BRB Nos. 11-0272 BLA
and 11-0273 BLA

VALLA JEAN LOUDERMILK (Widow of, and on behalf of, HAROLD E. LOUDERMILK)	)	
Claimant-Petitioner	)	
v.	)	
LAFAYETTE SPRINGS ENTERPRISE	)	DATE ISSUED: 12/01/2011
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Valla Jean Loudermilk, Rainelle, West Virginia, *pro se*.

Tiffany B. Davis and Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (2007-BLA-05832 and 2007-BLA-05833) of Administrative Law Judge Janice K. Bullard on a miner's claim and a survivor's claim, 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). In a March 31, 2010 Order, the administrative law judge provided the parties with notice of the recent amendments to the Act and directed them to submit position statements on their applicability to this case.[2] Claimant, employer, and the Director, Office of Workers' Compensation Programs (the Director), each submitted position statements. By Order dated May 11, 2010, the administrative law judge denied employer's request to hold the case in abeyance, but granted its motion to reopen the record for the submission of additional evidence in response to the change in law. The administrative law judge gave the parties sixty days to obtain new evidence and thirty

[1] Claimant, Valla Jean Loudermilk, is the widow of the deceased miner, Harold E. Loudermilk, and is pursuing the miner's claim on behalf of his estate. Survivor's Claim (SC) Director's Exhibits 26, 46. The miner filed his claim for benefits on April 5, 2006. Miner's Claim (MC) Director's Exhibit 1. Prior to a decision by the district director, however, the miner died on July 26, 2006. SC Director's Exhibit 7. The district director awarded benefits in the miner's claim in a Proposed Decision and Order dated December 29, 2006. MC Director's Exhibit 35. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges. MC Director's Exhibit 36. The miner's claim was held in abeyance, pending a determination by the district director in claimant's survivor's claim, which was filed on August 18, 2006. SC Director's Exhibit 1. The district director awarded benefits in the survivor's claim and both claims were referred to the Office of Administrative Law Judges.

[2] Relevant to the miner's claim and the 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 Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.SC. §921(c)(4)). Relevant only to the survivor's claim, the amendments revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*).

days from that date to submit rehabilitative evidence. Employer submitted a supplemental report by Dr. Fino in the miner's claim and a supplemental report by Dr. Repsher in the survivor's claim.

In the administrative law judge's Decision and Order, she determined that claimant invoked the fifteen-year presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), in both claims, based on their filing dates, the miner's 27.15 years of qualifying coal mine employment, and her finding that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge found, however, that employer rebutted the presumption in the miner's claim by proving that his total disability did not arise out of, or in connection with, his coal mine employment. Accordingly, the administrative law judge denied benefits in the miner's claim.

With regard to the survivor's claim, the administrative law judge found that claimant did not satisfy the eligibility requirements for derivative entitlement pursuant to amended Section 422(*l*), based on the denial of benefits in the miner's claim. The administrative law judge further found that, although claimant established that the miner had pneumoconiosis arising out coal mine employment under 20 C.F.R. §§718.202(a), 718.203(b), claimant failed to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant generally challenges the denial of benefits in both claims.[3] Employer responds, urging affirmance of the administrative law judge's Decision and Order denying benefits. The Director has declined to file a substantive response in this appeal.[4]

In an appeal filed by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported

[3] Claimant's appeal of the miner's claim was assigned BRB No. 11-0272 BLA, and the appeal in the survivor's claim was assigned BRB No. 11-0273 BLA. By Order dated February 15, 2011, the Board consolidated these appeals for purposes of decision only. *Loudermilk v. Lafayette Springs Enterprise*, BRB Nos. 11-0272 BLA and 11-0273 BLA (Feb. 15, 2011) (unpub. Order.).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of 27.15 years of qualifying coal mine employment and her finding that the existence of clinical pneumoconiosis was established under 20 C.F.R. §718.202(a)(2), (4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[5] 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).

To establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

To establish entitlement to survivor's benefits, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

I. THE MINER'S CLAIM

Pursuant to amended Section 411(c)(4), in order to rebut the presumption of total disability due to pneumoconiosis, employer must prove, by a preponderance of the evidence that: (1) that the miner had neither clinical nor legal pneumoconiosis; or (2) the miner's disabling respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *see Rose v. Clinchfield Coal Company*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). In the present

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

case, the administrative law judge found that, because employer did not rebut the presumption by establishing that the miner did not have clinical pneumoconiosis, employer could establish rebuttal only by proving that the miner's total disability did not arise out of, or in connection with, his coal mine employment.[6] Decision and Order at 24-25.

The administrative law judge addressed the relevant medical evidence and accorded greatest weight to the opinions of Drs. Fino and Castle, who concluded that the miner's totally disabling respiratory disability was caused by cigarette smoking. Decision and Order at 25-26; Miner's Claim (MC) Employer's Exhibits 3, 4, 9, 10, 18, 28, 29, 30. The administrative law judge credited, as persuasive, Dr. Fino's explanation distinguishing between the effects of smoking and pneumoconiosis, based on the significant reversibility demonstrated on the miner's pulmonary function studies. Decision and Order at 25. The administrative law judge credited, therefore, Dr. Fino's conclusion, that the miner's pneumoconiosis was insufficient to affect his pulmonary function, and found that Dr. Castle's opinion corroborated Dr. Fino's conclusion. *Id*. The administrative law judge concluded that the miner's significant smoking history, which led to his cancer, caused his total disability, based on the opinions of Drs. Fino and Castle. *Id*. at 26.

In contrast, the administrative law judge discounted the opinion in which Dr. Othman attributed the miner's total disability, in part, to pneumoconiosis, as Dr. Othman diagnosed pneumoconiosis based on an x-ray that the administrative law judge found was negative for the disease. Decision and Order at 25; MC Director's Exhibit 8. The administrative law judge further found that Dr. Rasmussen's opinion was not as well-documented or as well-reasoned as those of Drs. Fino and Castle, because he did not explain his conclusions that the miner's total disability was related to pneumoconiosis and that coal mine dust causes the same physiologic changes as cigarette smoking. Decision and Order at 25-26; MC Claimant's Exhibits 1, 2. The administrative law judge also gave limited weight to Dr. Rasmussen's diagnosis of legal pneumoconiosis, as she found that he "failed to account for the reversibility in reduced FEV_1 that resulted from bronchodilator administration." Decision and Order at 26. The administrative law judge further found that Dr. Rasmussen did not fully address the effects of the miner's significant smoking history, his cardiac condition or his lung cancer and, thus, accorded his opinion limited weight. *Id*. Based on the administrative law judge's consideration of the medical opinions of record, she concluded that employer met its burden, as it

[6] The administrative law judge determined that the preponderance of the evidence established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(2), (4). Decision and Order at 23-24.

affirmatively established that there was no connection between the miner's coal mine employment and his totally disabling respiratory impairment. *Id*.

Upon review of the administrative law judge's weighing of the medical opinions, we cannot affirm her decision to accord greater weight to the opinions in which Drs. Fino and Castle ruled out pneumoconiosis as a contributing cause of the miner's totally disabling respiratory impairment. Although the administrative law judge noted correctly that Drs. Fino and Castle cited the reversibility of the miner's respiratory impairment after the administration of a bronchodilator in support of their opinions, she did not consider whether the physicians explained why pneumoconiosis was not a contributing cause of the impairment that remained.[7] *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004) (unpub.). Moreover, the administrative law judge did not address the portions of Dr. Fino's opinion in which he indicated that coal dust exposure does not cause clinically significant respiratory or pulmonary impairments and cited studies that supported this conclusion. MC Employer's Exhibits 9, 18 at 12-15. This view is contrary to the findings of the Department of Labor (DOL), that coal dust exposure can cause clinically significant obstructive disease, and that coal dust and cigarette smoking have additive effects. *See* 65 Fed. Reg. at 79,940 (Dec. 20, 2000); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001) (it is proper to discount an opinion that is based on medical science which DOL has determined not to be in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature). Accordingly, we must vacate the administrative law judge's decision to accord greater weight to the opinions of Drs. Fino and Castle.

We also cannot affirm the administrative law judge's discrediting of Dr. Rasmussen's opinion, that pneumoconiosis was a contributing cause of the miner's disabling impairment, as she relied, in part, on her determination that Dr. Fino's

[7] The pulmonary function study to which Drs. Fino and Castle referred was performed by Dr. Koenig on February 18, 2003, and is apparently included in the miner's treatment records. *See* MC Employer's Exhibits 3, 9. Both physicians noted that the study reflected a twelve-percent improvement in the miner's FEV1 and FVC, after the administration of a bronchodilator. *Id*. The pulmonary function study performed by Dr. Othman on May 24, 2006, is the only study designated as evidence in the miner's claim. MC Director's Exhibit 12. The miner's pre-bronchodilator FEV1 and FVC were 1.24 and 2.36, respectively. *Id*. The miner's post-bronchodilator FEV1 and FVC were 1.27 and 2.39, respectively. *Id*. Both the pre-bronchodilator and post-bronchodilator tests were qualifying under 20 C.F.R. §718.204(b)(2)(i) and Appendix B to Part 718.

statement regarding the significance of the reversibility of the miner's impairment was persuasive. Decision and Order at 25-26. In addition, when rejecting Dr. Rasmussen's conclusions, the administrative law judge did not consider that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a physician need not be able to specifically apportion the extent to which various causal factors contribute to a totally disabling respiratory or pulmonary impairment, in order to provide a credible opinion regarding disability causation. *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *see also Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003).

The administrative law judge also did not provide a valid rationale for discrediting Dr. Othman's opinion, that the miner was totally disabled, in part, by pneumoconiosis. The administrative law judge determined that Dr. Othman's conclusion was entitled to little weight, as his diagnosis of pneumoconiosis was based upon an x-ray that the administrative law judge found was negative for the disease. Decision and Order at 24-25. The administrative law judge did not explain, however, why this detracted from the credibility of Dr. Othman's opinion on the issue of causation, when his diagnosis of pneumoconiosis was consistent with the administrative law judge's findings at 20 C.F.R. §718.202(a)(2), (4). *See Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Accordingly, we vacate the administrative law judge's findings with respect to the opinions of Drs. Rasmussen and Othman and her determination that employer rebutted the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). We must also vacate, therefore, the denial of benefits and remand this case to the administrative law judge.

On remand, the administrative law judge must reconsider whether the medical opinions of record are sufficient to establish that the miner's totally disabling respiratory impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *see Rose*, 614 F.2d at 940, 2 BLR at 2-44. When weighing the medical opinions on remand, the administrative law judge must fully consider the physicians' respective analyses, the quality of their reasoning, their qualifications and the extent to which their conclusions are consistent with the prevailing medical and scientific views accepted by DOL. *See Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge must also explain the bases for her credibility determinations in accordance with the Administrative Procedure Act (APA).[8] *See Wojtowicz v. Duquesne Light Company*, 12 BLR 1-162 (1989).

[8] 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

In light of our disposition regarding the administrative law judge's weighing of the medical opinions relevant to the issue of total disability causation, we also vacate the administrative law judge's finding that, absent the application of amended Section 411(c)(4), entitlement to benefits in the miner's claim is precluded, as claimant cannot establish that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 19, 23. If the administrative law judge again determines that the miner is not entitled to the rebuttable presumption set forth in amended Section 411(c)(4), the administrative law judge must reconsider her findings on the merits at 20 C.F.R. §718.204(c), in light of her reassessment of the medical opinion evidence on remand.

II. THE SURVIVOR'S CLAIM

As an initial matter, based on our decision to vacate the administrative law judge's denial of benefits in the miner's claim, we vacate the administrative law judge's determination that claimant is not entitled to derivative benefits pursuant to amended Section 422(*l*). *See* 30 U.S.C. §932(*l*).

Regarding the presumption of death due to pneumoconiosis set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge determined that it was rebutted, based on her disposition of the miner's claim. Decision and Order at 26. We must vacate this finding, as the evidence admitted in the miner's claim is different from the evidence admitted in the survivor's claim, and the medical opinions that the administrative law judge relied on in the miner's claim are not part of the record in the survivor's claim. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995).

If, on remand, the administrative law judge awards benefits in the miner's claim, she must consider whether claimant is derivatively entitled to benefits under amended Section 432(*l*). In the event that the administrative law judge denies benefits in the miner's claim, she must address all relevant evidence of record in the survivor's claim, resolve the physicians' conflicting opinions and determine whether employer has established rebuttal of the amended Section 411(c)(4) presumption. In so doing, the administrative law judge should take into consideration the respective credentials of the physicians, their explanations for their conclusions, the documentation underlying their medical judgments, and the extent to which their conclusions are consistent with the medical and scientific views accepted by DOL. *See Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-

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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).

275-76. The administrative law judge must also explain the bases for her credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order denying benefits in the miner's claim and the survivor's claim is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings 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