BRB No. 12-0639 BLA

MARGARET PREECE (Widow of MONTY PREECE, JR.)	)	
Claimant-Respondent	)	
v.	)	
PREECE COAL COMPANY	)	DATE ISSUED: 08/22/2013
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 Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

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

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/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-5861) of Administrative Law Judge Peter B. Silvain, Jr., with respect to a survivor's claim filed on October 14, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge determined that claimant established that the miner had 16.5 years of underground coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Employer argues, in its brief and reply brief, that the administrative law judge erred in relying on lay testimony to find total disability established at 20 C.F.R. §718.204(b)(2), and, therefore, erred in finding that claimant invoked the amended Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Further, employer argues that the administrative law judge did not properly weigh the evidence in determining that employer failed to rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, asserting that the Board should reject employer's argument that the administrative law judge applied the incorrect standard in deciding to consider lay evidence on the issue of total disability.[3]

[1] Claimant is the widow of the miner, Monty Preece, Jr., who died on April 3, 2008. Director's Exhibit 12. The miner filed a claim for benefits on June 29, 1973, which was finally denied by Administrative Law Judge Frederick D. Neusner on January 31, 1986, because the evidence was insufficient to establish that the miner was totally disabled due to pneumoconiosis. Living Miner's Exhibit 1.

[2] 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 coal mine employment, or employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established that the miner had 16.5 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[4] 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 Presumption – Total Disability at 20 C.F.R. §718.204(b)(2)

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge indicated that the record contained the non-qualifying results of a pulmonary function study obtained by Dr. Broudy on July 1, 2005.[5] Decision and Order at 29; Claimant's Exhibit 4. The administrative law judge noted Dr. Broudy's statement that the study revealed a mild to moderate restriction and air trapping, which suggested a primary obstructive impairment with a restrictive component. Decision and Order at 29. The administrative law judge further noted that Dr. Vuskovich, who reviewed the study, opined that it could not be validated, as there was only one flow volume loop and no volume time tracings. *Id*. at 29-30; Employer's Exhibit 11. The administrative law judge determined that "[b]ecause three tracings and flow-volume loop are used to determine the reliability of a ventilator study[,]" the pulmonary function study did not have probative value and was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 30. The administrative law judge also found that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii), as no blood gas studies were submitted and there was no evidence of cor pulmonale. *Id*.

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that Drs. Dennis and Oesterling did not address the issue of whether the miner was totally disabled. Decision and Order at 30. The administrative law judge also found that Dr. Jarboe's opinion, that the miner was not totally disabled from a pulmonary standpoint, was not well-reasoned or well-documented, as he primarily relied on the July 1, 2005 pulmonary function study, which the administrative law judge determined had no

[4] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. 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).

[5] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

probative value. *Id*. Consequently, the administrative law judge concluded that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

The administrative law judge then noted that, pursuant to 20 C.F.R. §718.305(b), when there is no medical or relevant evidence, affidavits by people having knowledge of the miner's condition can establish total respiratory or pulmonary disability.[6] Decision and Order at 30. Because the record contained only a discredited pulmonary function study and a medical opinion based upon that study, the administrative law judge stated that he would consider the lay testimony of Ms. Rebecca Francis, the miner's sister, and Mr. James Francis, the miner's nephew, to determine whether total disability was established. *Id*. The administrative law judge found the lay evidence from Ms. and Mr. Francis to be credible, as they saw the miner regularly before he died, their testimony was consistent, and they were candid concerning their lack of knowledge about the medications the miner was taking. *Id*. at 30-31. The administrative law judge also addressed claimant's testimony and found that it was consistent with the other testimony of record, although he acknowledged that, as claimant would benefit from a finding of total disability, he did not rely solely on her testimony. *Id*. at 31. The administrative law judge further noted that, in connection with the miner's claim, the miner testified that his last coal mine employment was as a superintendent and involved lifting rollers weighing fifty to sixty pounds. *Id*. The administrative law judge determined, based on the lay testimony, that the miner did not have the "respiratory capacity to walk more than fifty feet at a time, let alone perform his usual coal mine work, which included lifting heavy rollers, or comparable work." *Id*. The administrative law judge concluded, therefore, that "the miner was totally disabled from a pulmonary or respiratory standpoint at the time of his death." *Id*. Thus, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2) and invoked the presumption at amended Section 411(c)(4). *Id*.

Employer argues that the administrative law judge erred in finding that he could rely on the lay testimony because there was no *credible* medical evidence on the issue of total disability. Employer maintains that "[i]t is only when there is no medical evidence relevant to a claimant's total disability that lay testimony may be consulted." Employer's Brief at 14. Employer asserts that, because there is medical evidence in the record in the

[6] We note that the version of 20 C.F.R. §718.305 that is now in effect does not apply to claims, such as the present one, that were filed on or after January 1, 1982. *See* 20 C.F.R. §718.305(e). Remand is not required, however, because 20 C.F.R. §718.204(d)(3), which is applicable to the present claim, contains essentially the same language, as does the proposed regulation implementing amended Section 411(c)(4). *See* 77 Fed. Reg. 19,474, 19,475 (proposed Mar. 30, 2012)(to be codified at 20 C.F.R. §718.305).

form of a non-qualifying pulmonary function study and treatment records showing the absence of a respiratory impairment, the administrative law judge should have found that claimant failed to establish total disability without relying on the lay testimony. Employer also alleges that the administrative law judge did not adequately explain his determination that the non-qualifying pulmonary function study and Dr. Jarboe's opinion did not constitute credible medical evidence.

In the alternative, employer contends that, even if the administrative law judge did not err in considering the lay testimony, he erred in finding that it was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2). Employer maintains that, as a matter of law, the lay testimony established only that the miner had respiratory symptoms, not that he was unable to perform his regular coal mine employment due to a respiratory or pulmonary impairment.

The Director responds, arguing that employer has misstated the standard for the appropriate treatment of lay testimony on the issue of total disability in a survivor's claim. Citing *Pekala v. Director, OWCP*, 13 BLR 1-1 (1989), the Director states that the "use of lay evidence by itself to establish total disability is permissible when the available medical evidence is insufficient to affirmatively prove that no disease or disability was present." Director's Brief at 2-3. Therefore, the Director urges the Board to reject employer's argument that the administrative law judge applied an incorrect standard in considering the lay testimony. Employer has filed a reply, distinquishing *Pekala* on the ground that the record in this case contains extensive medical evidence addressing the miner's respiratory condition.

In *Coleman v. Director, OWCP*, 829 F.2d 3, 5, 10 BLR 2-287, 2-290 (6th Cir. 1987), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that lay testimony cannot be considered when the record contains "medical evidence on the issue of disability due to a respiratory or pulmonary impairment." We hold, therefore, that there is merit in employer's contention that the administrative law judge did not adequately explain, as required by the Administrative Procedure Act (APA),[7] why the non-qualifying pulmonary function study and treatment records did not constitute such evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[7] The Administrative Procedure Act provides 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

With respect to the administrative law judge's finding that the non-qualifying pulmonary function study "has no probative value," the Board has held that the quality standards found in Section 718.103 are not mandatory, and that "pulmonary function studies which fail to conform to [the quality standards set forth at Section 718.103] may not be precluded from consideration on this basis alone." *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988). The Board has also held that, while missing tracings render a pulmonary function study non-conforming, the study is not necessarily unreliable, particularly when the values produced are non-qualifying. *See Crapp v. United States Steel Corp.*, 6 BLR 1-476, 1-478-79 (1983). In addition, the party who challenges the probative value of an objective study because it does not conform to the quality standards must demonstrate how the defect or omission renders the study unreliable and the administrative law judge must determine whether the party has met this burden. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-57 (1987). In the current case, the administrative law judge did not conduct such an analysis, nor did he consider that the lack of tracings did not necessarily render the non-qualifying pulmonary function study of no probative value on the issue of total disability.

Employer is also correct in contending that the administrative law judge did not fully address the treatment records when determining that claimant could rely on the lay testimony to establish that the miner was totally disabled. In *Coleman*, the Sixth Circuit agreed with the Director's position that reliance on lay testimony was precluded, as the record contained "some medical evidence indicating the nonexistence of a lung impairment." *Coleman*, 829 F.2d at 5, 10 BLR at 2-290. This evidence consisted of a medical report and a chest x-ray indicating clear lungs, and evidence establishing that the sole cause of the miner's death was reticulum cell sarcoma, rather than an unidentified respiratory or pulmonary condition. *Id*.

In the current case, the treatment records do not reflect any specific treatment for a respiratory impairment, but rather focus on the miner's rheumatoid arthritis (RA) and other nonrespiratory conditions. *See* Director's Exhibit 15; Claimant's Exhibit 4; Employer's Exhibits 6, 7. Additionally, the majority of the treatment records contain notations indicating that the miner's lungs were clear, and to the extent that any respiratory impairment was noted, there was no indication that it was totally disabling. *See* Director's Exhibit 15; Claimant's Exhibit 4; Employer's Exhibits 6, 7. Although the administrative law judge noted the existence of the treatment records, he did not consider, in accordance with *Coleman*, whether they contained medical evidence indicating the nonexistence of a lung impairment. *See* Decision and Order at 14. Furthermore, the administrative law judge did not address whether Dr. Jarboe's opinion, that the miner did not have a totally disabling respiratory or pulmonary impairment, was supported by the physician's review of the treatment records.

Because the administrative law judge did not adequately explain his rejection of the non-qualifying pulmonary function study dated July 1, 2005, and did not fully address the treatment records or the bases of Dr. Jarboe's opinion, we vacate the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) by the lay testimony of record. *See Coleman*, 829 F.2d at 5, 10 BLR at 2-290; *Wojtowicz*, 12 BLR at 1-165. On remand, the administrative law judge must first reconsider, pursuant to 20 C.F.R. §718.204(b)(2)(i), whether the omission of the required number of flow volume loops and volume time tracings at 20 C.F.R. §718.103 rendered the pulmonary function study unreliable. In addition, the administrative law judge must examine the treatment records to determine whether they constitute some evidence of the nonexistence of a disabling respiratory impairment. The administrative law judge must further reconsider whether Dr. Jarboe's opinion is adequately reasoned and documented at 20 C.F.R. §718.204(b)(2)(iv), in light of his findings on remand regarding the July 1, 2005 pulmonary function study and the treatment records.

If the administrative law judge finds that there is no medical evidence indicating the nonexistence of a lung impairment, it would be appropriate for him to base a finding of total disability on lay testimony. *See Coleman*, 829 F.2d at 5, 10 BLR at 2-290. However, because the administrative law judge did not specifically explain how the testimony of the miner's sister and nephew established that the miner had a respiratory or pulmonary impairment that prevented him from performing his usual coal mine work, or comparable and gainful employment, he must reconsider this issue, if reached, on remand. 20 C.F.R. §718.204(b)(1), (d)(3); *see Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985).

If the administrative law judge concludes that total disability has been established at 20 C.F.R. §718.204(b)(2), he may reinstate his finding that claimant invoked the amended Section 411(c)(4) presumption. Should the administrative law judge determine that claimant has not invoked the presumption, he must consider whether claimant can establish entitlement to benefits on the merits.[8] On remand, the administrative law judge

[8] To establish entitlement to survivor's benefits without benefit of the presumption, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 302, 24 BLR 2-255, 2-264 (6th Cir. 2010).

must set forth his findings in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

II. Rebuttal of the Amended Section 411(c)(4) Presumption

In the interest of judicial economy, and to avoid the repetition of any error on remand, we will address employer's contentions concerning the administrative law judge's finding that employer did not establish rebuttal of the presumption. Employer initially contends that the administrative law judge should have considered whether it established rebuttal by showing that "the cause of death *or* total disability did not arise in whole or in part out of coal mine employment or that the miner did not have pneumoconiosis."[9] Employer's Brief at 17 (emphasis added). Employer also alleges that the administrative law judge did not properly consider the issues of legal pneumoconiosis and death due to pneumoconiosis, did not address all relevant evidence, and did not properly weigh Dr. Dennis's opinion.

As an initial matter, we note employer has not accurately stated the means by which the party opposing entitlement in a survivor's claim can establish rebuttal of the amended Section 411(c)(4) presumption. The party opposing entitlement can rebut the presumption by establishing either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment; the cause of the miner's total disability is not at issue. *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,474, 19,475 (proposed Mar. 30, 2012)(to be codified at 20 C.F.R. §718.305).

In addition, contrary to employer's allegation, the administrative law judge did not conflate the issue of legal pneumoconiosis and death causation when weighing the evidence. Rather, the administrative law judge rationally found that these issues are related, as they concern whether the miner's emphysema arose out of coal mine employment and whether the miner's death was due to pneumoconiosis in the form of emphysema arising out of coal mine employment. Decision and Order at 37; 20 C.F.R. §§718.201(a)(2), 718.205(c); *see Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 302, 24 BLR 2-255, 2-264 (6th Cir. 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). The administrative law judge also did not rely on Dr. Dennis's opinion in finding that employer is unable to rebut the presumed fact that the miner had legal pneumoconiosis. The administrative law judge indicated that Dr. Dennis's opinion did not support rebuttal of the presumption and found that, because he

[9] We affirm, as unchallenged, the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by establishing that the miner did not have clinical pneumoconiosis. *See Skrack*, 7 BLR at 1-711.

did not unequivocally identify coal dust exposure as a cause of the miner's emphysema, his opinion was not entitled to probative weight on the issue of legal pneumoconiosis. Decision and Order at 36.

Further, substantial evidence supports the administrative law judge's determination that employer did not rebut the presumed facts that the miner had legal pneumoconiosis or that the miner's death was due to legal pneumoconiosis. The administrative law judge acted within his discretion in giving less weight to Dr. Jarboe's opinion, that the miner's pulmonary emphysema was more likely due to smoking, because Dr. Jarboe relied on an inaccurate smoking history[10] and the absence of a "fibrotic reaction out in the pulmonary parenchyma," which was contrary to the administrative law judge's finding that the autopsy evidence established the existence of a fibrotic reaction in the form of clinical pneumoconiosis. Employer's Exhibit 5 at 26; *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); Decision and Order at 34-35. The administrative law judge also acted within his discretion in finding that Dr. Oesterling erred in ruling out coal dust exposure as a cause of the miner's emphysema due to the absence of coal dust deposits in the areas of emphysema, as legal pneumoconiosis, in the form of emphysema, can exist in the absence of clinical pneumoconiosis, i.e., "the permanent deposition of substantial amounts of particulate matter in the lungs[.]" 20 C.F.R. §718.201(a)(1); *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26; 65 Fed Reg. 79,939, 79,971 (Dec. 20, 2000); Decision and Order at 35.

Because the administrative law judge provided permissible reasons for discrediting the opinions of Drs. Jarboe and Oesterling, he rationally determined that employer did not rebut the amended Section 411(c)(4) presumption by establishing that the miner did not have legal pneumoconiosis.[11] *See Copley*, 25 BLR at 1-89; *Cornett v.*

[10] Dr. Jarboe relied on a fifty pack-year history of cigarette smoking. Employer's Exhibit 4. The administrative law judge found that the miner smoked a pack of cigarettes daily for forty years. Decision and Order at 33.

[11] We reject employer's argument that the administrative law judge did not properly consider that the miner's treatment records establish that the miner's death was caused by nonrespiratory conditions. The administrative law judge acted within his discretion as fact-finder in focusing on the consulting opinions in which Dr. Oesterling identified emphysema as a contributing cause of the miner's death and Dr. Jarboe acknowledged the presence of emphysema in the miner's lungs. *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); Decision and Order at 37; Employer's Exhibits 2, 4, 5; Claimant's Exhibit 2.

Benham Coal, Inc., 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). In light of the administrative law judge's reliance on these reasonable credibility determinations when considering death causation, we affirm the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by proving that the miner's death did not arise out of his coal mine employment. *See Copley*, 25 BLR at 1-89.

Therefore, if the administrative law judge determines on remand that claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2), and is thereby entitled to the presumption at amended Section 411(c)(4), the administrative law judge may reinstate his determination that employer did not rebut the presumption and further reinstate his award of benefits.

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

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