BRB No. 11-0463 BLA

DOROTHY IRENE KINNEY (Widow of RALPH KINNEY)	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY, LIMITED LIABILITY CORPORATION	)	DATE ISSUED: 04/24/2012
and	)	
PEABODY INVESTMENTS, INCORPORATED	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

Jeffrey S. Goldberg (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-5377) of Administrative Law Judge Joseph E. Kane, rendered on a survivor's claim filed on March 3, 2006, pursuant to the provisions of 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).[1] The administrative law judge credited the miner with forty-one years of surface coal mine employment, based on the stipulation of the parties, and found that the miner's surface mine work was in conditions substantially similar to those of an underground mine. Because the administrative law judge also determined that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), he found that claimant invoked the presumption that the miner's death was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further determined that employer did not rebut that presumption. Accordingly, the administrative law judge awarded benefits, commencing as of January 2006, the month and year of the miner's death.

On appeal, employer argues that the administrative law judge erred in finding that claimant was entitled to the amended Section 411(c) presumption. Specifically, employer asserts that it has been denied due process by the administrative law judge's reliance on the miner's testimony to find that the miner's surface mine work exposed him to dust conditions that are similar to those found in an underground mine. Employer also contends that the administrative law judge erred, as a matter of law, in relying on lay testimony to find that the miner was totally disabled. Additionally, employer challenges the administrative law judge's finding that employer failed to rebut the amended 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 letter brief, asserting that, contrary to employer's arguments, the administrative law judge permissibly relied on the miner's testimony in determining that the miner worked in comparable dust conditions and that he permissibly credited both lay testimony and medical evidence in finding that the miner was totally disabled. Employer filed a combined reply to the briefs filed by claimant and the Director, reiterating its arguments on appeal and requesting that the Board hold the case in abeyance, pending resolution of the constitutionality of recent amendments to the Act, discussed *infra*.

[1] Claimant is the widow of the miner, Ralph Kinney, who died on June 5, 2006. Director's Exhibit 12. The miner filed a claim for benefits during his lifetime, on October 1, 1985, which was denied. Director's Exhibit 1.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

I. Invocation of the Amended Section 411(c)(4) Presumption

Congress recently enacted amendments to the Act, contained in the Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556(a) (2010), affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, the effective date of the amendments.[3] Relevant to this survivor's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner worked at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those of an underground mine, and the evidence establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner was totally disabled due to pneumoconiosis or, in the case of a deceased miner, that his death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

A. Comparable Surface Coal Mine Work

In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is only required to proffer sufficient evidence of dust exposure in his or her work environment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

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[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, 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).

[3] We reject employer's request to hold this case in abeyance pending resolution of legal challenges to the Patient Protection and Affordable Care Act. *See 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); *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011).

In this case, the administrative law judge found that the record contains a transcript of a hearing held with respect to a state workers' compensation claim filed by the miner during his lifetime, wherein the miner specifically described the nature of his coal dust exposure. Decision and Order at 3; Director's Exhibit 1. The administrative law judge found that the miner described working in drilling operations that were dusty:

> [W]e drilled on the high wall, down in the pits where they had their machinery running, like high wall drills, and they had loaders, and they had trucks running up and down the coal face -- the shovel working -- and we be right in the middle of it, see, and it was all dust combined there. One time we've had so much dust that they had a safety man come out to try to make us do something about it, or else close down. We had that several times, where it was just so dusty.
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> We had lots of it [dust] back then. Lots more than what we have today. They had no control whatsoever back then.

Decision and Order 3-4, *quoting* Director's Exhibit 1 at 99-100, 104. The administrative law judge also noted that during the September 1, 2009 hearing held in connection with the current survivor's claim, claimant was asked what her husband looked like when he came home from work and replied, his "face was dirty" and "coal dust black." Decision and Order at 3; Hearing Transcript at 22. The administrative law judge stated that although he "did not personally observe the miner's testimony, it was corroborated by [c]laimant's testimony, which was credible and uncontradicted." Decision and Order at 16. Thus, the administrative law judge concluded that claimant established that the miner worked in dust conditions in surface coal mine employment that were substantially similar to those of an underground mine. *Id*.

Employer asserts on appeal that the administrative law judge should have considered "the lack of fairness or due process" in crediting the miner's testimony because employer had "no ability – or incentive – to conduct any cross-examination of [the miner.] Notice that the conditions present in [the miner's] surface mine employment came too late for [employer] to question [the miner]." Employer's Brief in Support of Petition for Review at 12. Employer maintains that while the administrative law judge provided the parties an opportunity to develop evidence in response to amended Section 411(c)(4), " this gesture was a hollow one," as the miner died before the question of

comparability was an issue.[4] Employer's Combined Reply Brief at 3. Employer also contends that the administrative law judge erred in relying on claimant's testimony as she did not see the miner at work and her testimony "might be affected by the fact" that she is seeking benefits. Employer's Brief in Support of Petition for Review at 12. Employer's arguments are rejected as without merit.

Due process requires that employer be given the opportunity to mount a meaningful defense. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). The due process rights of confrontation and cross-examination, as they are incorporated into 20 C.F.R. §725.455(c), require only that the parties be allowed a reasonable opportunity to know the claims of the opposing party and to meet them. *See North Am. Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989).

We agree with the Director that employer has not explained why the miner's death prevented it from developing evidence on the level of dust exposure in its own mines. Director's Brief at 8. The requirements of due process were satisfied in this case, as the administrative law judge gave the parties the opportunity to develop any additional evidence necessary to address amended Section 411(c)(4). Employer chose not to submit any additional evidence regarding the conditions of the miner's surface coal mine work, although it could have obtained deposition testimony from its own company officials or the miner's co-workers, regarding the dust conditions present at its mine site. Employer had full notice of the changes in the law, and the issues raised, as well as the opportunity to develop evidence to support its case and rebut claimant's evidence. Further, as the Director accurately observes, employer was given the opportunity to cross-exam both the miner and claimant. Thus, employer cannot claim that it was denied a meaningful opportunity to defend against this case or that it was prejudiced by the administrative law judge's reliance on the testimony of record to conclude that the miner was exposed to coal dust in his surface coal mine employment. Because employer has failed to show a due process violation, we affirm the administrative law judge's crediting of the miner's testimony and his finding that the miner worked in dust conditions substantially similar to those of an underground mine.[5] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Summers*, 272 F.3d at 479, 22 BLR at 2-275.

[4] Employer was present at the state workers' compensation hearing but contends that it had no reason to question the miner regarding his level of coal dust exposure. Employer's Brief in Support of Petition for Review 12.

[5] Because the administrative law judge has discretion to assess the credibility of the witness and determine the weight to accord that evidence, we also reject employer's assertion that claimant's hearing testimony was unreliable.

B. Total Respiratory or Pulmonary Disability

Employer also argues on appeal that the administrative law judge erred in finding that the miner was totally disabled by a respiratory or pulmonary impairment prior to his death. We disagree. The administrative law judge found that "the parties did not designate" any pulmonary function or arterial blood gas testing for consideration at 20 C.F.R. §718.204(b)(2)(i)-(ii), and that there was no evidence in the record that the miner had cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 17. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the "medical opinion evidence on this issue is limited," given the lack of objective evidence to support the opinions of Drs. Rasmussen and Fino, that the miner was totally disabled from a respiratory or pulmonary impairment. *Id*. The administrative law judge found that "the medical opinion evidence is insufficient, *standing alone*, to establish total disability." *Id*. (emphasis added).

The administrative law judge also found, however, that since the miner is deceased and the "record overwhelmingly indicates the presence of lung disease," it was appropriate to consider lay testimony regarding the miner's physical condition. Decision and Order at 18. The administrative law judge found that the miner testified at his workers' compensation hearing that his job as a drill foreman involved "some manual labor, and a significant amount of walking." *Id*. He also noted that the miner testified that he could no longer do this work due to his breathing problems and that he would have worked longer, if his physical condition allowed it. *Id.* Additionally, the administrative law judge found that, during the hearing held on the current survivor's claim, the miner's son testified that the miner had to rest after walking seventy-five feet and "had difficulty lifting anything."[6] *Id*. The administrative law judge concluded that the medical opinion evidence, "[c]onsidered in conjunction with the lay testimony" established that the miner was totally disabled. *Id*.

Employer asserts that the fact that the medical evidence failed to establish total disability "does not mean that lay testimony can be considered in its place." Employer's Brief in Support of Petition for Review at 13. Contrary to employer's assertion, however, the administrative law judge did not rely solely on the lay testimony to find that the miner was totally disabled.[7] Based on our review of the administrative law judge's Decision

[6] The administrative law judge stated that he considered claimant's hearing testimony to be consistent with the other testimony of record, but noted that he did "not rely solely on her testimony since she would be eligible for benefits if the claim were approved." Decision and Order at 18.

[7] The Director, Office of Workers' Compensation Programs, maintains that the administrative law judge erred in finding that the opinions of Drs. Rasmussen and Fino, standing alone, are insufficient to establish total disability simply because there is no

and Order, we conclude that substantial evidence supports the administrative law judge's conclusion that the miner was totally disabled. Specifically, we affirm, as unchallenged by employer on appeal, the administrative law judge's finding that Drs. Rasmussen and Fino diagnosed a totally disabling respiratory or pulmonary impairment.[8] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We also affirm the administrative law judge's rational finding that the lay testimony corroborates the medical opinion evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 18. We therefore affirm the administrative law judge's finding that claimant established that the miner had a totally disabling respiratory or pulmonary impairment, and that she was entitled to invoke the amended Section 411(c)(4) presumption. *Id.*

II. Section 411(c)(4) Rebuttal

The administrative law judge found that, in order to rebut the amended Section 411(c)(4) presumption, employer was required to establish either that the miner did not have pneumoconiosis or that "the miner's death did not arise, in whole or in part, out of coal dust exposure in the miner's coal mine employment." Decision and Order at 18. The administrative law judge concluded that employer failed to satisfy its burden on rebuttal.

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objective testing in the record to support their conclusions. Director's Brief at 11 n. 8. We agree. The regulation at 20 C.F.R. §718.204(b)(2)(iv) specifically provides:

> "[w]here total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment . . . concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner" from engaging in his usual coal mine employment.

See 20 C.F.R. §718.204(b)(2)(iv). However, we consider the administrative law judge's error to be harmless insofar as he ultimately relied on the medical opinion evidence, in conjunction with the lay testimony, to find that the miner was totally disabled. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] Dr. Rasmussen diagnosed disabling chronic lung disease. Claimant's Exhibit 5. Dr. Fino stated, based on his review of the miner's hospitalization records, that "it is reasonable to assume that [the miner] did indeed have significant lung disease which disabled him and contributed to death." Employer's Exhibit 9.

A. The Existence of Pneumoconiosis

Employer contends that the administrative law judge erred in finding that employer failed to disprove that the miner had clinical pneumoconiosis.[9] Employer argues that the administrative law judge failed to resolve the conflict in the x-ray evidence and did not explain his findings in accordance with the Administrative Procedure Act.[10] We disagree.

The administrative law judge found that the record contains three x-rays dated March 17, 1998, April 15, 2004 and December 20, 2005, and that each x-ray was read by Dr. Wiot, a dually qualified Board-certified radiologist and B reader, as negative for pneumoconiosis, and by Dr. Alexander, also dually qualified, as positive for pneumoconiosis. Decision and Order at 6-7, 18-20; Claimant's Exhibits 1-3; Employer's Exhibits 1-2, 7. The administrative law judge gave greatest weight to Dr. Alexander's positive readings for pneumoconiosis because he found that Dr. Alexander "provided a more detailed opinion."[11] *Id.* Although employer challenges the administrative law judge's credibility determination, employer's argument amounts to a request that we reweigh the evidence, which we are not empowered to do. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director,*

[9] Clinical pneumoconiosis is a disease "characterized by [the] 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).

[10] The Administrative Procedure Act, 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), requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law.

[11] The administrative law judge noted that Dr. Wiot provided a narrative report with respect to the March 17, 1998 x-ray, wherein he commented that claimant did not have pneumoconiosis because pneumoconiosis starts in the upper lung fields with rounded opacities, but in this case the upper lung fields were clear and there were irregular opacities in the lungs. Decision and Order at 19; *see* Employer's Exhibit 7. The administrative law judge noted, however, that Dr. Alexander provided narrative descriptions with regard to all three x-rays, identified rounded opacities consistent with pneumoconiosis on each film and explained that, while pneumoconiosis generally starts in the upper lung fields, "emphysema destroys lung tissue in the upper lungs, significantly decreasing the apparent profusion of small opacities." *Id.*; *see* Claimant's Exhibits 1-3.

OWCP [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge's finding that the x-ray evidence is positive for simple clinical pneumoconiosis and that employer did not rebut the presumption by establishing that the miner did not have pneumoconiosis.[12] *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Because employer failed to disprove that the miner had clinical pneumoconiosis, it is not necessary to address employer's arguments as to the existence of legal pneumoconiosis.[13] Employer's Brief in Support of Petition for Review at 16-20.

B. Death Causation

The administrative law judge concluded that the opinions of Drs. Fino and Caffrey were insufficient to satisfy employer's burden to rebut the amended Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Decision and Order at 25. Contrary to employer's contention, the administrative law judge properly concluded that the opinions of Drs. Fino and Caffrey, that the miner's death was unrelated to coal dust exposure, were unpersuasive on the issue of the cause of the miner's death, as neither physician was of the opinion that the miner had the disease. *Id.*; *see Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated sub nom., Consolidated Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on*

[12] We reject employer's assertion that the administrative law judge failed to consider relevant x-ray and CT scan evidence contained in the miner's hospitalization and treatment records. Employer's Brief in Support of Petition for Review at 16. Contrary to employer's argument, the administrative law judge specifically noted that a CT scan conducted on December 22, 2005, showed a large mass but did not report coal workers' pneumoconiosis, and that multiple x-rays contained in the miner's treatment records were interpreted as showing emphysema, chronic obstructive pulmonary disease and interstitial fibrosis. Decision and Order at 12-13. The administrative law judge permissibly determined that the treatment records were "not relevant" to the issue of the existence of pneumoconiosis, as "no physician discussed the etiology" of the miner's condition. *Id*. at 13; *see Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

[13] 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).

other grounds, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Therefore, we affirm the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis and we affirm the award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge