

BRB No. 12-0089 BLA

SUSIE ESTEPP)
(Widow of DALLAS ESTEPP))
)
Claimant-Respondent)
)
v.)
)
WAR EAGLE ENERGY, INCORPORATED)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 11/28/2012
PNEUMOCONIOSIS FUND)
)
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 of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, P.S.C., Pikeville, Kentucky, for claimant.

Karin L. Weingart (Spilman, Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05433) of Administrative Law Judge Adele Higgins Odegard rendered on a survivor's claim filed on October 11, 2011, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge accepted the parties' stipulations to thirty-five years of underground coal mine employment and the existence of simple pneumoconiosis, and adjudicated this claim pursuant to 20 C.F.R. Part 718. Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),¹ the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant² was entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis. The administrative law judge further found that employer failed to establish rebuttal of the presumption by showing that the miner's totally disabling respiratory impairment was not due to coal dust exposure. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief.³

¹ On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment or comparable surface mine employment, 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, 124 Stat. 119 (2010) (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. *Id.*

² Claimant, Susie Estep, is the widow of the miner, Dallas Estep, who died on April 29, 2006. Director's Exhibits 2, 14.

³ We affirm, as unchallenged on appeal, the administrative law judge's acceptance of the parties' stipulations to 35 years of coal mine employment and the existence of simple pneumoconiosis, and his findings that the evidence established total respiratory disability at 20 C.F.R. §718.204(b); that claimant was entitled to invocation of the presumption at amended Section 411(c)(4); and that employer could not establish rebuttal of the presumption with proof that the miner did not have pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Subsequent to the issuance of the administrative law judge's Decision and Order, the Board held that, in a survivor's claim filed after January 1, 2005, in order to rebut the presumption under amended Section 411(c)(4), the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment. *Copley v. Buffalo Mining Co.*, BLR , BRB No. 11-0713 BLA (July 31, 2012); *see* 77 Fed. Reg. 19,456, 19,475 (Mar. 30, 2012)(to be codified at 20 C.F.R. §718.305). In the present case, the administrative law judge applied the wrong rebuttal standard, as she required employer to prove that the miner's totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment, rather than requiring employer to prove that the miner's death was unrelated to his coal mine employment.⁵ Consequently, we vacate the administrative law judge's finding that employer did not establish rebuttal, and remand this case for the administrative law judge to reevaluate the evidence and determine whether employer has rebutted the amended Section 411(c)(4) presumption by proving that the miner's death did not arise out of dust exposure in coal mine employment. On remand, the administrative law judge is instructed to reassess the conflicting medical opinions in light of the physicians' qualifications and explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication and bases of their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Additionally, while the administrative law judge indicated that it was not necessary for her to determine whether the miner had complicated pneumoconiosis, she is directed to do so on remand, as such a determination may either entitle claimant to the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, or it may affect the administrative law judge's weighing of the medical opinions.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 3.

⁵ In light of this holding, we decline to address employer's allegations of error regarding the administrative law judge's weighing of the medical opinions relevant to the cause of the miner's respiratory disability.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and this case is remanded 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