BRB Nos. 12-0275 BLA
and 12-0276 BLA

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| HELEN L. TAYLOR<br>(Widow of and o/b/o the Estate of KIRK L. TAYLOR) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| HAWKINS COAL COMPANY | ) | DATE ISSUED: 02/21/2013 |
| and | ) | |
| AMERICAN BUSINESS & MERCANTILE | ) | |
| 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 Granting Benefits in the Miner's Estate Claim and Decision and Order Granting Benefits in the Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

Rita A. Roppolo (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 Granting Benefits in the Miner's Estate Claim (2008-BLA-5191) and the Decision and Order Granting Benefits in the Survivor's Claim (2010-BLA-5407) of Administrative Law Judge Larry S. Merck, rendered on a subsequent miner's claim[1] filed on March 8, 2006 and a survivor's claim[2] filed on June 8, 2009 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Regarding the miner's claim, the administrative law judge accepted the parties' stipulation that the miner had twenty-three years of above ground coal mine employment, and that at least fifteen years were in conditions substantially similar to those of underground coal mine employment. The administrative law judge also found that the evidence established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant was entitled to invocation of the rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), on the miner's claim.[3] Further, the administrative law judge found that, although employer established that the miner did not have clinical pneumoconiosis, it failed to establish that the miner did not have legal pneumoconiosis or that his disabling respiratory impairment

[1] The miner filed an initial claim for benefits on February 9, 1987, which was denied by the district director. Director's Exhibit 1. The miner filed a second claim on December 1, 1993, which was denied in 1995 on the grounds of abandonment. Director's Exhibit 2.

[2] Claimant is the widow of the miner, Kirk L. Taylor, who died on April 21, 2009. Decision and Order at 3. Claimant is pursuing the miner's claim on behalf of his estate, and is also pursuing her survivor's claim. The miner's and survivor's claims were consolidated on August 19, 2009.

[3] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to the miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable above ground coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

did not arise out of, or in connection with, coal mine employment.[4] The administrative law judge, therefore, found that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits on the miner's claim. Regarding the survivor's claim, the administrative law judge found that, because benefits were awarded in the miner's claim, claimant was entitled to derivative benefits. 30 U.S.C. §932(*l*).[5]

On appeal, employer challenges the administrative law judge's finding that the miner had fifteen years of qualifying coal mine employment. Employer also challenges the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by failing to show the absence of legal pneumoconiosis or that the miner's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment.[6] *See* 30 U.S.C. §921(c)(4). Employer further contends that, because the administrative law judge erred in finding entitlement to benefits in the miner's claim, he erred in finding claimant entitled to derivative benefits.[7] Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the awards on both claims.

[4] Upon invocation of the amended Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption with affirmative proof that the miner does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

[5] Under amended Section 422(*l*), a qualified survivor is automatically entitled to benefits without having to establish that the miner's death was due to pneumoconiosis, if the miner filed a successful claim and was eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*).

[6] 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).

[7] Employer also contends that a decision on the merits in this case should be stayed pending resolution of the issues of the constitutionality of, and the severability of, portions of the Patient Protection and Affordable Care Act by the United States Supreme Court. This argument is rendered moot by the decision of the Court in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

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, rational, and in accordance with applicable law.[8] 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).

**Section 411(c)(4) Invocation**
**Qualifying Coal Mine Employment**

Employer contends that the administrative law judge erred in basing his finding of *qualifying coal mine employment*[9] on the mere fact that the miner's surface coal mine employment was "dusty" without sufficiently considering whether the surface mine conditions were "substantially similar" to those in underground coal mining. Specifically, employer contends that the administrative law judge erred in relying on testimony of coal dust exposure to determine the comparability of the conditions between above ground and underground coal mine employment, without considering the actual working conditions, the degree of dust exposure, and the nature and frequency of the dust exposure. *See* Employer's Brief at 15-17. Employer also contends that the absence of standards for determining the comparability of conditions in above ground and underground coal mine employment violates the requirements of the Administrative Procedure Act (APA), 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).

In finding that the conditions of claimant's above ground coal mine employment were comparable to those in underground coal mine employment, the administrative law judge considered the miner's answers to interrogatories regarding his coal mine employment, as well as to the testimony of claimant and the miner's co-worker. The administrative law judge noted that the miner stated that his coal mine employment consisted of loading coal onto coal gongs, dropping coal gongs, operating the beltline, shoveling coal that fell from the beltline, and working as a mechanic. Director's Exhibit 15. Considering claimant's testimony, the administrative law judge found that claimant testified that the miner worked as a "coal tipple operator" from 1962 to 1978 or 1979.

[8] Because the miner's coal mine employment was in Kentucky, 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); Director's Exhibit 3.

[9] *Qualifying coal mine employment* is defined as work in an underground mine or work in conditions that are substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4); *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988).

Hr. Tr. at 17. The administrative law judge noted that claimant described the miner's job at the tipple as follows: "He sat in a little bitty tin hut and watched the coal go on the belt line and he would have to make sure that the coal was moving into the coal gon[gs]." Hr. Tr. at 18. When she was asked how he did that, she replied: "He sat there and he watched the coal. If it was too big or too lumpy or something, he had to take poles and hit that coal and get it going on the belt line into the gon[gs] after the truck had dumped the coal on to the chute." *Id*. She further testified that in 1978 or 1979, the miner worked as a mechanic in strip mining operations until he stopped coal mine employment in 1986. Hr. Tr. at 17-18. She stated that while the mining operations were ongoing at the strip mines that the "[miner] worked on big, heavy equipment, motors and things that needed to be fixed on the heavy equipment." Hr. Tr. at 18. The administrative law judge further noted that when claimant was asked to describe the miner's appearance when he came home every day from his coal mine employment, she described his physical appearance as "nasty with coal dust." Hr. Tr. at 19. She stated that the miner had substantial amounts of coal dust on his clothes, in his ears, on and underneath his clothes. Hr. Tr. at 20-21. She testified that she found coal dust in her washing machine after she washed the miner's clothes. Hr. Tr. at 21.

The miner's co-worker, Mr. Bobby C. Woolwine, testified at the hearing that he worked for Hawkins Coal Company from "the later part of [19]73 and … from [19]84 to about [19]93." Hr. Tr. at 27-28. He testified that he was a tipple operator working "along side of [the miner]." Hr. Tr. at 28. When asked to describe his job as a tipple operator, he stated:

> Well, basically, it'd start first thing in the morning. The truck was backed in, they're going to put coal into the hopper. We had to set our coal cars up on the tracks with what's called the car spotter would pull it back. You'd go into the tipple, fire the tipple up. The coal would come out of the hopper off the feeder panel to the belt line. From the belt line, it would drop inside to the tipple room from which you were standing on to a shaker screen which is a coal separator and that's where the dust actually started pretty bad, roll off on to a picking table which is approximately seven to eight foot in length, dropped into a crusher which crushed the coal and pulverized it which was another source of the dust and it would up [sic] another belt line, drop down a chute into a coal car. Once it was loaded, we'd drop down a chute into a coal car. Once it was loaded, we'd drop them cars out and set another one up. That was the process, the duration of the tipple being loaded.

Hr. Tr. at 28-29.

Mr. Woolwine testified that he was exposed to coal mine dust all of the time that he worked as a tipple operator. Hr. Tr. at 32. He explained that coal mine dust was created when the trucks dumped coal into the hopper and was being crushed, when the coal was transported on the belt line, and transported from the crusher to railroad cars. Hr. Tr. at 29-31. Also, he testified that he had to use a standard shovel to remove the dust that was spilled. *Id*. In sum, he stated that all of the work he did as a tipple operator exposed him to coal mine dust. Hr. Tr. at 33.

The administrative law judge found that all of the miner's coal mine employment took place on the surface and included work as a mechanic, loading coal onto coal gongs, dropping coal gongs, operating the beltline, and as a tipple laborer. Decision and Order at 9; Hr. Tr. at 17-18 and 27-29. Additionally, the administrative law judge found that the testimony of claimant and the miner's co-worker that the miner was continually exposed to coal dust while working, and regarding his condition after working in the mines, was "similar" to the testimony of underground coal miners and was similar to the level of dust described by underground coal miners. Decision and Order at 11. The administrative law judge rationally concluded, therefore, that claimant met her burden to establish the comparability of the miner's surface coal mine employment to underground coal mine employment. *Id*. Consequently, the administrative law judge found that the conditions of the miner's above ground coal mine work were substantially similar to those in underground coal mining, and satisfied the comparability requirement for invocation of the Section 411(c)(4) presumption. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

We agree with claimant and the Director that, based on the uncontradicted testimony of claimant and the miner's co-worker, the administrative law judge properly concluded that the conditions of the miner's surface coal mine employment were comparable to those in underground coal mining. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *see also Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); Claimant's Response Brief at 21-24; Director's Response Brief at 5-6.

Because the administrative law judge considered the comparability of the conditions between the miner's surface coal mine employment and underground coal mine employment, and substantial evidence supports his findings, we reject employer's argument that the administrative law judge's coal mine employment finding failed to comply with the requirements of the APA. *See Leachman*, 855 F.2d at 512.

As we affirm the administrative law judge's finding that the miner had at least fifteen years of *qualifying coal mine employment*, and as the administrative law judge found that the

miner had a totally disabling respiratory impairment pursuant to Section 718.204(b),[10] we affirm the administrative law judge's finding that claimant is entitled to invocation of the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

**Section 411(c)(4) Rebuttal**

Employer challenges the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by failing to show the absence of legal pneumoconiosis or that the miner's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). Specifically, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to Section 411(c)(4) rebuttal.

The medical evidence supportive of Section 411(c)(4) rebuttal consists of the opinions of Drs. Fino and Jarboe.[11] Dr. Fino opined that the miner did not have legal pneumoconiosis and that his disabling respiratory impairment was not related to coal mine employment, because his pulmonary emphysema was due to smoking, and not coal mine employment. Dr. Fino stated that while "coal miners can get emphysema, … [it] will always be in proportion to the amount of dust retention." Decision and Order at 33; Employer's Exhibits 11-12, 16. Dr. Jarboe opined that the miner did not suffer from legal pneumoconiosis and that his disability was not due to coal mine employment, based on the values of the miner's $FEV_1$ and FVC on pulmonary function studies, his responsiveness to bronchodilators, and the absence of clinical pneumoconiosis. Employer's Exhibit 6.

The preamble to the revised regulations sets forth the position of the Department of Labor (DOL) on questions of scientific fact relevant to the elements of entitlement that must be established in order to secure an award of benefits. Consequently, the extent to which a medical opinion is consistent with the preamble is a valid criterion for an administrative law judge to consider in assessing the credibility of an opinion. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Further, in order

[10] We affirm, as unchallenged on appeal, the administrative law judge's finding that a totally disabling respiratory impairment was established pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[11] The administrative law judge found that Dr. Mettu, the miner's treating physician, opined that the miner had a chronic pulmonary impairment due to both smoking and coal mine employment. Director's Exhibit 11.

to assess the credibility of medical opinion evidence, the administrative law judge may evaluate medical rationales for consistency with the conclusions contained in the medical literature and scientific studies relied upon by the DOL in drafting the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a); 65 Fed. Reg. 79,920-77 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7. Thus, contrary to employer's contention, the administrative law judge may evaluate a medical opinion for consistency with the definition of legal pneumoconiosis set forth in the preamble. *Id.*; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990).

In this case, the administrative law judge determined that Dr. Fino relied on the absence of sufficient dust retention in the miner's lungs to attribute his emphysema to smoking, rather than coal mine employment. The administrative law judge reasonably found that such an opinion is tantamount to a finding that legal pneumoconiosis occurs only in the presence of, and in association with, clinical pneumoconiosis, and is, therefore, inconsistent with the position that the DOL set forth in the preamble. *See Obush*, 650 F.3d at 256, 24 BLR at 2-383. Specifically, the DOL states that "most evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of [clinical pneumoconiosis]." 65 Fed. Reg. at 79,939, 79,943. Thus, the administrative law judge permissibly found that Dr. Fino's opinion, that the miner's emphysema was not due to coal mine employment and that his disability was unrelated to coal mine employment, was based on the lack of coal dust retention in his lungs, and thus was "not well-reasoned". Decision and Order at 33. The administrative law judge permissibly accorded the opinion little weight as inconsistent with the DOL's position on the cause of emphysema, as set forth in the preamble. *Obush*, 650 F.3d at 256, 24 BLR at 2-383; Decision and Order at 33. Consequently, we affirm the administrative law judge's finding that Dr. Fino's opinion was insufficient to rebut the Section 411(c)(4) presumption.

Turning to the opinion of Dr. Jarboe, the administrative law judge also found that it was insufficient to show the absence of legal pneumoconiosis or that the miner's disability was due to coal mine employment. In so finding, the administrative law judge permissibly determined that Dr. Jarboe's opinion regarding the miner's pulmonary function study results did not provide an adequate basis for Dr. Jarboe's opinion that smoking alone caused the miner's respiratory impairment.[12] Specifically, the administrative law judge found that "Dr. Jarboe's premise is somewhat antithetical to the

[12] Dr. Jarboe opined that a disproportionate reduction of the miner's $FEV_1$ value, compared to his FVC value, reflected a functional abnormality caused by smoking and/or asthma, instead of coal dust exposure. Employer's Exhibit 6.

findings of the National Institute for Occupational Safety and Health (NIOSH), which were cited with approval by the DOL. *See* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79943 (Dec. 20, 2000)[:]"

> NIOSH 'carefully reviewed the available evidence on lung disease in coal miners,' and found that '[chronic obstructive pulmonary disease (COPD)] may be detected from decrements in certain measures of lung function, especially $FEV_1$ and the ratio of $FEV_1$/FVC. Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is also present.' *Id.* The Board has held that it is rational to accord less weight to a physician's opinion that coal dust did not contribute to a miner's COPD if the opinion is based on a reduced $FEV_1$/FVC ratio. *Y.D. v. Diamond May Coal Co.*, BRB No. 08-0176 BLA (Nov. 26, 2008) (unpub.); *see also C.C. v. Westmoreland Coal Co.*, BRB No. 07-0359 BLA (May 29, 2008); *M.A. v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009). I find that the [m]iner's reduced $FEV_1$/FVC ratio is not an adequate basis for Dr. Jarboe's opinion that cigarette smoking, alone, caused the [m]iner's pulmonary impairment.

Decision and Order at 34.

Next, the administrative law judge properly rejected Dr. Jarboe's opinion "that the [m]iner did not have legal pneumoconiosis, [because it is] based[,] in part, on the partial reversibility in the pulmonary function study which in his opinion [is] inconsistent with pneumoconiosis, noting that '[c]oal dust inhalation does not cause reversible airway disease.' (EX 6)." Decision and Order at 34. The administrative law judge properly found that such an opinion does not adequately explain why Dr. Jarboe believes that coal dust exposure did not contribute to, or exacerbate, the miner's smoking-related impairment. Decision and Order at 35; *see Barrett*, 478 F.3d at 356, 23 BLR at 2-483-84.

Additionally, the administrative law judge properly rejected Dr. Jarboe's opinion because he, like Dr. Fino, opined that coal miners get emphysema in proportion to the amount of coal dust retention. The administrative law judge properly found that such an opinion is not in keeping with the DOL's position, as set forth in the preamble, that coal mine dust exposure can cause emphysema. *See* 65 Fed. Reg. at 79,939; *Obush*, 650 F.3d at 256, 24 BLR at 2-383. The administrative law judge, therefore, permissibly rejected the opinion as tantamount to a finding that emphysema in miners "only occurs in the presence of, and in association with, clinical pneumoconiosis." Decision and Order at 33. The administrative law judge, therefore, rationally found that Dr. Jarboe's opinion was insufficient to rebut the Section 411(c)(4) presumption.

As the administrative law judge properly discredited the two opinions supportive of employer's burden on Section 411(c)(4) rebuttal, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption. Because substantial evidence supports the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), we affirm his award of benefits in the miner's claim and his award of derivative benefits in the survivor's claim.

Accordingly, the administrative law judge's Decision and Order Granting Benefits in the Miner's Estate Claim and his Decision and Order Granting Benefits in the Survivor's Claim are affirmed.[13]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[13] By Order dated August 8, 2012, the Board consolidated employer's appeals of the administrative law judge's awards of attorney fees in the miner's and survivor's claims, BRB Nos. 12-548 BLA and 12-549 BLA, with the above appeals, BRB Nos. 12-0275 BLA and 12-0276 BLA. For purposes of this decision however, the appeals in BRB Nos. 12-548 BLA and 12-549 BLA are severed from BRB Nos. 12-0275 BLA and 12-0276 BLA. Employer's appeals of attorney fees in BRB Nos. 12-548 BLA and 12-549 BLA will be addressed in a separate Decision and Order.