



BRB No. 15-0095 BLA

NANCY L. BEVERLY)	
(Widow of ROY M. BEVERLY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CLINCHFIELD COAL)	
COMPANY/PITTSTON COMPANY)	DATE ISSUED: 11/20/2015
)	
Employer-Respondent)	
)	
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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Nancy L. Beverly, Clintwood, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order on Remand (2011-BLA-5664) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits 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, involving claimant's request for modification of the denial of a survivor's claim filed on October 27, 2006, is before the Board for the third time.

In the initial decision, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge denied benefits. Upon review of claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *N.L.B. [Beverly] v. Clinchfield Coal Co.*, BRB No. 09-0102 BLA (Aug. 28, 2009) (unpub.).

Claimant timely requested modification. Director's Exhibit 44. After crediting the miner with at least fifteen years of qualifying coal mine employment,² the administrative law judge found that the medical evidence established that the miner 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 that the miner's death was due to pneumoconiosis, set forth at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). Although the administrative law judge found that employer could not disprove the existence of clinical or legal pneumoconiosis, he found that employer established that the miner's death was not caused or hastened by clinical pneumoconiosis. The administrative law judge, therefore, found that employer rebutted the Section 411(c)(4) presumption, and denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's determination that employer established that the miner's lung cancer, the direct cause of his death, was not due to his coal mine dust exposure. *Beverly v. Clinchfield Coal Co.*, BRB No. 13-0532 BLA, slip op. at 6 (May 19, 2014) (unpub.). The Board also affirmed the administrative law judge's finding that the evidence established that the miner's clinical pneumoconiosis did not contribute to, or hasten, his death. *Id.* at 7. However,

¹ Claimant is the surviving spouse of the miner, who died on April 26, 2005. Director's Exhibit 8.

² The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

because the administrative law judge failed to address whether employer established that no part of the miner's death was caused by his legal pneumoconiosis, the Board vacated the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption, and remanded the case for further consideration.

On remand, the administrative law judge found that employer established that no part of the miner's death was caused by legal pneumoconiosis. The administrative law judge, therefore, found that employer rebutted the Section 411(c)(4) presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In remanding this case, the Board noted that the administrative law judge found that the preponderance of the pathology evidence was positive for the presence of legal pneumoconiosis. Specifically, the Board noted that the administrative law judge found that "Dr. Caffrey's observation of some focal emphysema associated with coal dust macules support[ed] a finding of legal pneumoconiosis." *Beverly*, BRB No. 13-0532 BLA, slip op. at 7, quoting Decision and Order at 33. On remand, the administrative law judge considered the opinion of Dr. Caffrey, the only physician to diagnose the miner with focal emphysema.

Dr. Caffrey reviewed the miner's autopsy slides. In "Slide 1," Dr. Caffrey opined that there were "three lesions of simple . . . [coal workers' pneumoconiosis] consisting of anthracotic pigment with reticulin and focal emphysema." Director's Exhibit 31 at 2-3. Dr. Caffrey stated that although "coal dust can cause emphysema[,] [the] amount of coal dust in [the miner's] lungs is certainly mild in my opinion as evidenced by the autopsy slides showing only a paucity of lesions of simple [coal workers' pneumoconiosis]." *Id.* at 9.

The administrative law judge found that Dr. Caffrey's opinion established that the miner's mild coal workers' pneumoconiosis did not hasten or contribute to his death.

Decision and Order on Remand at 6-7. The Board, however, previously affirmed the administrative law judge's determination that the miner's clinical pneumoconiosis did not contribute to his death. *Beverly*, BRB No. 13-0532 BLA, slip op. at 7. Thus, this portion of the administrative law judge's decision does not address the issue of whether no part of the miner's death was caused by legal pneumoconiosis. The administrative law judge also found that Dr. Caffrey's opinion established that the miner's "mild, very rare, and minimal coal workers' pneumoconiosis, which included coal workers' pneumoconiosis related-*focal emphysema*, in [the miner's] lungs did not adversely affect his pulmonary function in any manner or hasten his death." Decision and Order on Remand at 7 (emphasis added). The administrative law judge, however, did not explain what portion of Dr. Caffrey's opinion supported the administrative law judge's finding that legal pneumoconiosis played no part in the miner's death. Consequently, the administrative law judge's decision does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We must therefore vacate the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption by establishing that the miner's legal pneumoconiosis, in the form of focal emphysema caused by coal mine dust exposure, played no part in his death. 20 C.F.R. §718.305(d)(2)(ii).

On remand, the administrative law judge is instructed to reconsider whether Dr. Caffrey's opinion is sufficient to establish that the miner's legal pneumoconiosis, in the form of focal emphysema caused by coal mine dust exposure, played no part in his death. 20 C.F.R. §718.305(d)(2)(ii). The administrative should explain the basis for his finding. *Wojtowicz*, 12 BLR at 1-165. Because Dr. Caffrey's opinion is the only opinion potentially supportive of a finding that the miner's focal emphysema played no part in his death, *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, BLR (4th Cir. 2015), if the administrative law judge determines that it does not satisfy employer's burden, claimant would be entitled to an award of benefits.

If, on remand, the administrative law judge determines that Dr. Caffrey's opinion establishes that the miner's focal emphysema played no part in his death, the administrative law judge must then address whether employer has proved that the miner's other pulmonary afflictions were not related to, or aggravated by, coal mine dust exposure. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-66-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (1980); 20 C.F.R. §718.201(b). In this case, physicians diagnosed the miner with centrilobular emphysema, chronic bronchitis, chronic obstructive pulmonary disease,

bronchopneumonia, and asthmatic bronchitis.³ To the extent that employer is unable to prove that those diseases were not legal pneumoconiosis, it would then be required to establish that no part of the miner's death was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii); *see also Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

³ In addition to diagnosing focal emphysema, Dr. Caffrey diagnosed centrilobular emphysema, chronic bronchitis, and bronchopneumonia. Director's Exhibit 31. Dr. Shamiyeh diagnosed chronic obstructive pulmonary disease (COPD). Director's Exhibits 8, 11. Dr. Bluemink diagnosed panacinar emphysema and bronchopneumonia. Director's Exhibit 11. Dr. Naeye diagnosed centrilobular emphysema. Director's Exhibit 10. Drs. Hippensteel and Castle diagnosed COPD/emphysema. Director's Exhibits 31, 32; Employer's Exhibits 1, 2. Dr. Castle also diagnosed asthmatic bronchitis. Employer's Exhibit 3.