

BRB No. 11-0848 BLA

NANCY HELTON)	
(Widow of WAYNE HELTON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
LEMARCO, INCORPORATED)	DATE ISSUED: 09/26/2012
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
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 on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2005-BLA-6087) of Administrative Law Judge Alice M. Craft, rendered on a survivor's claim¹

¹ Claimant is the widow of the miner, Wayne Helton, who died on June 17, 2004. Director's Exhibit 12.

filed on July 9, 2004, pursuant to 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 a second time. In a Decision and Order dated April 29, 2008, the administrative law judge credited the miner with thirteen and three-quarters years of coal mine employment. The administrative law judge found that employer was collaterally estopped from re-litigating whether the miner had clinical pneumoconiosis, as the existence of clinical pneumoconiosis was established in the miner's lifetime claim, based on a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1).² The administrative law judge further found that claimant established that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203, and that the miner's death was due to legal pneumoconiosis³ at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded survivor's benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in finding that the miner's death was due to legal pneumoconiosis at 20 C.F.R. §718.205(c), without first weighing the conflicting evidence of record on the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *N.H. [Helton] v. Lemarco, Inc.*, BRB No. 08-0623 BLA, slip op. at 4 (May 19, 2009) (unpub.). Therefore, the Board vacated the award of benefits and remanded the case for further consideration. *Id.* at 4-5.

On March 23, 2010, while this case was pending before the administrative law judge on remand, amendments to the Act, included in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, were enacted that changed the entitlement criteria for certain claims filed after January 1, 2005 that were pending on or after March 23, 2010. In pertinent part, the amendments revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing that the survivor of a miner who was eligible to receive benefits at the

² 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. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of 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. 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).

time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis.

In her Decision and Order Awarding Benefits on Remand (Decision and Order on Remand), issued on August 23, 2011, the administrative law judge noted that the miner was receiving benefits at the time of his death and concluded that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). The administrative law judge further found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that the miner's death was due to legal pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant was entitled to benefits under amended Section 932(l), as claimant filed her survivor's claim before January 1, 2005. Employer also argues that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and death due to pneumoconiosis at 20 C.F.R. §718.205(c), based on the medical opinion evidence. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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).

I. Derivative Entitlement

Initially, we agree with employer that the administrative law judge erred in finding that claimant was eligible for survivor's benefits based on amended Section 932(l). The Board has held that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the survivor's claim was filed. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012) (No. 11-1342); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Based on the July 9, 2004 filing date of this survivor's

⁴ Because the miner's coal mine employment was in Kentucky, 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 (1989) (en banc); Director's Exhibit 4.

claim, amended Section 932(l) is not applicable. Therefore, we vacate the administrative law judge's finding that claimant is entitled to survivor's benefits based on amended Section 932(l), and address the administrative law judge's alternative finding that claimant established that the miner's death was due to legal pneumoconiosis.

II. Merits of Entitlement

In order to establish entitlement to survivor's benefits, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In this survivor's claim, filed after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

A. Legal Pneumoconiosis

On the issue of the existence of legal pneumoconiosis, the administrative law judge noted that the miner's treatment records reflect that he was "consistently diagnosed with [chronic obstructive pulmonary disease (COPD)]." Decision and Order on Remand at 14. The administrative law judge observed that all of the physicians who rendered opinions in this case also believe that the miner suffered from COPD, but disagree as to the etiology of that condition. *Id.* at 14-16. The administrative law judge considered the opinions of Drs. Clarke, Eubank, Rosenberg and Vuskovich to be "documented and reasoned opinions." *Id.* The administrative law judge found that Drs. Clarke and Eubank diagnosed COPD due to coal dust exposure, but noted that they did not discuss the miner's smoking history. *Id.* at 15. The administrative law judge gave their opinions "some weight" on the issue of legal pneumoconiosis because they were "consistent with the premises underlying the regulations." *Id.* In contrast, she assigned the opinions of Drs. Rosenberg and Vuskovich, that the miner's COPD was due to smoking, "little weight" because their reasoning was "not consistent with the premises underlying the regulations" and because of specific flaws that the administrative law judge identified with their rationales. *Id.* at 15-16. Therefore, the administrative law judge found that claimant established that the miner suffered from legal pneumoconiosis, based on the opinions of Drs. Clarke and Eubank.

Employer asserts that the administrative law judge erred in relying on the preamble to the regulations when evaluating the credibility of the conflicting medical opinions, mischaracterized the opinions of Drs. Rosenberg and Vuskovich and incorrectly found that the opinions of Drs. Clarke and Eubank were sufficient to satisfy claimant's burden of proof at 20 C.F.R. §718.202(a)(4). These assertions of error are rejected as without merit.

Contrary to employer's arguments, the administrative law judge had discretion to consult the preamble to the regulations as an authoritative statement of medical principles accepted by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive respiratory or pulmonary impairments arising out of coal dust exposure. *See A&E Coal Co. v. Adams*, F.3d , No. 11-3926, 2012 WL 3932113 (6th Cir. Sept. 11, 2012); *see also Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, BLR (4th Cir. May 15, 2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Decision and Order on Remand at 13-14. Moreover, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams*, No. 11-3926, 2012 WL 3932113; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990). Thus, the administrative law judge properly consulted the preamble in weighing the conflicting medical opinions without giving employer specific notice of her intent to do so.

The administrative law judge noted that Dr. Rosenberg opined that the miner does not have legal pneumoconiosis based, in part, on his belief that coal mine dust exposure does not cause a clinically significant obstructive respiratory condition, "absent progressive massive fibrosis." Director's Exhibit 20; *see* Employer's Exhibits 1, 3; Decision and Order on Remand at 15. The administrative law judge permissibly found that Dr. Rosenberg's rationale for excluding coal dust exposure as a cause for the miner's COPD was at odds with the position of the DOL "that coal dust exposure may induce obstructive lung disease *even in the absence of* fibrosis or complicated pneumoconiosis." Decision and Order on Remand at 13-14 (emphasis added), *citing* 65 Fed. Reg. 79,938, 79,940, 79,943 (Dec. 20, 2000); *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We, therefore, affirm the administrative law judge's decision to assign "little weight" to Dr. Rosenberg's opinion pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order on Remand at 15; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

The administrative law judge found that while Dr. Vuskovich opined that the miner's COPD was due entirely to smoking, Dr. Vuskovich "offered no explanation" for

excluding coal dust exposure as at least a “*contributing* factor” in the miner’s COPD. Decision and Order on Remand at 15 (emphasis added); The administrative law judge reasonably assigned Dr. Vuskovich’s opinion less weight, noting that his opinion did not address the position of DOL that coal mine dust exposure is clearly associated with clinically significant airway obstruction, and the risk is additive with cigarette smoking. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Employer’s Exhibits 2, 4; Decision and Order on Remand at 14. The administrative law judge also noted that, while Dr. Vuskovich opined that the miner did not have cor pulmonale, his opinion was contrary to that of Dr. Rosenberg and “all of the [B]oard[-]certified cardiologists who treated the [m]iner and agreed that he did.” Decision and Order at 15. Thus, we affirm the administrative law judge’s decision to accord Dr. Vuskovich’s opinion “little weight on the issue of legal pneumoconiosis.” *Id.*; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 15; Employer’s Exhibits 2, 4.

We also reject employer’s argument that the administrative law judge erred in relying on Dr. Clarke’s opinion at 20 C.F.R. §718.202(a)(4) because, employer asserts, Dr. Clarke did not diagnose legal pneumoconiosis. Contrary to employer assertion, Dr. Clarke diagnosed a severe chronic obstructive airway disease based on claimant’s pulmonary function studies, and concluded that the most likely cause of claimant’s test results was the “breathing of irritants of coal mine employment.” Claimant’s Exhibit 5. The administrative law judge rationally found that Dr. Clarke’s description of claimant’s respiratory condition constitutes a diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-482-83 (6th Cir. 2007); *Cornett*, 227 F.3d at 575-76, 22 BLR at 2-120-21.

Finally, we reject employer’s contention that by crediting Dr. Clarke’s opinion, which employer asserts is not sufficiently explained, the administrative law judge gave claimant an improper presumption that his COPD was due to coal dust exposure and did not hold claimant to his burden of proof. The administrative law judge rationally found that Dr. Clarke’s opinion is documented and reasoned and entitled to “some weight” insofar as he “took histories, performed objective testing and examined the [c]laimant” and explained his conclusions in light of a “chest x-ray, pulmonary function test and the [m]iner’s symptomatology.” Decision and Order on Remand at 9, 15; *see Cornett*, 227 F.3d at 575-76, 22 BLR at 2-120-121; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge also observed that Dr. Clarke’s opinion is “consistent with the premises underlying the regulations that coal dust can cause obstructive disease even in the absence of clinical pneumoconiosis or smoking.” Decision and Order on Remand at 16. We also specifically reject employer’s contention that the administrative law judge’s credibility finding does not satisfy the

Administrative Procedure Act.⁵ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thus, we affirm the administrative law judge's reliance on Dr. Clarke's opinion to find that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁶ See *Adams*, No. 11-3926, 2012 WL 3932113; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order on Remand at 16.

B. Death Due to Pneumoconiosis

Pursuant to 20 C.F.R. §718.205(c), the administrative law judge noted that claimant relied on the opinion of the miner's treating physician, Dr. Eubank, that coal dust exposure contributed to the miner's COPD and that COPD directly caused the miner's death. Decision and Order at 17. In contrast, the administrative law judge noted the opinions of Drs. Rosenberg and Vuskovich, that the miner's death was due to conditions unrelated to coal dust exposure. *Id.* at 17-18. The administrative law judge assigned controlling weight to Dr. Eubank's opinion because she found that it was supported by the miner's treatment records, which show that he had a disabling respiratory impairment during his lifetime. The administrative law judge also noted that the miner's death certificate listed the cause of the miner's death as "congestive heart failure due to cor pulmonale as a consequence of [COPD]."⁷ Decision and Order on

⁵ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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)(2).

⁶ Employer argues that the administrative law judge erred in crediting Dr. Eubank's diagnosis of legal pneumoconiosis because it is not explained. The administrative law judge, however, correctly noted that Dr. Eubank treated the miner for three years prior to his death for chronic obstructive pulmonary disease (COPD) and cor pulmonale. We see no error in the administrative law judge's decision to accord some weight to Dr. Eubank's diagnosis of legal pneumoconiosis as it corroborates the opinion of Dr. Clarke, which is reasoned and documented. See *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order on Remand at 15-16.

⁷ There is no merit to employer's argument that Dr. Eubank's opinion, as a matter of law, is insufficient to meet claimant's burden of proof at 20 C.F.R. §718.205(c), since Dr. Eubank explained that COPD due to coal dust exposure resulted in cor pulmonale, which directly caused the miner's death from congestive heart failure. See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Remand at 17. The administrative law judge was not persuaded by Dr. Rosenberg's explanation that the miner's death was caused entirely by alcohol-related end stage cardiomyopathy, with no contribution whatsoever from coal dust exposure. She also rejected the opinion of Dr. Vuskovich that the miner's death was unrelated to coal dust exposure since he denied that the miner had cor pulmonale, contrary to the weight of evidence. *Id.*

Contrary to employer arguments on appeal, the administrative law judge acted within her discretion in rendering her credibility determinations and employer's assertions of error are a request that the Board reweigh the evidence, which we are not empowered to do. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge rationally explained how the weight of the treatment records better supports Dr. Eubank's opinion and stated:

Drs. Qazi, Rahman, and Saleh, all Board-certified physicians specializing in Cardiovascular Disease, each opined that the [m]iner suffered from congestive heart failure and cor pulmonale. Dr. Qazi's catherization of the [m]iner *confirmed* his original diagnosis of congestive heart failure and cor pulmonale.

Decision and Order on Remand at 17 (emphasis added); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. The administrative law judge permissibly concluded that, since Dr. Vuskovich specifically denied that the miner suffered from cor pulmonale near the end of his life, his explanation for the cause of the miner's death was less credible. Decision and Order on Remand at 17; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Furthermore, we affirm the administrative law judge's decision to assign little weight to Dr. Rosenberg's opinion regarding the cause of the miner's death since he was not of the opinion that the miner had legal pneumoconiosis, contrary to the administrative law judge's findings in this case. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995). Thus, we affirm the administrative law judge's reliance on Dr. Eubank's opinion, as supported by the treatment records, to find that claimant satisfied her burden to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant is entitled to survivor's benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge