

BRB No. 11-0231 BLA

SHIRLEY AMBURGEY )  
(Widow of OLIN AMBURGEY) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 GUM BRANCH COAL COMPANY ) DATE ISSUED: 12/15/2011  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits in a Survivor’s Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order – Denial of Benefits in a Survivor’s Claim (2008-BLA-5990) of Administrative Law Judge Larry S. Merck, rendered pursuant to 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). In a Decision and Order dated November 30, 2010, the administrative law judge adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law accepted the parties’ stipulation that the miner worked at least thirty years in coal mine employment and further determined that all of the miner’s coal mine work was underground. The administrative law judge found that the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, therefore, he found that claimant was entitled to a rebuttable 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, however, found that employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that employer established rebuttal of the amended Section 411(c)(4) presumption, based on the opinions of Drs. Dahhan and Jarboe. Claimant also challenges the weight accorded the opinion of Dr. Workman, the miner’s treating physician, as to whether pneumoconiosis hastened the miner’s death. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs, has declined to file a substantive response to claimant’s appeal, unless specifically requested to do so by the Board. Claimant has also filed a reply brief, reiterating her arguments in this appeal.

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.<sup>2</sup> 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).

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<sup>1</sup> Claimant is the widow of the miner, Olin Amburgey, who died on February 9, 2007. Director’s Exhibit 11. Claimant filed her survivor’s claim filed on May 1, 2007. Director’s Exhibit 2

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner’s coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 6.

On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner's death was due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the miner had at least thirty years of underground coal mine employment, that the miner was totally disabled by a respiratory or pulmonary impairment prior to his death, and that claimant invoked the presumption at amended Section 411(c)(4).<sup>3</sup> See *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

With regard to rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge indicated that employer was required to prove that the miner did not suffer from clinical or legal pneumoconiosis, that the miner's death did not arise out of, or in connection with, his coal mine employment, or that he was not totally disabled due to pneumoconiosis at the time of death. Decision and Order at 7. The administrative law judge found that the miner did not have clinical pneumoconiosis because a preponderance of the x-ray evidence was negative for the disease.<sup>4</sup> Decision and Order at 10, 19. However, the administrative law judge determined that employer failed to disprove the existence of legal pneumoconiosis.<sup>5</sup> In resolving this latter issue,

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<sup>3</sup> The miner filed a claim for benefits on May 3, 1978, which was denied by Administrative Law Judge Bernard J. Gilday, Jr., on February 4, 1986. Director's Exhibit 1. The miner appealed and the Board affirmed the denial of benefits. *Amburgey v. Gum Branch Coal Co.*, BRB No. 86-0416 BLA (Feb. 23, 1988) (unpub.) Because the miner was not receiving benefits at the time of his death, claimant is not eligible for benefits under the automatic entitlement provisions of amended Section 422(l) of the Act, 30 U.S.C. §932(l).

<sup>4</sup> "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).

<sup>5</sup> "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not

the administrative law judge gave controlling weight to Dr. Workman's opinion, that the miner had chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure. Decision and Order at 14. The administrative law judge specifically found that Dr. Workman's opinion was well-reasoned and well-documented, as it was supported by radiological findings for emphysema and by the miner's symptoms. *Id.* In contrast, the administrative law judge found that Dr. Dahhan provided "very little reasoning" for his opinion, that the miner had no respiratory disease caused by coal dust exposure.<sup>6</sup> *Id.* at 15. The administrative law judge further determined that Dr. Jarboe's opinion, that there was insufficient evidence to support a diagnosis of COPD, was "equivocal and vague."<sup>7</sup> *Id.* at 18.

The administrative law judge next considered whether the miner's death was caused, or hastened, by his COPD. Decision and Order at 20. The administrative law judge noted that the death certificate, signed by Dr. Workman, listed the cause of the

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limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

<sup>6</sup> Dr. Dahhan prepared a consultative report on March 23, 2009, in which he reviewed the miner's death certificate, treatment notes and medical records. Employer's Exhibit 2. He indicated that the miner had no radiological evidence for coal workers' pneumoconiosis but that he had a moderate respiratory impairment, based on a pulmonary function test. *Id.* He also noted that the miner had severe rheumatoid arthritis, a condition which affects the lungs and "may cause interstitial fibrosis." *Id.* Dr. Dahhan opined that there was "no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by inhalation of coal dust or coal workers' pneumoconiosis." *Id.* Employer's Exhibit 4.

<sup>7</sup> Dr. Jarboe prepared a consultative report on March 24, 2009, in which he reviewed the death certificate, treatment notes, the questionnaire completed by Dr. Workman, and the miner's hospitalization records. Employer's Exhibit 3. Dr. Jarboe opined that there was insufficient evidence to support a diagnosis of either clinical or legal pneumoconiosis, noting that the one pulmonary function study in the record, demonstrating a moderate obstructive respiratory impairment, did not have tracings for review to validate the test. *Id.* He concluded that "in the absence of any valid function studies . . . it is difficult to comment upon a possible contribution by coal dust inhalation." *Id.* In an addendum prepared on May 12, 2010, Dr. Jarboe criticized Dr. Workman's diagnosis of chronic obstructive pulmonary disease, noting that "cough and shortness of breath are extremely non-specific findings and could have resulted from any of a number of medical conditions." Employer's Exhibit 6.

miner's death as "respiratory arrest" and "cardiac arrest." *Id.*, quoting Director's Exhibit 11. The administrative law judge found that the death certificate was entitled to "some probative weight," as it was "supported by Dr. Workman's medical reports, deposition testimony and treatment notes." Decision and Order at 20. The administrative law judge, however, was not persuaded by Dr. Workman's opinion that the miner's death was due, in part, to his legal pneumoconiosis. *Id.* The administrative law judge noted that Dr. Workman completed a questionnaire, wherein he opined that pneumoconiosis weakened the miner's heart and contributed to his death. *Id.*; see Director's Exhibit 13. He also noted Dr. Workman's testimony that the inhalation of coal dust "contributed to [the miner's] heart-related problems" by "worsening his lung conditions," which weakened the miner's heart muscle and caused "more stress on the heart." Employer's Exhibit 5 at 8. The administrative law judge, however, found that Dr. Workman "basically state[d] that [the miner's] pneumoconiosis made him more susceptible to other types of trauma, here cardiac arrest," but that he did not explain how pneumoconiosis hastened the miner's death through a specifically defined process. Decision and Order at 21, citing *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303, 24 BLR 2-255, 2-266-67 (6th Cir. 2010).<sup>8</sup>

Conversely, the administrative law judge credited Dr. Dahhan's opinion that the cause of the miner's death was "due to recurrent aspirations that caused him to have the respiratory event," which "simply means he could not swallow and the food [went] to his lungs . . . instead of to his stomach." Decision and Order at 22, quoting Employer's Exhibit 4. The administrative law judge also gave "full probative weight" to Dr. Jarboe's opinion that the miner's death was not hastened by legal pneumoconiosis. Decision and Order at 23. Thus, the administrative law judge found that employer rebutted the presumption at amended Section 411(c)(4). *Id.* at 23-24.

Claimant argues on appeal that the administrative law judge erred in failing to explain the basis for his finding that the opinions of Drs. Dahhan and Jarboe were reasoned and documented. Claimant contends that, because the administrative law judge specifically rejected the opinions of Drs. Dahhan and Jarboe, that the miner did not have legal pneumoconiosis, in the form of COPD due to coal dust exposure, the administrative law judge erred in relying on their opinions to find that the miner's death did not arise out of, or in connection with, his coal mine employment. Claimant's arguments have merit.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that it is proper for an administrative law judge to

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<sup>8</sup> In *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 303, 24 BLR 2-255, 2-266-67 (6th Cir. 2010), the Sixth Circuit stated that "legal pneumoconiosis only hastens a death if it does so through a specifically defined process that reduces the miner's life by an estimable time."

discount a physician's negative opinion on causation of disability/death when that opinion is based on an erroneous assumption that the miner does not have pneumoconiosis. 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 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). In this case, because Dr. Dahhan specifically opined that claimant does not have COPD due to coal dust exposure, and Dr. Jarboe also concluded that the miner did not have COPD or a disabling respiratory impairment, contrary to the administrative law judge's findings of fact, the administrative law judge must explain why the opinions of Drs. Dahhan and Jarboe are credible with regard to whether the miner's death was caused or hastened by pneumoconiosis. See *Skukan*, 993 F.2d at 1233, 17 BLR at 2-104; *Toler*, 3 F.3d at 116, 19 BLR at 2-83.

Furthermore, although the administrative law judge made generalized findings that Dr. Dahhan's opinion was credible because it was "based on objective medical evidence," and that Dr. Jarboe's opinion was supported "by objective medical evidence, including [the miner's] treatment and hospitalization records," the administrative law judge erred in failing to specifically explain how the evidence supported their conclusions. Decision and Order at 23; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge also erred in failing to explain why Dr. Jarboe's opinion was entitled to "full probative weight," when the administrative law judge specifically determined that Dr. Jarboe expressed views that were contrary to the position of the Department of Labor that "respiratory impairments related to coal dust exposure can cause severe impairment, even without x-ray evidence establishing heavy dust burden in a miner's lungs."<sup>9</sup> Decision and Order at 23; *see* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *Wojtowicz*, 12 BLR at 1-165. Thus, we vacate the administrative law judge's finding, based on the opinions of Drs. Dahhan and Jarboe, that employer rebutted the amended Section 411(c)(4) presumption, by proving that miner's death was not hastened by legal pneumoconiosis.

On remand, the administrative law judge should consider whether employer has presented sufficient evidence to affirmatively establish rebuttal of the presumption

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<sup>9</sup> Dr. Jarboe opined, in part, that pneumoconiosis was not a causal factor in the miner's death because the x-ray evidence did not show "a dust burden in his lungs which in itself would have caused a pulmonary impairment." Employer's Exhibit 6.

pursuant to amended Section 411(c)(4).<sup>10</sup> See *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011). In rendering his findings, the administrative law judge must explain the bases for all of his credibility determinations in accordance with 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). See *Wojtowicz*, 12 BLR at 1-165.

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<sup>10</sup> Contrary to claimant's contention, the administrative law judge rationally found that Dr. Workman failed to explain how pneumoconiosis hastened the miner's death through "a specifically defined process that reduced the miner's life by an estimable time." *Conley*, 595 F.3d at 303, 24 BLR at 2-266-67; see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); Decision and Order at 12. However, because claimant invoked a presumption that the miner's death was due to pneumoconiosis, and employer bears the burden to establish rebuttal of that presumption, the relevant inquiry on remand is the sufficiency of employer's evidence, without regard to the weight accorded Dr. Workman's opinion. See 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits in a Survivor's Claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge