

BRB Nos. 12-0540 BLA
and 12-0541 BLA

TONDA NAPIER)	
(Widow and on behalf of SAM NAPIER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
SHAMROCK COAL COMPANY, INCORPORATED)	DATE ISSUED: 04/29/2013
)	
Employer-Petitioner)	
)	
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 Kenneth A. Krantz,
Administrative Law Judge, United States Department of Labor.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville,
Kentucky, for employer.

Helen H. Cox (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 on Remand (2008-BLA-05169 and
2004-BLA-06674), awarding benefits of Administrative Law Judge Kenneth A. Krantz,
with respect to a survivor's claim filed on December 28, 2006, pursuant to the provisions
of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the

Act).¹ This is the second time that this case has been before the Board. In its prior Decision and Order, the Board addressed claimant's² appeal of the denial of benefits in the miner's claim and the survivor's claim and affirmed the denials in both claims.³ *Napier v. Shamrock Coal Co., Inc.*, BRB Nos. 09-0520 BLA and 09-0615 BLA (Mar. 17, 2010)(unpub.). Upon consideration of claimant's Motion for Reconsideration, the Board reaffirmed its disposition of the appeal of the denial of benefits in the miner's claim and held that the miner was not entitled to invoke the presumption set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), based on the filing date of his claim. *Napier v. Shamrock Coal Co., Inc.*, BRB Nos. 09-0520 BLA and 09-0615 BLA (Nov. 9, 2010)(Decision and Order on Recon.)(unpub.). However, the Board vacated the denial of benefits in the survivor's claim and remanded the claim for consideration of whether claimant is entitled to invoke the rebuttable presumption of death due to pneumoconiosis set forth in amended Section 411(c)(4).⁴ *Id.* at 3-4.

¹ In its acknowledgment letter, the Board noted that employer's Notice of Appeal listed the case numbers for both the miner's claim (2004-BLA-06674) and the survivor's claim (2008-BLA-05169). The Board, therefore, assigned two docket numbers to employer's appeal – BRB No. 12-0540 BLA to the miner's claim and BRB No. 12-0541 BLA to the survivor's claim. Despite the Board's assignment of two BRB numbers to employer's appeal, the only appeal currently before the Board is employer's appeal of the award of benefits in the survivor's claim.

² Claimant is the surviving spouse of the deceased miner, who died on December 7, 2006. Director's Exhibit 9.

³ The miner's claim was filed on June 27, 2003. In a Decision and Order issued on January 23, 2007, Administrative Law Judge Paul H. Teitler awarded benefits. On appeal, the Board vacated the award of benefits and remanded the case for reconsideration of the issues of the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis. *S.N. [Napier] v. Shamrock Coal Co.*, BRB No. 07-0439 BLA (Feb. 29, 2008)(unpub.). The case was reassigned to Administrative Law Judge Janice K. Bullard, who denied benefits in a Decision and Order dated March 3, 2009. The appeal of the denial of the miner's claim was consolidated with claimant's appeal of the denial of her claim by Administrative Law Judge Kenneth A. Krantz (the administrative law judge).

⁴ Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had fifteen or more years of underground, or substantially similar, coal mine employment. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

On remand, the administrative law judge reaffirmed his previous findings that the miner worked at least eighteen years in underground coal mine employment and that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the amended Section 411(c)(4) presumption. The administrative law judge also determined that employer did not rebut the presumption. Consequently, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer did not rebut the amended Section 411(c)(4) presumption.⁵ Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, alleging that, although the administrative law judge did not consider whether employer rebutted the presumption at amended Section 411(c)(4) by disproving a causal connection between the miner's death and pneumoconiosis, employer waived the issue by not raising it on appeal. In its reply brief, employer contends that, contrary to the Director's argument, it identified this issue when challenging invocation of the amended Section 411(c)(4) presumption.⁶

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁷ 33 U.S.C. §921(b)(3), as incorporated by 30

⁵ Employer also contended that retroactive application of Section 1556 is unconstitutional, as it violates due process and unlawfully deprives operators of their property. The Director, Office of Workers' Compensation Programs, responded in opposition to employer's arguments. However, in its reply brief, employer withdrew its constitutional challenges based on the holding of the United States Court of Appeals for the Sixth Circuit in *Vision Processing, LLC v. Groves*, 705 F.3d 551, BLR (6th Cir. 2013). Further, the Board need not address employer's assertion that the Board must consider automatic entitlement in the survivor's claim, as the miner was not awarded benefits in his claim, this provision does not apply. *See* 30 U.S.C. §932(l).

⁶ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant worked at least eighteen years in underground coal mine employment and his findings that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii) and invocation of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁷ The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibits 5, 19 at 7. 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 (1989)(en banc).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge determined that employer rebutted the presumption that the miner had clinical pneumoconiosis,⁸ based on the x-ray, biopsy, and medical opinion evidence. Decision and Order on Remand at 19. However, the administrative law judge found that the opinions of Drs. Broudy and Rosenberg were insufficient to rebut the presumption that the miner had legal pneumoconiosis⁹ or that the miner’s disabling respiratory impairment was due to coal mine employment. *Id.* at 21. As a result, the administrative law judge concluded that “[c]laimant is entitled to the presumption that the [m]iner’s death was due to pneumoconiosis.” *Id.* at 22.

Employer argues that, because the administrative law judge found that the medical opinion evidence was insufficient to establish a disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv), “he was bound to make a finding that employer has rebutted [amended] Section 411(c)(4) with evidence the miner had lung cancer that caused the pulmonary impairment.” Employer’s Memorandum in Support of Petition for Review (Memorandum) at 19. Employer asserts that nothing in the record “really rebutted or contradicted” Dr. Rosenberg’s opinion that the miner’s respiratory impairment was due to his lung cancer and the metastatic disease that spread outside of his lungs. *Id.* at 20. Employer also asserts that Dr. Broudy ruled out legal pneumoconiosis after examining the miner, and that Dr. Oesterling ruled out pneumoconiosis after looking at the biopsy of the miner’s lung, which employer contends “is the gold standard.” *Id.*

⁸ Pursuant to 20 C.F.R. §718.201(a)(1):

“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).

⁹ “Legal pneumoconiosis” is defined as “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 also includes “any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” *Id.*

As an initial matter, we reject employer's contention that the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) necessitated a determination that employer rebutted the presumed existence of legal pneumoconiosis. Because the burden of proof shifted to employer to disprove affirmatively the existence of both clinical and legal pneumoconiosis, based on claimant's invocation of the amended Section 411(c)(4) presumption, the administrative law judge could not merely rely on his weighing of the medical opinions at 20 C.F.R. §718.204(b)(2)(iv) to resolve the issue of the existence of legal pneumoconiosis. *See Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). Moreover, a finding as to whether the miner had legal pneumoconiosis differs from the issue of whether the miner was totally disabled, as the degree of the impairment is not relevant to the diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

Furthermore, the administrative law judge acted within his discretion in discrediting the opinions of Drs. Broudy and Rosenberg regarding whether employer rebutted the presumed fact that the miner had legal pneumoconiosis. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). The administrative law judge permissibly gave less weight to Dr. Broudy's opinion, as he found that Dr. Broudy did not adequately explain why the miner's more than eighteen years of coal dust exposure did not contribute to the impairment that the doctor attributed to asthma and smoking alone.¹⁰ *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In addition, the administrative law judge rationally determined that Dr. Rosenberg's opinion was entitled to less weight because, like Dr. Broudy, Dr. Rosenberg did not explain why the miner's more than eighteen years of coal dust exposure did not contribute to his respiratory impairment. *See Groves*, 277 F.3d at 836, 22 BLR at 2-325. The administrative law judge also permissibly found that Dr. Rosenberg's reliance on the reversible nature of the miner's obstructive impairment to exclude a contribution from coal dust, without addressing the significance of the impairment that remained, detracted from the probative value of his opinion.¹¹ *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

¹⁰ Dr. Broudy stated that the miner's respiratory impairment is "due to a combination of chronic obstructive asthma and cigarette smoking." Employer's Exhibit 5.

¹¹ Dr. Rosenberg stated that "the variable nature of [the miner's] obstruction, combined with his wheezing and treatment for asthmatic flaring, clearly indicates that it was unrelated to or aggravated by past coal mine dust exposure." Employer's Exhibit 8.

Employer's reliance on Dr. Oesterling's exclusion of pneumoconiosis based on the biopsy evidence is also unavailing, as Dr. Oesterling addressed the existence of clinical, not legal, pneumoconiosis. *See* Decision and Order on Remand at 19, 21; Employer's Exhibit 10. Therefore, we affirm the administrative law judge's finding that employer did not rebut the presumption at amended Section 411(c)(4) by establishing the absence of legal pneumoconiosis, as it is rational and supported by substantial evidence. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

The Director asserts, in its limited response, that employer waived the issue of disability causation by failing to raise it on appeal. The Director is technically incorrect, as employer stated in its Memorandum that the administrative law judge "erred in finding it had not rebutted the presumption that the miner's death was hastened by the disease." Employer's Memorandum at 17. However, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below do more than merely raise an issue. The party must address the Decision and Order and demonstrate why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109.

Because employer did not go beyond its bare assertion that the administrative law judge erred in finding that it did not rebut the presumption of death due to pneumoconiosis, we have no basis on which to review the administrative law judge's determination that claimant was entitled to the presumption that the miner's death was due to pneumoconiosis.¹² The administrative law judge's finding is, therefore, affirmed. *See Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109.

¹² To the extent that employer makes specific allegations of error, they pertain to the issue of total disability causation. Employer's Memorandum in Support of Petition for Review at 17-20.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge