underwent in 1993 for the treatment of smoking-related lung cancer. *Id.* Based on those findings, the administrative law judge determined that the opinions of Drs. Koenig and Rosenberg were in equipoise. *Id.* at 6. The administrative law judge further found that Dr. Spagnolo provided an "extremely thorough and comprehensive" opinion that the miner's COPD was unrelated to his coal mine employment and did not hasten his death. *Id.* Because the existence of pneumoconiosis was not established, the administrative law judge found that the miner's death could not be related to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

Claimant appealed, and while her appeal was pending at the Board, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. 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), *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 rebut the presumption. 30 U.S.C. §921(c)(4).

After considering the parties' statements that the case was affected by amended Section 411(c)(4), the Board vacated the administrative law judge's Decision and Order, and remanded the case for further consideration.⁴ The Board instructed the

⁴ Because the Board concluded that the case had to be remanded for consideration in light of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), it did not address the administrative law judge's credibility determinations regarding the medical opinions.

administrative law judge, on remand, to consider whether claimant was entitled to invocation of the rebuttable presumption at Section 411(c)(4). The Board further instructed the administrative law judge 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. §725.414.⁵ *McMann v. Sewell Coal Co.*, BRB No. 10-0124 BLA (Sept. 21, 2010)(unpub.).

On remand, the administrative law judge applied amended Section 411(c)(4),⁶ and found that claimant established that the miner worked for more than fifteen 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). The administrative law judge therefore determined that claimant invoked the rebuttable presumption. Turning to rebuttal, the administrative law judge found that employer disproved the existence of clinical pneumoconiosis.⁷ Regarding legal pneumoconiosis, the administrative law judge found that Dr. Rosenberg's opinion did not "completely refute[]" the existence of legal pneumoconiosis. Decision and Order Denying Benefits on Second Remand (Decision and Order on Remand) at 6. The administrative law judge, however, found that Dr. Spagnolo's opinion "prove[d] that the miner's COPD/emphysema was unrelated to his coal mine dust exposure." *Id.* Specifically, the administrative law judge reiterated his previous determination, that Dr. Spagnolo provided a thorough opinion that was based on a comprehensive review of the miner's medical treatment records from 1986 until his death in 2004, in which Dr. Spagnolo explained that the totality of the miner's objective findings and his medical history indicated that none of the miner's respiratory impairments was related to coal mine dust exposure. The administrative law judge

⁵ The Board further determined that, because the miner's lifetime claims were 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. *McMann v. Sewell Coal Co.*, BRB No. 10-0124 BLA, slip op. at 4 n.6 (Sept. 21, 2010)(unpub.).

⁶ In view of the potential applicability of amended Section 411(c)(4), the administrative law judge, on remand, reopened the record for sixty days so that the parties could submit new evidence in response to the change in the law. The parties submitted no new evidence.

⁷ "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).

further reiterated his previous determination that Dr. Koenig's opinion, attributing the miner's COPD, in part, to coal mine dust exposure, was not sufficiently reasoned. *Id.* Based on these findings, the administrative law judge determined that employer proved "that [the] deceased miner did not suffer from clinical or legal pneumoconiosis . . . and that the miner's death was unrelated to pneumoconiosis." *Id.* Therefore, the administrative law judge found that employer rebutted the Section 411(c)(4) presumption, and he denied benefits.

On appeal, claimant contends that the administrative law judge erred in crediting Dr. Spagnolo's opinion that the miner did not suffer from legal pneumoconiosis, and in discrediting Dr. Koenig's contrary opinion that the miner's COPD was aggravated by coal mine dust exposure and hastened his death. Employer did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.⁸

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

Claimant contends that, in considering the medical opinion evidence regarding legal pneumoconiosis, the administrative law judge did not provide a valid reason for crediting Dr. Spagnolo's opinion over that of Dr. Koenig.⁹ Specifically, claimant argues that Dr. Spagnolo did not set forth a rational basis for excluding coal mine dust exposure as a cause of the miner's COPD or as a factor in his death. Claimant's Brief at 10-13. Claimant further asserts that Dr. Koenig provided a reasoned opinion, and she alleges that the administrative law judge mischaracterized the doctor's opinion and did not provide a valid reason for discounting it. Claimant's Brief at 8, 10.

⁸ Claimant does not challenge the administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis. Therefore, that finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁹ The bulk of claimant's brief argues that the administrative law judge failed to account for multiple ways in which Dr. Rosenberg's opinion allegedly conflicted with the medical literature accepted by the Department of Labor regarding coal mine dust and its potential to cause obstructive lung disease. Claimant's Brief at 4-9. Because the administrative law judge found that Dr. Rosenberg's medical opinion did not support employer's burden to disprove the existence of legal pneumoconiosis, we need not address claimant's argument regarding Dr. Rosenberg's opinion.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Contrary to claimant's contention, substantial evidence supports the administrative law judge's determination that Dr. Spagnolo's medical opinion was well-reasoned and documented, and sufficient to carry employer's burden to demonstrate that the miner did not have legal pneumoconiosis. 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 (4th Cir. 1980). A review of the record reflects that Dr. Spagnolo addressed each of the miner's lung impairments or diseases, and explained that they were unrelated to coal mine dust exposure.¹⁰ The administrative law judge reiterated his consistent finding that Dr. Spagnolo's medical opinion was extremely thorough and comprehensive, and he determined that it was credible and persuasive. Decision and Order on Remand at 6; [2009] Decision and Order Denying Benefits on Remand at 6; [2008] Decision and Order Denying Benefits at 10-11, 19. As substantial evidence supports these credibility determinations, we conclude that the administrative law judge acted within his discretion as the factfinder in according greater weight to Dr. Spagnolo's opinion. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Further, contrary to claimant's assertion, a review of the record does not disclose that the administrative law judge mischaracterized Dr. Koenig's medical opinion. Additionally, the administrative law judge permissibly accorded less weight to Dr. Koenig's opinion, as Dr. Koenig based his reasoning, in part, on an incorrect assumption that the miner quit smoking years earlier than he did, and because he did not adequately explain the effect that the miner's pneumonectomy had on his subsequent loss of lung function. See *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order on Remand at 6; [2009] Decision and Order Denying Benefits on Remand at 6. The determination of whether a medical opinion is

¹⁰ Dr. Spagnolo opined that the miner's lung cancer was unrelated to coal mine dust exposure, but was due to smoking. Employer's Exhibit 5 at 17-18; Employer's Exhibit 7 at 18-20. Dr. Spagnolo further opined that the miner's pneumonectomy, with its resulting loss of lung capacity, was done to treat the miner's smoking-related cancer. Employer's Exhibit 7 at 17-20. Additionally, Dr. Spagnolo indicated that the miner had "mild" obstructive lung disease that was due to his many years of smoking, and that he repeatedly suffered from pneumonia, which stemmed from his inability to swallow and thus, was unrelated to coal mine dust exposure. Employer's Exhibit 7 at 23-24. Dr. Spagnolo concluded that "the totality" of the miner's objective evidence and medical history reflected that the miner would have suffered from the same impairments had he never been exposed to coal mine dust. Employer's Exhibit 5 at 17-18.

adequately reasoned and documented is for the administrative law judge as the factfinder to decide, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc), and the Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the administrative law judge's credibility determinations, they are affirmed.

Because substantial evidence supports the administrative law judge's findings that employer established that the miner did not have clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), those findings are affirmed. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-174 (4th Cir. 2000). We therefore affirm the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption by demonstrating that the miner did not have pneumoconiosis. Further, as the existence of pneumoconiosis is a necessary element of entitlement in a survivor's claim under 20 C.F.R. Part 718, claimant's entitlement is precluded under the Act. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Second Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge