**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0236 BLA

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| GARNETTE R. WOODS<br>(Widow of SCOTT A. WOODS) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| CLINCHFIELD COAL COMPANY | ) | |
| | ) | DATE ISSUED: 04/19/2021 |
| 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 - Denying Benefits of Francine L. Applewhite, Administrative Law Judge, Department of Labor.

Garnette R. Woods, Dante, Virginia.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel,[2] Administrative Law Judge Francine L. Applewhite's Decision and Order - Denying Benefits (2014-BLA-05823) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on October 22, 2013.

After crediting the Miner with more than fifteen years of underground coal mine employment, the administrative law judge found he had a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2018). She found Employer rebutted the presumption, however, by establishing the Miner did not have clinical or legal pneumoconiosis. Thus, she denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds that the administrative law judge erred in finding the Miner had at least fifteen years of underground coal mine employment but argues the error was harmless because she properly found the Section 411(c)(4) presumption rebutted.[4] The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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[1] Claimant is the surviving spouse of the Miner, who died on July 17, 2013. Director's Exhibit 10.

[2] On Claimant's behalf, Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Benefits Review Board review the administrative law judge's decision, but Ms. Napier is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act also provides that a survivor of a miner determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018). Claimant cannot benefit from Section 422(*l*), however, as the Miner's lifetime claims for benefits were denied. Director's Exhibit 1.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the Miner was totally disabled. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Response Brief at 3.

In an appeal a claimant files without the assistance of counsel, the Benefits Review Board considers whether substantial evidence supports the Decision and Order below. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

We need not spend a significant amount of deliberation considering Employer's one-sentence statement that the administrative law judge erred in finding Claimant invoked the presumption. While Employer contends the administrative law judge "improperly calculated the length of the [M]iner's coal mine employment," it provides no support for its assertion. Employer's Response Brief at 3. As the Board must limit its review to contentions of error the parties specifically raise, we affirm the administrative law judge's finding that the Miner had over fifteen years of underground coal mine employment and therefore Claimant invoked the Section 411(c)(4) presumption.[6] *See* 20 C.F.R. §§802.211,

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 6.

[6] The administrative law judge found Claimant could not invoke the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Substantial evidence supports this finding. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). The administrative law judge noted certain treatment records contained diagnoses of progressive massive fibrosis. Decision and Order at 7, 18; Claimant's Exhibits 6, 7. The administrative law judge accurately found, however, that the treatment records included no basis for the diagnosis, and later treatment records provided no diagnoses of progressive massive fibrosis; therefore, she found the record did not establish the presence of complicated pneumoconiosis. Decision and Order at 7, 18.

802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish the Miner had neither legal[7] nor clinical pneumoconiosis,[8] or "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found Employer rebutted the presumption by establishing the Miner did not have clinical or legal pneumoconiosis. Decision and Order at 19.

**Clinical Pneumoconiosis**

To disprove clinical pneumoconiosis, Employer must establish the Miner did not have any of the "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). The administrative law judge initially found Employer did not submit any x-ray interpretations and thus could not rebut the presumption with x-ray evidence. Decision and Order at 15; *see* 20 C.F.R. §718.202(a)(1). She turned next to the biopsy evidence, which she found did not disprove

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Because the record contains no other evidence of progressive massive fibrosis or complicated pneumoconiosis, we affirm the administrative law judge's finding that the treatment record notations of progressive massive fibrosis do not establish complicated pneumoconiosis. 20 C.F.R. §718.304.

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

[8] "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).

clinical pneumoconiosis because the biopsy sample did not include lung tissue. Decision and Order at 15; Employer's Exhibits 6, 22; *see* 20 C.F.R. §§718.201(a)(1), 718.202(a)(2).

The record also contains the medical opinions of Drs. Castle and Rosenberg, who provided negative readings of computed tomography (CT) scans and agreed the Miner did not have clinical pneumoconiosis. Employer's Exhibits 20-21. Both physicians also considered the Miner's treatment records, which they indicated contained interpretations of x-rays and CT scans that detected bullous emphysema but not clinical pneumoconiosis. Employer's Exhibits 20-23. The administrative law judge found the "CT evidence of record supportive of the findings of Drs. Castle and Rosenberg that the evidence of record does not establish the presence of pneumoconiosis." Decision and Order at 17-18.

Finally, the administrative law judge found the treatment records support Drs. Castle's and Rosenberg's opinions that the Miner did not have clinical pneumoconiosis. *Id.* at 19. She indicated that while there were diagnoses of "black lung" from Dr. Robinette, he pointed to no x-ray reports or CT scans to support those diagnoses. Decision and Order at 7, 18. She therefore found Drs. Castle's and Rosenberg's medical opinions well-reasoned and rebutted the presence of clinical pneumoconiosis. Decision and Order at 16. Weighing the evidence together, the administrative law judge concluded "[t]he record does not contain evidence of clinical pneumoconiosis," and the medical reports "are not contradicted by the other evidence of record . . . ." Decision and Order at 19. Thus, she found Employer rebutted the presence of clinical pneumoconiosis. *Id.*

Contrary to the administrative law judge's statement that the record contains no evidence of clinical pneumoconiosis, Claimant submitted, as "other medical evidence," an interpretation of a digital x-ray dated December 22, 2006, by Dr. DePonte, a Board-certified radiologist and B reader. Claimant's Exhibit 5; 20 C.F.R. §718.107. Dr. DePonte read the digital x-ray as positive for coal workers' pneumoconiosis, with a profusion of "1/2." Claimant's Exhibit 5. Claimant's Exhibit 5 was admitted into evidence at the hearing. Hearing Transcript at 6. The administrative law judge therefore failed to consider all the relevant evidence, as the Act requires. 30 U.S.C. §923(b).

Thus, we vacate the administrative law judge's finding that Employer rebutted clinical pneumoconiosis and remand this case to the administrative law judge to consider all relevant evidence and weigh each category of evidence together to determine if Employer affirmatively disproved clinical pneumoconiosis.[9] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09 (4th Cir. 2000).

[9] The administrative law judge noted "other medical evidence" in the form of CT scan readings by Drs. Castle and Rosenberg, then provided a list of CT scan and x-ray

**Legal Pneumoconiosis**

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co*., 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge considered the medical opinions of Drs. Castle and Rosenberg and the Miner's treatment records. Drs. Castle and Rosenberg opined the Miner did not have legal pneumoconiosis but had bullous panlobular emphysema, a form of chronic obstructive pulmonary disease (COPD) they stated was caused by smoking, not coal dust exposure.[10] Employer's Exhibits 20 at 18; 21 at 4-7; 22 at 29; 23 at 12, 15. They explained that bullous emphysema is most commonly attributed to cigarette smoking and there is no medical literature attributing bullous emphysema to coal mine dust. Employer's Exhibits 22 at 11-12; 23 at 10-13. They indicated coal mine dust can cause emphysema in certain circumstances, but it causes a different type of emphysema than the Miner had. Employer's Exhibits 20; 21 at 4, 6; 22 at 11-12, 16-17; 23 at 12-13.

The administrative law judge found Drs. Castle's and Rosenberg's opinions that the Miner had bullous emphysema well-supported by the treatment notes, treatment x-rays, and CT scans demonstrating this condition.[11] Decision and Order at 17. She further found both physicians stated that coal mine dust exposure does not cause bullous emphysema and no evidence contradicted their opinions or explanations regarding the medical studies supporting their assertions. *Id.* Thus, to the extent Drs. Castle and Rosenberg "[relied] on

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reports contained within the treatment records. Decision and Order at 17. Two of the CT scans listed as contained within the treatment records, however, were CT scan readings by Dr. Fino that Employer submitted as "other medical evidence." Employer's Exhibits 1, 12. Employer argues the negative CT scan readings outweigh Dr. DePonte's positive reading of the digital x-ray. Employer's Response Brief at 4. The administrative law judge, however, did not make this finding and the Board is not empowered to weigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[10] The administrative law judge found the Miner had a forty-year history of "heavy" smoking. Decision and Order at 5.

[11] The administrative law judge noted the Miner's treatment records contained diagnoses of COPD and emphysema, but provided no discussion of the cause of these diseases. Decision and Order at 18; Director's Exhibits 11-12; Employer's Exhibits 3-5, 16; Claimant's Exhibits 6, 16.

the fact that bullous emphysema is not caused by coal mine dust," the administrative law judge found their opinions well-reasoned and documented, and sufficient to rebut the presumption of legal pneumoconiosis.[12] *Id.*

While the administrative law judge credited their opinions that smoking, not coal mine dust exposure, causes bullous emphysema, she failed to address whether either physician explained why the Miner's coal mine dust exposure did not contribute to, or substantially aggravate, his COPD and emphysema along with his smoking. The Miner is presumed to have had legal pneumoconiosis, i.e., a "chronic pulmonary disease or respiratory or pulmonary impairment *significantly related to, or substantially aggravated by,* dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added). Because the administrative law judge did not consider if Drs. Castle and Rosenberg adequately explained why coal mine dust exposure did not substantially aggravate the Miner's emphysema, we must vacate her finding that Employer rebutted legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Griffith v. Terry Eagle Coal Co.*, 25 BLR 1-223, 1-229 (2017).

On remand, the administrative law judge must consider whether Drs. Castle and Rosenberg disproved that the Miner had legal pneumoconiosis by persuasively explaining his emphysema was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Griffith*, 25 BLR at 1-229. When considering the medical opinion evidence, the administrative law judge must address the explanations for the physicians' conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). When making these credibility determinations, the administrative law judge may consult the Department of Labor's discussion of the medical science contained in the preamble to the 2001 revised regulations. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d

[12] The administrative law judge afforded Dr. Rosenberg's opinion less weight to the extent he relied on the reversibility of the Miner's obstruction to conclude he did not have legal pneumoconiosis, as he did not address the irreversible portion of the Miner's obstruction. Decision and Order at 16-17; *see Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). She further found Dr. Rosenberg's reliance on the decreased $FEV_1$/FVC ratio on pulmonary function testing as a basis to distinguish between COPD caused by smoking and COPD caused by coal mine dust exposure unpersuasive. Decision and Order at 17; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014).

248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

If the administrative law judge again finds Employer established the Miner had neither clinical nor legal pneumoconiosis, Employer will have rebutted the presumption at 20 C.F.R. §718.305(d)(2)(i). If Employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(2)(i), the administrative law judge must determine whether Employer is able to rebut the presumed fact of death causation with credible proof 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*, 25 BLR at 1-89.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge