



BRB No. 14-0352 BLA

GERDIE R. GEARHART)
(Widow of GENE E. GEARHART))

Claimant-Respondent)

v.)

E & H MINING AND TRUCKING,)
INCORPORATED)

and)

AMERICAN MINING CLAIMS)
SERVICES/WEST VIRGINIA COAL)
WORKERS' PNEUMOCONIOSIS FUND)

DATE ISSUED: 07/21/2015

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 on Modification Granting Benefits of
Pamela J. Lakes, Administrative Law Judge, United States Department of
Labor.

Timothy C. MacDonnell and Craig Haring (Washington & Lee University
School of Law), Lexington, Virginia, for claimant.

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

Jonathan P. Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James,
Associate Solicitor; Michael J. Rutledge, Counsel for Administrative
Litigation and Legal Advice), Washington, D.C., for the Director, Office of
Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Modification Granting Benefits (2010-BLA-5899) of Administrative Law Judge Pamela J. Lakes, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of the denial of her survivor's claim, which she originally filed on April 26, 2005.¹ Initially, Administrative Law Judge Larry W. Price denied benefits on January 31, 2008, finding that claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 51. On June 16, 2008, claimant timely requested modification pursuant to 20 C.F.R. §725.310.

Following a hearing, Administrative Law Judge Robert B. Rae issued a Decision and Order Denying Request for Modification on January 21, 2010, finding that the evidence was insufficient to establish the existence of pneumoconiosis and that claimant failed to meet her burden to establish that there had been a mistake in a determination of fact in the denial of benefits. Director's Exhibit 74. On April 21, 2010 claimant timely filed a request for modification.

On June 17, 2014, Administrative Law Judge Pamela J. Lakes (the administrative law judge) issued a Decision and Order on Modification Granting Benefits. After determining that modification will render justice under the Act, the administrative law judge credited the miner with twenty-one years of underground coal mine employment, as stipulated by the parties. Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §§921(c)(4),² the administrative law judge found that the miner had a totally disabling

¹ Claimant is the widow of the miner, who died on April 16, 2003. Director's Exhibit 10.

² Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment at the time of his death, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not

respiratory impairment, and that claimant was entitled, therefore, to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis. The administrative law judge further determined that employer failed to establish rebuttal of the presumption, and granted the modification request on the basis that a mistake in a determination of fact had been made pursuant to Section 725.310. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's decision that modification would render justice under the Act. Employer also contends that the administrative law judge applied an incorrect standard for determining whether employer established rebuttal of the presumption, and erred in her weighing of the evidence relevant to rebuttal. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the rebuttal standards had no impact on this case. Employer has filed a consolidated reply brief in support of its position.³

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.⁴ 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).

Initially, we address employer's contention that the administrative law judge improperly restricted employer to the rebuttal methods provided to the Secretary of Labor as set forth in 30 U.S.C. §921(c)(4), contrary to the statutory language and the holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3, BLR 2-36 (1976). Employer asserts that the administrative law judge erred in applying the "rule out" standard on rebuttal

have pneumoconiosis, or that no part of his death was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established more than fifteen years of underground coal mine employment, total respiratory disability pursuant to 20 C.F.R. §718.204(b), and invocation of the presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Decision and Order at 2.

when addressing death causation, and argues that the implementing regulation at 20 C.F.R. §718.305 is invalid because it conflicts with the statute. The Board, however, has addressed and rejected these arguments in *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015), as has the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015). For the reasons set forth in *Minich* and *Bender*, we reject employer's contentions in this case.

Employer next challenges the administrative law judge's weighing of the opinions of Drs. Renn, Basheda, Hippensteel and Castle in finding them insufficient to rebut the presumed fact of legal pneumoconiosis pursuant to amended Section 411(c)(4). Employer's Brief at 17-26.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. The administrative law judge provided a comprehensive summary of the opinions of Drs. Renn, Basheda, Hippensteel, and Castle, and fully delineated the doctors' findings and the bases supporting their conclusion that the miner did not have legal pneumoconiosis and that coal dust exposure in no way contributed to, or hastened, the miner's death. Decision and Order at 21-32; Director's Exhibits 12, 40, 41, 43, 71; Employer's Exhibits 1, 2, 4, 6, 8, 10, 11. Specifically, Dr. Renn explained that the miner's respiratory failure was due to tobacco smoke-induced chronic bronchitis and bullous emphysema, noting that the miner's radiographic findings of hyperexpansion, hyperinflation, air trapping and bullous emphysema are found in tobacco smoke-induced chronic obstructive pulmonary disease (COPD). Director's Exhibits 12, 40. Similarly, Dr. Basheda noted that the miner had all of the features of tobacco-induced COPD, and opined that the clinical and radiographic evidence is classic for tobacco-induced COPD. He diagnosed severe tobacco-induced COPD/asthma complicated by acute reversible hypoxemic hypercarbic respiratory failure, which necessitated mechanical ventilation and aggressive therapy with bronchodilators, anti-inflammatory agents, antibiotics, and oxygen therapy, noting that the successful therapy/reversibility of the miner's clinical status was consistent with the diagnosis of tobacco-induced COPD with an asthmatic component. Employer's Exhibits 4, 6, 10. Dr. Hippensteel determined that the miner's disabling pulmonary impairment was not due to his coal dust exposure but, rather, was secondary to chronic bronchitis and chronic sinusitis of the general public, with chronic hypercarbia, aggravated by sedatives []. . . and accompanied by bullous emphysema. He opined that the bullous emphysema likely added to claimant's air flow obstruction, which was likely related to his cigarette smoking and some congenital aspect. Employer's Exhibits 2, 8, 11; Director's Exhibit 71. Finally, Dr. Castle explained that there were no valid physiologic studies, but that there was clear evidence of severe airway obstruction consistent with severe tobacco-induced bullous emphysema. He noted that the miner

showed evidence of rapidly developing respiratory acidosis during his final hospitalization while receiving oxygen therapy, and that he had significant hypoxemia with severe hypercapnia and respiratory acidosis, which are findings typical of respiratory failure associated with hypoxemia and hypercapnia due to tobacco smoke-induced bullous emphysema. Employer's Exhibit 1; Director's Exhibit 43. However, as the administrative law judge determined that Drs. Renn, Basheda, Hippensteel and Castle failed to adequately address how coal dust exposure could be excluded as a contributing or aggravating factor to the miner's condition, even if it was primarily due to smoking-induced emphysema, the administrative law judge acted within her discretion in concluding that their opinions were not well-reasoned. Decision and Order at 24, 26; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121-22 (6th Cir. 2000). Contrary to employer's arguments, the administrative law judge did not apply an incorrect legal standard on rebuttal; rather, she determined that the opinions of Drs. Renn, Basheda, Hippensteel and Castle were not credible. Decision and Order at 28. As substantial evidence supports the administrative law judge's determination, we affirm her finding that employer failed to establish rebuttal of the presumed fact of legal pneumoconiosis.⁵ Because employer has failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(2)(i)(A), we need not address employer's arguments regarding the administrative law judge's weighing of the evidence relevant to the issue of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i)(B).

We decline to address employer's allegation that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Houser that the miner had legal pneumoconiosis. Because employer bears the burden of rebutting the amended Section 411(c)(4) presumption, error, if any, in the administrative law judge's weighing of their opinions is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); 30 U.S.C. §902(b).

The administrative law judge properly found that the same reasons that she provided for discrediting the opinions of Drs. Renn, Basheda, Hippensteel and Castle on the issue of pneumoconiosis also undercut their opinions that no part of the miner's death was caused by pneumoconiosis. Decision and Order at 32; *see Scott v. Mason Coal Co.*,

⁵ Because the administrative law judge provided at least one valid reason for according less weight to the opinions of Drs. Renn, Basheda, Hippensteel and Castle, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Renn, Basheda, Hippensteel and Castle.

289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As substantial evidence supports the administrative law judge's findings, we affirm her conclusion that the opinions of Drs. Renn, Basheda, Hippensteel and Castle were insufficient to establish rebuttal of the presumed fact of death causation, and that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2)(i), (ii).

Lastly, we reject employer's contention that the administrative law judge erred in finding that granting modification would render justice under the Act. Citing *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 25 BLR 2-157 (4th Cir. 2012), *cert. denied*, 570 U.S. (2013); *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007), the administrative law judge discussed the relevant factors to be considered, noting that claimant has been actively pursuing her claim for benefits; that the modification request was made for the purpose of achieving a just result; that claimant was diligent and timely in pursuing her claim, and that sufficient grounds existed upon which to find that a mistake in a determination of fact was made. Decision and Order at 7-9. Because we discern no error or abuse of discretion in the administrative law judge's determination that granting modification would render justice under the Act, it is affirmed. See *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68, 72 (1999), *citing Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991). Thus, we affirm the administrative law judge's finding that claimant established a basis for modification pursuant to 20 C.F.R. §725.310, and affirm the award of benefits.

Accordingly, the Decision and Order on Modification Granting Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge