

BRB No. 13-0091 BLA

GERALDINE CAIN)	
(Widow of HERBERT CAIN, JR.))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 09/20/2013
)	
G.A.J.K. COAL CORPORATION)	
)	
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 on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

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

Jonathan 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (08-BLA-5318) of Administrative Law Judge John P. Sellers, III, awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case, involving a survivor's claim¹ filed on January 24, 2007, is before the Board for the second time.

In the initial decision, Administrative Law Judge Thomas F. Phalen, Jr. credited the miner with seventeen years of coal mine employment.² Judge Phalen found that claimant established that the miner had legal pneumoconiosis,³ in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4), and established that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, Judge Phalen awarded benefits.

After reviewing the case on employer's appeal, the Board vacated Judge Phalen's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), because Judge Phalen failed to explain his analysis of one medical opinion, and mischaracterized two other opinions. *Cain v. G.A.J.K. Coal Corp.*, BRB No. 10-0276 BLA, slip op. at 4-8 (Feb. 8, 2011)(unpub.). Because the Board vacated Judge Phalen's finding of the existence of legal pneumoconiosis, it also vacated his finding that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Cain*, slip op. at 8-9. The Board therefore remanded the case for Judge Phalen to reconsider the issues of the existence of legal pneumoconiosis and whether the miner's death was due to pneumoconiosis. *Cain*, slip op. at 8-10. Additionally, the Board instructed Judge Phalen, on remand, to consider whether claimant was entitled to

¹ Claimant is the widow of the miner, who died on December 14, 2006. Director's Exhibit 9.

² The record indicates that the miner's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law 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).

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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

the 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).⁴

On remand, due to the unavailability of Judge Phalen, the case was reassigned, without objection, to Administrative Law Judge John P. Sellers, III (the administrative law judge). Considering the claim pursuant to Section 411(c)(4), the administrative law judge found that claimant invoked the presumption of death due to pneumoconiosis, and determined that employer did not rebut the presumption. 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 when he found that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in referring to the preamble to the regulations when evaluating the physicians' opinions. Employer filed replies to both claimant's and Director's response briefs, reiterating its contentions.⁵

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. 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).

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by

⁴ Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

⁵ The parties stipulated to seventeen years of coal mine employment. Employer does not challenge the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4). This finding is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

disproving the existence of pneumoconiosis, or by proving that the miner's death did not arise from his coal mine employment. 30 U.S.C. §921(c)(4); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305). The administrative law judge found that employer did not establish rebuttal by either method. Decision and Order on Remand at 29-39.

After finding that employer disproved the existence of clinical pneumoconiosis,⁶ the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis. In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Jarboe and Rosenberg.⁷ Dr. Jarboe opined that the miner's airflow obstruction was caused by a combination of asthma and smoking, and not the inhalation of coal mine dust. Director's Exhibit 21 at 9. Dr. Rosenberg opined that the miner had smoking-induced COPD. Employer's Exhibit 3 at 9; Employer's Exhibit 5 at 4.

The administrative law judge indicated that he "simply [did] not find persuasive the reasons Dr. Jarboe gave for ruling out coal [mine] dust exposure as a cause or contributing cause of the miner's obstructive impairment." Decision and Order on Remand at 33. The administrative law judge found that "Dr. Rosenberg's opinion [was not] convincing either," "for much the same reasons as [he] did not find Dr. Jarboe's opinion persuasive." *Id.* at 35. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 37.

Employer contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Jarboe and Rosenberg did not disprove the existence of legal pneumoconiosis. Employer's Brief at 17-29. We disagree. As set forth below, the administrative law judge permissibly found that the reasons given by Drs. Jarboe and Rosenberg for excluding coal mine dust exposure as a cause of the miner's COPD were not persuasive. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

⁶ "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁷ The administrative law judge also considered, and discounted, the opinions of Drs. Koura and Chaney, that the miner suffered from legal pneumoconiosis. Decision and Order on Remand at 35-36; Claimant's Exhibit 1 at 7; Claimant's Exhibit 2 at 7-8.

Initially, we reject employer's contention that the administrative law judge applied an incorrect rebuttal standard. Contrary to employer's argument, the administrative law judge correctly stated that employer bore the burden to establish that the miner did not have pneumoconiosis. The United States Court of Appeals for the Sixth Circuit has held that "rebuttal [of the Section 411(c)(4) presumption] requires an affirmative showing . . . that the [miner did] *not* suffer from pneumoconiosis," and that an employer bears the burden to "affirmatively prove[] the absence of pneumoconiosis. . . ." *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 n.5, 25 BLR 2-1, 2-9, 2-12 n.5 (6th Cir. 2011). Therefore, we reject employer's contention that the administrative law judge erred when he required employer's physicians to provide persuasive opinions establishing that the miner's seventeen years of coal mine dust exposure did not contribute to his obstructive impairment. *See Id.*; 20 C.F.R. §718.201(a)(2); Decision and Order on Remand at 36-37.

We also reject employer's assertion that the administrative law judge erred in referring to the preamble to the amended regulations, when weighing the medical opinions relevant to Section 411(c)(4) rebuttal. The preamble to the amended regulations sets forth how the Department of Labor (DOL) has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may evaluate expert opinions, therefore, in conjunction with DOL's discussion of sound medical science set forth in the preamble to the amended regulations. *A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-151 (6th Cir. 2012). Consequently, the administrative law judge acted within his discretion in consulting the preamble as a statement of medical principles accepted by DOL, in assessing the credibility of the medical experts' opinions in this case. *See Adams*, 694 F.3d at 802, 25 BLR at 2-211; *Banks*, 690 F.3d at 489, 25 BLR at 2-151; *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313, 25 BLR 2-115, 2-125 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

In assessing the credibility of the physicians' opinions, the administrative law judge accurately noted that Dr. Jarboe eliminated coal mine dust exposure as a source of the miner's COPD, in part, because he found a disproportionate decrease in the miner's FEV1, compared to his FVC value, characteristics that the physician explained are indicative of cigarette smoke-induced lung disease, but not of lung disease caused by coal mine dust exposure. Director's Exhibit 21 at 10; Employer's Exhibit 1 at 7-8; Employer's Exhibit 4 at 5-6. Similarly, Dr. Rosenberg eliminated coal mine dust exposure as a source of the miner's COPD, in part, because he found a marked decrease in FEV1 and a severe reduction in FEV1/FVC, characteristics that the physician explained are indicative of cigarette smoke-induced lung disease, not of a disease caused

by coal mine dust. Employer's Exhibit 3 at 7-9; Employer's Exhibit 5 at 3. The administrative law judge permissibly discounted the opinions of Drs. Jarboe and Rosenberg, noting that medical science endorsed by DOL recognizes that coal mine dust can cause clinically significant COPD, as shown by a reduction in the FEV1/FVC ratio. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; Decision and Order on Remand at 29-30, 34; *see also* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

In addition, the administrative law judge noted that both Drs. Jarboe and Rosenberg relied, in part, on the absence of x-ray, CT scan, or autopsy evidence of coal dust deposits in the miner's lungs to support their conclusion that only the miner's cigarette smoking, and not his coal mine dust exposure, caused his COPD. Decision and Order on Remand at 31-32, 34; Director's Exhibit 21 at 10; Employer's Exhibit 1 at 9-10; Employer's Exhibit 3 at 9; Employer's Exhibit 4 at 6; Employer's Exhibit 5 at 4. The administrative law judge permissibly declined to credit the reasoning by Drs. Jarboe and Rosenberg, finding it to be contrary to DOL's recognition that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of evidence of clinical pneumoconiosis.⁸ *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Banks*, 690 F.3d at 487, 489, 25 BLR at 2-150, 2-152-53; Decision and Order on Remand at 31-32, 34, *citing* 65 Fed. Reg. at 79,971.

Additionally, the administrative law judge noted that Drs. Jarboe and Rosenberg relied, in part, on the partial reversibility of the miner's impairment after bronchodilator administration, to exclude coal mine dust exposure as a cause of the miner's COPD. Decision and Order on Remand at 30-31, 35. The administrative law judge found, as was within his discretion, that Drs. Jarboe and Rosenberg did not adequately explain why the irreversible portion of the miner's pulmonary impairment was unrelated to coal mine dust exposure, or why the miner's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of the miner's COPD. *See* 20 C.F.R. §718.201(a)(2); *Banks*, 690 F.3d at 489, 25 BLR at 2-152; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

⁸ The premises underlying the regulations permit a finding of legal pneumoconiosis, notwithstanding the absence of radiographic evidence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000)(indicating that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]").

Therefore, contrary to employer's contentions, the administrative law judge provided valid reasons for discounting the opinions of Drs. Jarboe and Rosenberg, that the miner's COPD was unrelated to his years of coal mine dust exposure.⁹ Substantial evidence supports the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. Thus, we affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

In considering whether employer established that the miner's death did not arise out of coal mine employment, the administrative law judge again considered the opinions of Drs. Jarboe and Rosenberg. Dr. Jarboe opined that the miner "died of pneumonia associated with sepsis and shock resulting in severe metabolic acidosis." Director's Exhibit 21 at 11. In so opining, Dr. Jarboe acknowledged that "individuals with COPD can have an increased incidence of lower respiratory tract infections and pneumonia," but Dr. Jarboe attributed the miner's COPD to smoking and asthma, not coal mine dust exposure. Employer's Exhibit 1 at 12. Dr. Rosenberg opined that the miner died due to pneumonia, "superimposed on" his underlying COPD, which was unrelated to coal mine dust exposure. Employer's Exhibit 3 at 9; Employer's Exhibit 5 at 4. The administrative law judge found that, for the same reasons he gave when declining to credit the opinions of Drs. Jarboe and Rosenberg, that the miner's COPD did not constitute legal pneumoconiosis, their opinions did not establish that legal pneumoconiosis played no role in the miner's death. Decision and Order on Remand at 39. Thus, the administrative law judge found that employer did not rebut the Section 411(c)(4) presumption by proving that the miner's death did not arise out of coal mine employment.

Employer argues that the administrative law judge erred in requiring Drs. Jarboe and Rosenberg to rule out the possibility that the miner's death was due to pneumoconiosis. Employer's Brief at 29-30. Employer's argument lacks merit. The administrative law judge found that Drs. Jarboe and Rosenberg concluded that the miner died of pneumonia that was either related to, or was more likely to occur because of, his COPD. Decision and Order on Remand at 38. These physicians, however, did not believe that the miner's COPD was related to his coal mine dust exposure, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. The administrative law judge, therefore, permissibly discounted their opinions that the miner's death was not related to pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other*

⁹ Thus, we need not address employer's other arguments regarding the weight that the administrative law judge accorded Dr. Jarboe's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

grounds, Skukan v. Consolidated Coal Co., 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 825-26, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *V.M. [Matney] v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008). Consequently, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that the miner's death did not arise out of coal mine employment. *See Copley*, 25 BLR at 1-89.

Because we affirm the administrative law judge's findings that employer did not disprove the existence of pneumoconiosis, or establish that the miner's death did not arise out of coal mine employment, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. Therefore, we affirm the award of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge