BRB No. 11-0159 BLA

CLARA R. SISK (Widow of OWEN SISK)	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 12/14/2011
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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (09-BLA-5308) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed 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). This case involves a survivor's claim filed on July 28, 2007. In considering the claim, the administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of qualifying coal mine employment, and that he had a totally

disabling respiratory impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis.[1] 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption.[2] 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge credited the miner with thirty-four years of coal mine employment,[3] twenty-eight years of which were underground. The administrative law judge further found that the evidence established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found invocation of the rebuttable presumption established. The administrative law judge also found that employer failed to establish either that the miner did not have pneumoconiosis, or that his death was not due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the miner was totally disabled, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption.[4] Employer also contends that the administrative law

[1] Section 1556 of Public Law No. 111-148 also amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), to provide that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's claims for benefits were denied. Administrative Law Judge's Exhibits 1, 2.

[2] In an April 12, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements, and she reopened the record to allow the parties to submit additional evidence to respond to the change in law. Claimant, employer and the Director, Office of Workers' Compensation Programs, submitted position statements. None of the parties submitted any new evidence.

[3] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibits 3, 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*).

[4] We deny employer's request to hold this case in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14,

judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has 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'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Employer 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. Employer specifically contends that the administrative law judge erred in finding that claimant established that the miner had a totally disabling respiratory impairment.

In considering whether the evidence established that the miner suffered from a totally disabling respiratory impairment, the administrative law judge found that the miner's most recent pulmonary function study, conducted on December 24, 1999, was qualifying.[5] Decision and Order at 28; Director's Exhibit 18. The administrative law judge, therefore, found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Additionally, because employer does not challenge the administrative law judge's finding that the miner had thirty-four years of coal mine employment, of which twenty-eight years were spent in underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

Turning to the medical opinion evidence,[6] the administrative law judge considered the medical opinions of Drs. Fino and Repsher.[7] Dr. Fino opined that, from a respiratory standpoint, the miner was totally disabled. Employer's Exhibit 2. Dr. Repsher opined that the miner's pulmonary function studies "showed only a mild and clinically insignificant obstructive impairment." Employer's Exhibit 3. The administrative law judge found that Dr. Fino's opinion, that the miner was totally disabled by a respiratory impairment, was entitled to great weight, because it was consistent with the objective evidence. Decision and Order at 28. In contrast, the administrative law judge questioned Dr. Repsher's contrary opinion, because she found that it was unclear whether Dr. Repsher reviewed the miner's qualifying 1999 pulmonary function study. *Id.* The administrative law judge, therefore found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Finally, the administrative law judge weighed all of the relevant evidence together, both like and unlike, and found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 29.

Employer contends that the administrative law judge erred in relying upon the miner's qualifying December 24, 1999 pulmonary function study, because the test results included comments from the administering physician that the miner coughed during the test. Employer's Brief at 14. Employer's contention lacks merit. Although employer accurately notes that the comments indicate that the miner coughed during the testing, no physician opined that the test results were invalid. Director's Exhibit 18-37. The record reflects that the administering physician indicated that the miner's effort and cooperation during the pulmonary function study were "good." *Id.* Moreover, Dr. Fino, one of employer's physicians, reviewed the results of the study and did not question its validity, relying in part on its results to support his opinion that the miner was totally disabled from a respiratory standpoint. Employer's Exhibit 2. Consequently, we reject

[6] The administrative law judge found that the blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and that there was no evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 28.

[7] The administrative law judge noted that the record also contains medical opinion evidence submitted in connection with the miner's claims, including Dr. Anderson's 1985 deposition testimony. Decision and Order at 23, 28. However, the administrative law judge reasonably relied upon the more recent 2009 medical opinions of Drs. Fino and Repsher, which he found more accurately reflected the miner's condition prior to his death in 2007. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 28.

employer's contention that the administrative law judge erred in accepting the miner's qualifying December 24, 1999 pulmonary function study as a reliable study. *See* 20 C.F.R. §718.103(c). We, therefore, affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Because employer does not challenge the administrative law judge's findings that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), or the administrative law judge's finding that all of the medical evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2), these findings are also affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In light of our affirmance of the administrative law judge's findings that the miner had more than fifteen years of qualifying coal mine employment, and was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant established invocation of the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal. 30 U.S.C. §921(c)(4); Decision and Order at 29. Although the administrative law judge found that employer disproved the existence of clinical pneumoconiosis,[8] she found that employer failed to disprove the existence of legal pneumoconiosis.[9] *Id.* at 29-33. The administrative law judge further found that employer failed to establish that the miner's death was not due to pneumoconiosis. *Id.* at 34. The administrative law judge, therefore, found that employer failed to establish rebuttal of the Section 411(c)(4) presumption. *Id.* at 29-34.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. The administrative law judge

[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).

[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).

considered the medical opinions of Drs. Fino and Repsher. Drs. Fino and Repsher diagnosed the miner with chronic obstructive pulmonary disease (COPD) due entirely to cigarette smoking. Employer's Exhibits 2, 3. In evaluating the evidence, the administrative law judge discredited Dr. Fino's opinion, that the miner did not suffer from legal pneumoconiosis, because she found that Dr. Fino failed to provide a valid reason for excluding the miner's coal mine dust exposure as a contributing cause of his COPD. Decision and Order at 33. The administrative law judge also discredited Dr. Fino's opinion because he relied upon an inflated cigarette smoking history, and because the administrative law judge found that his opinion was inconsistent with the premises underlying the regulations. *Id.* The administrative law judge discredited Dr. Repsher's opinion, that the miner did not suffer from legal pneumoconiosis, because she found that the doctor failed to adequately explain how he eliminated the miner's coal mine dust exposure as a contributor to his COPD. *Id.* at 32-33. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 33.

Employer contends that the administrative law judge erred in her consideration of the opinions of Drs. Fino and Repsher. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Fino and Repsher, that the miner's COPD was due solely to smoking, because neither physician adequately explained how they eliminated the miner's thirty-four years of coal mine dust exposure as a source of his COPD.[10] *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, BLR (6th Cir. 2011); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 22-23. The administrative law judge, therefore, properly discounted the opinions of Drs. Fino and Repsher.[11] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*).

[10] Although Dr. Fino opined that the miner's chronic obstructive pulmonary disease (COPD) represented a "classic case of continued cigarette smoking . . . resulting in significant lung diseases," the administrative law judge found that this was "not a valid reason for excluding coal dust exposure as an additional contributing cause." Decision and Order at 33; Employer's Exhibit 2. Further, as the administrative law judge found, Dr. Repsher set forth no basis for eliminating the miner's coal mine dust exposure as a cause of his COPD. Employer's Exhibit 3.

[11] Because the administrative law judge provided a valid basis for according less weight to Dr. Fino's opinion, *i.e.*, that he did not adequately explain why the miner's coal mine dust exposure did not contribute to his COPD, we need not address employer's remaining arguments regarding the weight accorded to Dr. Fino's opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Because the opinions of Drs. Fino and Repsher are the only opinions supportive of a finding that the miner did not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Morrison*, 644 F.3d at 480. As employer does not raise any other contentions of error regarding the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, this finding is affirmed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

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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REGINA C. McGRANERY
Administrative Appeals Judge