

BRB No. 10-0497 BLA

LINDA SUE JAMES)	
(Widow of JESSUP JAMES))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 05/31/2011
ISLAND CREEK COAL COMPANY)	
)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Allison B. Moreman (Jackson Kelly, PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (06-BLA-5791) of Administrative Law Judge Daniel F. Solomon awarding benefits on a survivor's claim filed on June 30, 2005, 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 is before the Board for the second time. In the initial decision, the administrative law judge credited

the miner with fourteen years of coal mine employment,¹ and accepted the parties' stipulation to the existence of clinical pneumoconiosis² arising out of coal mine employment. The administrative law judge found that the medical opinion evidence established that the miner also suffered from legal pneumoconiosis,³ in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that legal pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, he awarded benefits.

Pursuant to employer's appeal, the Board vacated the benefits award because the administrative law judge erred in his analysis of the medical evidence. *L.S.J. [James] v. Island Creek Coal Co.*, BRB No. 08-0456 BLA (Mar. 31, 2009)(unpub.). Regarding legal pneumoconiosis, the Board held that the administrative law judge did not resolve the conflict in the evidence as to the etiology of the miner's COPD, and did not adequately explain why Dr. Houser's opinion, attributing the miner's COPD to coal mine dust exposure and smoking, was more credible than the contrary opinions of Drs. Caffrey, Jarboe, Repsher, and Roggli, that the miner's COPD was unrelated to coal dust exposure. Further, the Board held that, on the issues of both legal pneumoconiosis and death causation, the administrative law judge erred in automatically crediting Dr. Houser's opinion based on his status as the miner's treating physician. Therefore, the Board remanded the case for the administrative law judge to reconsider whether the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and, if necessary, whether the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

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

² "Clinical pneumoconiosis" is defined as "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).

³ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). A disease "arising out of coal mine employment" is "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

On remand, the administrative law judge found that the miner suffered from legal pneumoconiosis, and that his death was due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence in finding the existence of legal pneumoconiosis, and that the miner's death was due to legal pneumoconiosis. Employer additionally states that recent amendments to the Act, enacted by Section 1556 of Public Law No. 111-148,⁴ do not apply to this claim, based on its filing date.⁵ Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not file a substantive response to employer's appeal. The Director states that if the Board does not affirm the award of benefits, it must remand the case for the administrative law judge to consider the claim pursuant to the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), reinstated by Section 1556 of Public Law No. 111-148.⁶

⁴ On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on March 23, 2010, were enacted. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides that if a miner had at least fifteen years of qualifying coal mine employment, and had a totally disabling respiratory impairment, there is a rebuttable presumption that his 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)). Another amendment reinstated the derivative entitlement provision of Section 932(l) of the Act, 30 U.S.C. §932(l), but that amendment does not affect this case, as the miner's lifetime claims were denied.

⁵ Claimant filed her claim after January 1, 2005. Therefore, employer incorrectly asserts that Section 1556 does not apply to her claim because of its filing date. Pub. L. No. 111-148, §1556(c).

⁶ In his letter to the Board, the Director, Office of Workers' Compensation Programs (the Director), states that the administrative law judge did not discuss the relevant evidence of record when he found fewer than fifteen years of coal mine employment established. The Director notes that claimant alleged at least fifteen years, and he asserts that the record contains Social Security Administration earnings records, which, if credited, could establish that the miner had more than fifteen years of coal mine employment. Director's Letter at 2, discussing Director's Exhibit 7.

Based upon the parties' arguments, and our review, we conclude that Section 1556 may affect this case. As will be discussed below, we cannot affirm the administrative law judge's award of survivor's benefits. Because we must remand this case for the administrative law judge to reconsider the merits of entitlement, we will also instruct the administrative law judge, on remand, to consider this case in light of the amendments to the Act.

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); see *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the irrebuttable presumption related to complicated pneumoconiosis, provided at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In our last decision, we set out in detail the physicians' opinions on whether the miner had legal pneumoconiosis. *James*, slip op. at 3-5. We briefly reiterate that Dr. Houser diagnosed the miner with chronic bronchitis and COPD due to the combined effects of coal mine dust exposure and "long-term" smoking.⁷ Director's Exhibit 29; Claimant's Exhibit 1 at 28. In contrast, Drs. Caffrey, Jarboe, Repsher, and Roggli opined that the miner's chronic bronchitis, COPD, and emphysema were due solely to smoking.⁸ Director's Exhibit 28; Employer's Exhibits 3-5, 8-10.

The administrative law judge, on remand, found that Dr. Houser's opinion was documented and reasoned. He noted that Dr. Houser based his opinion on physical

⁷ Dr. Houser stated that the miner smoked a pack of cigarettes per day for fifty-two years. Claimant's Exhibit 1 at 27.

⁸ Drs. Jarboe and Repsher described the miner's smoking habit as long, heavy, and continuous, until near the time of his death. Employer's Exhibit 3 at 13; Employer's Exhibit 4 at 15-16; Employer's Exhibit 5 at 19, 21. The administrative law judge, in his first decision, found that the miner "smoked cigarettes from about age ten to close to his demise[,] at about one pack per day." Decision and Order at 12. The miner was seventy-four when he died. Director's Exhibit 13.

examinations, objective test results, and the miner's coal mine employment and smoking histories. Decision and Order on Remand at 5, 7. Further, he found that Dr. Houser adequately explained why he believed that coal mine dust contributed to the miner's COPD. Specifically, he found that Dr. Houser explained that the duration of the miner's coal mine dust exposure was sufficient to cause legal pneumoconiosis, that the miner's COPD progressively worsened, and that the medical literature documents a combined effect of smoking and coal mine dust exposure that causes more severe chronic bronchitis than would be expected from either exposure alone. Decision and Order on Remand at 5-6. The administrative law judge determined that the Department of Labor's findings in the preamble to the regulations, regarding the medical literature on coal mine dust exposure and obstructive lung disease, lent support to Dr. Houser's opinion on an additive effect of smoking and coal mine dust exposure. Decision and Order on Remand at 7.

Regarding the contrary opinions, the administrative law judge found that Dr. Jarboe "did not evaluate the progression of the COPD in this record," and that Dr. Repsher did not consider the additive effect of smoking and coal mine dust exposure. Decision and Order on Remand at 5, 7. The administrative law judge further found that, although Drs. Caffrey and Roggli are Board-certified pathologists "qualified to review autopsy evidence,"⁹ Dr. Houser not only reviewed the miner's autopsy evidence, he observed, examined, and treated the miner from 1979 until his death, gaining "superior information" as a result. Decision and Order on Remand at 6. Finding that the other physicians of record failed to "reconcile the fact that the [m]iner had 14 years of coal mining exposure," and finding Dr. Houser's opinion to be "better reasoned and . . . more consistent with the regulations," the administrative law judge found that legal pneumoconiosis was established. Decision and Order on Remand at 7, 8.

Employer initially asserts that the administrative failed to comply with the Board's instruction to consider whether Dr. Houser's opinion was documented and reasoned. Employer's Brief at 16-17. We disagree. As set forth above, the administrative law judge analyzed the bases for Dr. Houser's diagnosis of legal pneumoconiosis, and specifically considered whether it was documented and reasoned. The determination of whether a medical opinion is adequately reasoned is committed to the discretion of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Upon review, we conclude that substantial evidence supports the

⁹ Drs. Caffrey and Roggli reviewed the miner's autopsy lung tissue slides. Dr. Caffrey opined that the minimal amount of coal dust in the miner's lung tissue was too sparse to cause emphysema or any other pulmonary problem. Employer's Exhibit 8 at 16, 18. Dr. Roggli opined that smoking was the cause of the miner's emphysema and COPD. Employer's Exhibit 10 at 15-16.

administrative law judge's determination that Dr. Houser rendered a documented and reasoned diagnosis of legal pneumoconiosis, in that he set forth the bases for his opinion, and adequately explained his reasoning. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, we reject employer's contention that the administrative law judge erred in considering the preamble to the regulations, when he determined that it contained at least some support for Dr. Houser's explanation that there is an additive effect of coal mine dust exposure and smoking. *See J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); 65 Fed. Reg. 79920, 79940 (Dec. 20, 2000)(finding that a cross-sectional study of coal miners demonstrated that "[s]mokers who mine have additive risk for developing significant obstruction" and "chronic bronchitis").

There is merit, however, in employer's contention that the administrative law judge did not adequately explain why Dr. Houser's opinion was *better* reasoned, and therefore, *more credible* than the contrary opinions of record. Employer's Brief at 17, 20. In weighing the evidence, the administrative law judge did not address whether the contrary opinions of Drs. Caffrey, Jarboe, Repsher, and Roggli were documented and reasoned, and then weigh those opinions against Dr. Houser's opinion. He briefly mentioned the contrary opinions of Drs. Caffrey, Jarboe, Repsher, and Roggli only to discount them, mainly because they did not address points that Dr. Jarboe made. Decision and Order on Remand at 4-8. In so doing, the administrative law judge did not conduct an even-handed analysis of the opinions, *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999)(*en banc*), and did not explain to the Board why Dr. Houser's opinion merited greater weight, or why the opinions of employer's medical experts merited less weight. Therefore, the administrative law judge's decision does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(d). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Moreover, the administrative law judge's reasons for discounting the contrary opinions are either not supported by substantial evidence, or are unexplained. As noted above, the administrative law judge faulted Dr. Jarboe for not addressing the progression of the miner's COPD. Contrary to the administrative law judge's finding, the record reflects that Dr. Jarboe specifically addressed the progression of the miner's COPD, and explained that the miner's heavy, continuous smoking caused the COPD to progress.¹⁰ Employer's Exhibit 3 at 13; Employer's Exhibit 4 at 31-32. Further, the administrative

¹⁰ Dr. Jarboe reasoned that the miner left coal mining in 1979 with normal lung function, he continued to smoke heavily until shortly before his death, and his lung tissue contained too little coal dust to have caused progression of his obstructive impairment. Employer's Exhibit 3 at 13; Employer's Exhibit 4 at 32.

law judge found that Dr. Repsher did not consider whether there can be an additive effect of smoking and coal mine dust exposure. The record, however, reflects that Dr. Repsher was asked to consider that issue, and he agreed that smoking and coal mine dust exposure can be additive in producing chronic bronchitis. Employer's Exhibit 5 at 28. Further, the administrative law judge discounted the opinions of Drs. Caffrey and Roggli because they were based on reviews of the miner's autopsy slides, when, by comparison, Dr. Houser gained "superior information" by examining and treating the miner. The administrative law judge, however, did not explain how Dr. Houser's treatment of the miner provided him with superior information on the etiology of the miner's COPD. *See* 20 C.F.R. §718.104(d)(5); *Williams*, 338 F.3d at 514, 22 BLR at 2-648-49; *Wojtowicz*, 12 BLR at 1-165.

Because the administrative law judge did not resolve the conflicting evidence, or adequately explain his findings, we are unable to determine whether substantial evidence supports his finding that the miner suffered from legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). Therefore, we must vacate the administrative law judge's finding, and remand this case to him for further consideration. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. On remand, the administrative law judge must reconsider whether claimant has satisfied her burden to prove the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). In deciding that issue, the administrative law judge must examine each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explain his rationale for crediting or discrediting any of the evidence of record. *See Martin v. Ligon Preparation Co.*, 400 F.3d 306, 23 BLR 2-261, 2-284 (6th Cir. 2005); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). The administrative law judge must also explain the bases for all of his findings of fact and conclusions of law, in accordance with the APA. *Wojtowicz*, 12 BLR at 1-165.

Because we have vacated the administrative law judge's finding of legal pneumoconiosis, we also vacate his finding that legal pneumoconiosis hastened the miner's death from anoxic encephalopathy, under 20 C.F.R. §718.205(c). On remand, the administrative law judge must reconsider that issue, if reached.

On remand, prior to considering the merits of the claim, the administrative law judge must make a determination as to the length of the miner's qualifying coal mine employment, *see* n.6, *supra*, and, if applicable, must consider claimant's entitlement to the presumption, set forth in Section 411(c)(4), that the miner's death was due to pneumoconiosis. The administrative law judge should allow for the submission of additional evidence by the parties to address the change in law, consistent with the evidentiary limitations at 20 C.F.R. §725.414. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review*

Board, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1).

Should the administrative law judge determine that the Section 411(c)(4) presumption is not applicable, or if employer rebuts the presumption, then the administrative law judge should determine whether claimant has established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). If so, he must consider whether pneumoconiosis hastened the miner's death, pursuant to 20 C.F.R. §718.205(c), in accordance with the standard set forth in *Williams*, 338 F.3d at 518, 22 BLR at 2-655, and *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 24 BLR 2-257 (6th Cir. 2010). In so doing, the administrative law judge must explain his findings. *Wojtowicz*, 12 BLR at 1-165.

Lastly, employer argues that we should remand this case to a different administrative law judge because the case has reached "administrative gridlock." Employer's Brief at 5. The record does not reflect that the administrative law judge is unfair or partial to claimant, or that he has demonstrated a bias against employer. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Thus, we decline to order that this case be reassigned to another administrative law judge.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge