



BRB Nos. 16-0640 BLA
and 16-0640 BLA-A

REBECCA COBURN (Executrix of the)
Estate of ALMA M. RICHARDS, Deceased)
Widow of EMORY A. RICHARDS))

Claimant-Respondent/)
Cross-Petitioner)

v.)

DATE ISSUED: 09/18/2017

UNITED STATES STEEL MINING)
COMPANY, LLC)

Employer-Petitioner/)
Cross-Respondent)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of Drew A. Swank,
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Howard G. Salisbury (Kay, Casto & Chaney PLLC), Charleston, West
Virginia, for employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (2014-BLA-5571) of Administrative Law Judge Drew A. Swank awarding 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 involves a survivor's claim filed on August 21, 2013.¹

The administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),² the administrative law judge found that claimant established that the miner had at least fifteen years of qualifying coal mine employment.³ The administrative law judge also found that the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also found 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 crediting the miner with at least fifteen years of qualifying coal mine employment. Employer also challenges the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer therefore contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4)

¹ While the survivor's claim was pending before the Office of Administrative Law Judges, the miner's widow died on October 3, 2015. Hearing Transcript at 15. Claimant, who is the executrix of the estate of the miner's widow, is pursuing the survivor's claim on behalf of the widow's estate. *Id.* at 4.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

³ The miner's coal mine employment was in West 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, 1-202 (1989) (en banc).

presumption. Employer further argues that the administrative law judge erred in finding that it failed to rebut the presumption. Claimant responds in support of the award of benefits. In her cross-appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis. Employer responds in support of the administrative law judge's finding that the evidence did not establish the existence of complicated pneumoconiosis. The Director, Office of Workers' Programs, has not filed a response brief.

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).

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in crediting the miner with at least fifteen years of qualifying coal mine employment. Employer also contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer, therefore, argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

Qualifying Coal Mine Employment

To invoke the presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

In determining the length of claimant's coal mine employment, the administrative law judge noted that the parties stipulated that the miner had at least twenty years of coal mine employment. Decision and Order at 4. The administrative law judge subsequently found, without further analysis, that claimant "had [fifteen] or more years of qualifying coal mine employment," and that claimant, therefore, invoked the Section 411(c)(4) presumption. *Id.* at 13. Notably, the administrative law judge did not make any specific findings regarding whether the miner's work as a truck driver occurred in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(2). Consequently, we must vacate the administrative law judge's determination that claimant established the requisite fifteen years of

qualifying coal mine employment for invocation of the Section 411(c)(4) presumption. On remand, the administrative law judge is instructed to make specific findings regarding whether the miner was regularly exposed to coal-mine dust during his work as a truck driver. 20 C.F.R. §718.305(b)(2).

Total Disability

Employer next argues that the administrative law judge erred in finding that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge initially found that because neither party submitted any pulmonary function studies or blood gas studies into evidence, claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(ii). Decision and Order at 14. Moreover, because there is no evidence of cor pulmonale with right-sided congestive heart failure in the record, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

In considering whether the medical opinion evidence established that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the miner's hospitalization records,⁴ the miner's death certificate,⁵ and the medical reports of Drs. Oesterling and Caffrey.⁶ The administrative law judge summarized this evidence as follows:

⁴ The miner was hospitalized from February 23, 2013 until his death on March 15, 2013. Director's Exhibit 12. The discharge summary from this hospitalization indicates that the miner suffered from numerous diseases, including acute kidney failure, obstructive chronic bronchitis, diabetes, chronic kidney disease, congestive heart failure, and atherosclerotic heart disease. *Id.* The discharge summary further indicates that the miner was dependent on supplemental oxygen, and died in part due to "recurrent episodes of exacerbation of his chronic lung disease." *Id.*

⁵ Dr. Harris completed the miner's death certificate. Dr. Harris attributed the miner's death to "end organ failure" due to "acute or chronic cardio-renal syndrome" and "severe heart and lung disease." Director's Exhibit 10. Dr. Harris also listed "end[-]stage lung disease with coal workers' pneumoconiosis" as a "significant condition contributing to death." *Id.* The death certificate indicates the miner had been suffering from severe heart and lung disease for one year prior to his death. *Id.*

⁶ Based on his review of the miner's autopsy slides, Dr. Oesterling diagnosed moderate chronic obstructive pulmonary disease (COPD) and sarcoidosis, each of which he opined "could have produced some alterations in pulmonary function." Employer's Exhibit 1. Dr. Oesterling also indicated that the miner's "heart failure with marked

The miner's death certificate lists "end organ failure" due to "acute chronic cardio-renal syndrome" and "severe heart and lung disease" as the cause of death. Contributing to the miner's death was "end stage lung disease with coal workers' pneumoconiosis." Medical records reference the deceased miner having "obstructive chronic bronchitis," "Chronic Obstructive Pulmonary Disease (COPD)," and "chronic lung disease." Employer's expert Dr. Oesterling opined that the deceased miner suffered "marked passive pulmonary congestion which contributed to his death." Employer's other expert, Dr. Caffrey, opined that the deceased miner had a "moderate degree of centrilobular emphysema" and "significant heart and lung disease."

Decision and Order at 14.

Based on the "totality of the evidence," the administrative law judge found that claimant established that the miner was totally disabled by a pulmonary or respiratory impairment prior to his death. *Id.* The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. *Id.*

Employer argues that the administrative law judge's finding of total disability is based entirely on "his own speculation." Employer's Brief at 16. Employer contends that the administrative law judge's finding of total disability should be reversed because the evidence of record is insufficient to support such a determination. *Id.* Although employer accurately notes that no physician explicitly opined that the miner was totally disabled from a pulmonary standpoint, a physician need not phrase his or her opinion in terms of "total disability" in order to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board [Raines]*, 758 F.2d 1532, 1534 (11th Cir. 1985) ("[i]t is not essential for a physician to state specifically that an individual is totally impaired . . ."). Diagnoses, statements and notes set forth in treatment records or other documents regarding limits on a miner's activities due to a pulmonary condition may be relevant to a total disability determination even if the records do not use the phrase "totally disabled" or specifically address the miner's ability to perform his prior coal mine job. A medical opinion may

passive pulmonary congestion" contributed to his death. *Id.* Dr. Caffrey reviewed the miner's autopsy slides and other medical evidence. Dr. Caffrey diagnosed "a moderate degree of centrilobular emphysema." Employer's Exhibit 2. Dr. Caffrey noted that the miner also "had significant heart and lung disease." *Id.*

support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that a miner is or was unable to do his last coal mine job.⁷ See *Poole*, 897 F.2d at 894, 13 BLR at 2-356; *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142, 19 BLR 2-257, 2-263 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988).

In this case, the record contains evidence that, while far from conclusive, is relevant to the issue of total disability. The administrative law judge's analysis of this evidence is, however, incomplete. Specifically, the administrative law judge erred in failing to address whether the evidence upon which he relied was credible, prior to giving those descriptions determinative weight in finding that the miner was totally disabled.⁸ Director's Exhibit 16; see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Moreover, the administrative law judge failed to explain how the credited evidence supports an inference that the miner suffered from a totally disabling pulmonary impairment. Accordingly, the administrative law judge's analysis does not comport with the requirements of the Administrative Procedure Act (APA), which provide 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We must therefore vacate the administrative law judge's finding that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and remand the case for further consideration.

In light of the above-referenced errors, we vacate the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C.

⁷ It is claimant's burden to establish the exertional requirements of the miner's usual coal mine employment in order to provide the administrative law judge with a basis of comparison in which to evaluate a medical assessment of disability, and reach a conclusion regarding total disability. See *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc); *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

⁸ The administrative law judge also failed to reconcile his crediting of the miner's death certificate regarding the extent of the miner's pulmonary impairment with his subsequent discrediting of this evidence. Specifically, in addressing the cause of the miner's death, the administrative law judge discredited the miner's death certificate, noting that Dr. Harris provided no explanations for his conclusions. Decision and Order at 14.

§921(c)(4). On remand, should the administrative law judge determine that the miner that the miner had fifteen years of qualifying coal mine employment and that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant will have established invocation of the Section 411(c)(4) presumption.

Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. Because the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner did not have legal and clinical pneumoconiosis,⁹ 20 C.F.R. §718.305(d)(2)(i), or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

In addressing whether employer established rebuttal of the Section 411(c)(4) presumption, the administrative law judge stated:

Based upon a review of the expert medical opinions, the undersigned finds that Employer has failed to rebut the legal presumption that coal workers' pneumoconiosis caused, contributed to, or hastened the miner's death contained at 20 C.F.R. §718.305. Assume, *arguendo*, that Drs. Oesterling and Caffrey are correct and that the miner's coal workers' pneumoconiosis was not severe enough to cause, contribute, or hasten the miner's death. Both physicians, however, also opine that the deceased miner has centrilobular emphysema (and in the case of Dr. Oesterling, additionally COPD). While both physicians attribute centrilobular emphysema to the deceased miner's smoking, the Preamble to the [revised] Regulations directly links, rightly or wrongly, emphysema (as a component of COPD) to coal mine dust exposure.

⁹ "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). "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." 20 C.F.R. §718.201(a)(1).

Doctor Oesterling opined that the miner's emphysema and COPD "could have produced some alteration in [his] respiratory function." Doctor Caffrey failed to opine as to the effect [that] the miner's emphysema had on his respiratory function. Neither of these physicians' opinions therefore rebuts the presumption that coal mine dust exposure – resulting in emphysema and/or COPD – caused, contributed to, or hastened the miner's death.

Decision and Order at 16 (Exhibit citations omitted).

In addressing the evidence, the administrative law judge erroneously concluded that the miner's COPD must be attributable to coal-mine dust inhalation and constitute legal pneumoconiosis. Contrary to the administrative law judge's conclusion, whether a particular miner's COPD or emphysema arose out of dust exposure in coal mine employment must be determined on a case-by-case basis, in light of the administrative law judge's consideration of the evidence of record. *See* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861, 23 BLR 2-124, 2-159 (D.C. Cir. 2002); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). Because the issue is relevant to employer's ability to establish that "no part of the miner's death was caused by pneumoconiosis," employer must be afforded an opportunity to establish that the miner did not suffer from legal pneumoconiosis.¹⁰

Further, the administrative law judge applied an incorrect standard by addressing whether coal-mine dust exposure caused the miner's death. Pursuant to 20 C.F.R. §718.305(d)(2)(ii), the standard to be applied with respect to death causation is whether employer established that "no part of the miner's death *was caused by pneumoconiosis* as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii) (emphasis added). Consequently, we vacate the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. On remand, should the administrative law judge find that claimant has invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, the administrative law judge must reconsider whether employer has rebutted the presumption utilizing the correct rebuttal standard.

¹⁰ The administrative law judge found that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 11. As a result, employer cannot rebut the establish Section 411(c)(4) presumption by establishing that the miner did not suffer from pneumoconiosis.

Complicated Pneumoconiosis

On cross-appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner had complicated pneumoconiosis. Claimant therefore argues that the administrative law judge erred in finding that claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).¹¹ Claimant specifically argues that the administrative law judge erred in finding that the autopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

Dr. Barreta, the autopsy prosector, diagnosed simple pneumoconiosis, but not complicated pneumoconiosis. Director's Exhibit 11. Three Board-certified pathologists, Drs. Kahn, Oesterling, and Caffrey, reviewed the miner's autopsy lung tissue slides. Although Dr. Kahn diagnosed complicated pneumoconiosis, Claimant's Exhibits 1, 2, Drs. Oesterling and Caffrey opined that the miner did not suffer from the disease. Employer's Exhibits 1, 2, 4, 5.

In weighing the conflicting autopsy evidence, the administrative law judge noted that Dr. Kahn diagnosed complicated pneumoconiosis, but indicated that "others might not measure the coal workers' pneumoconiosis nodules the same as he did." Decision and Order at 11. After finding that the opinions of Drs. Oesterling and Caffrey were "the most documented and persuasive," the administrative law judge found that the "miner had *simple* clinical coal workers' pneumoconiosis." *Id.* (emphasis added). Although the administrative law judge did not make an explicit finding as to whether the autopsy evidence established the existence of complicated pneumoconiosis, he subsequently noted that the claimant could not invoke the Section 718.304 presumption because "there is no evidence that the miner had complicated pneumoconiosis." *Id.* at 12.

The administrative law judge's statement that there is no evidence of complicated pneumoconiosis conflicts with his acknowledgment that Dr. Kahn diagnosed the disease. Moreover, to the extent that the administrative law judge determined that the opinions of

¹¹ Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

Drs. Oesterling and Caffrey were more documented and persuasive than that of Dr. Kahn on the issue of the existence of complicated pneumoconiosis, he did not provide a basis for his conclusion. Consequently, the administrative law judge's analysis of the autopsy evidence does not comport with the requirements of the Administrative Procedure Act (APA), which provide 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We, therefore, instruct the administrative law judge, on remand, to reconsider whether the autopsy evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

In summary, if the administrative law judge finds, on remand, that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), or that claimant has not established fifteen years of qualifying coal mine employment, claimant cannot invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. However, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), as well as fifteen years of qualifying coal mine employment, claimant will have invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. In that case, the administrative law judge must reconsider whether employer has established rebuttal of the presumption in accordance with the standards set forth at 20 C.F.R. §718.305(d)(2)(i),(ii). If the administrative law judge finds that claimant cannot invoke the Section 411(c)(4) presumption, or that employer has rebutted the Section 411(c)(4) presumption, the administrative law judge must reconsider whether claimant is entitled to invocation of the irrebuttable Section 411(c)(3) presumption.¹² 20 C.F.R. §718.304.

¹² The administrative law judge found that, without the benefit of the Section 411(c)(3) and Section 411(c)(4) presumptions, claimant could not establish that the miner's death was due to pneumoconiosis. Decision and Order at 16. Because this finding is not challenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, if the administrative law judge, on remand, finds that claimant cannot establish entitlement pursuant to the Section 411(c)(3) or Section 411(c)(4) presumptions, he must deny benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, 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