BRB No. 13-0234 BLA

MARY L. BROTHERS (Widow of EARL BROTHERS) Claimant-Respondent v. PITTSBURG & MIDWAY COAL MINING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/20/2014 DECISION and ORDER

Appeal of the Decision and Order on Second Remand Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer.

Emily Goldberg-Kraft (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 appeals the Decision and Order on Second Remand Awarding Benefits (2006-BLA-5678) of Administrative Law Judge Joseph E. Kane, rendered on a survivor's claim,[1] filed on June 13, 2005, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a third time.[2] In its most recent Decision and Order, the Board vacated the administrative law judge's denial of benefits and remanded the case for consideration under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] *Brothers v. Pittsburg & Midway Coal Mining*, BRB No. 10-0436 BLA (Mar. 15, 2011) (unpub.). On remand, the

[1] Claimant, Mary L. Brothers, is the widow of the miner, who died on May 9, 2005. Director's Exhibit 18. The miner filed a claim on February 25, 1981. By letter dated February 25, 1983, the district director advised the parties that the claim had been deemed abandoned. *Id.* There is no indication in the record that the miner took any further action in regard to his 1981 claim.

[2] In the initial decision in the present survivor's claim, Administrative Law Judge Thomas F. Phalen, Jr., credited the miner with at least thirty-three years of underground coal mine employment and considered the claim pursuant to 20 C.F.R. Part 718. Judge Phalen found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and denied benefits accordingly. On appeal, the Board vacated the administrative law judge's finding that the x-ray and medical opinion evidence were insufficient to establish clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1), (4), and remanded the case for further consideration. *M.L.B.* [*Brothers*] *v. Pittsburg & Midway Coal Mining*, BRB No. 08-0702 BLA (May 27, 2009)(unpub.). On remand, due to the unavailability of Judge Phalen, the case was reassigned to Administrative Law Judge Joseph E. Kane (the administrative law judge). In a Decision and Order issued on March 22, 2010, the administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis and denied benefits.

[3] 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, and made it applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010), *amending* 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if claimant establishes that the miner had 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 the miner had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

administrative law judge found that claimant established that the miner worked for more than fifteen years in underground coal mine employment and was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge determined, therefore, that claimant invoked the rebuttable presumption of death due to pneumoconiosis set forth at amended Section 411(c)(4) and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded survivor's benefits, effective May 1, 2005, the first day of the month in which the miner died.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this claim. Employer initially argues that, because the survivor's claim was denied by the administrative law judge on March 22, 2010, the claim was not pending when the amendments to the Act became effective on March 23, 2010. Employer also argues that the administrative law judge erred in his analysis of the evidence when he found that the miner was totally disabled at 20 C.F.R. §718.204(b). Additionally, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption. Employer further challenges the administrative law judge's finding as to the date for the commencement of benefits. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's challenges to the applicability of the amended Section 411(c)(4) presumption to this case and the administrative law judge's finding regarding the commencement date for benefits. Employer has filed a reply brief reiterating its contentions.

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).

Applicability of Amended Section 411(c)(4)

As an initial matter, we reject employer's argument that the administrative law judge erred in considering this claim under Section 411(c)(4), as it was not pending on March 23, 2010. The Board determined in its most recent Decision and Order that employer's contention was without merit, as claimant's timely appeal of the

[4] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 12. 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).

administrative law judge's March 22, 2010 Decision and Order denying benefits prevented the denial of her claim from becoming final. *Brothers*, BRB No. 10-0436 BLA, slip op. at 3, *citing* 20 C.F.R. §§725.478, 725.479. Because employer has not established that the Board's disposition of its argument was clearly erroneous, or set forth a valid exception to the law of the case doctrine, we decline to disturb our prior determination. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990).

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

Pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), the administrative law judge noted that the record did not contain any pulmonary function studies or blood gas studies developed in connection with the claim for benefits. Decision and Order on Second Remand at 17. Relevant to 20 C.F.R. §718.204(b)(2)(ii), however, the administrative law judge indicated that the treatment records submitted by claimant included blood gas studies. *Id*. at 11-13; Director's Exhibit 26. The administrative law judge found that the results of the blood gas studies obtained on April 13 and April 14, 1996 were unreliable, as they were conducted while the miner was in respiratory failure. Decision and Order on Second Remand at 17. The administrative law judge next noted that, although the December 24, 1993 and February 26, 2002 blood gas studies were also performed while the miner was experiencing episodes of acute respiratory illness, "the illnesses and the test results were not as extreme as in April 1996." *Id*. Consequently, the administrative law judge found that the December 24, 1993 and February 26, 2002 blood gas studies were reliable. The administrative law judge also noted that the February 26, 2002 blood gas study was qualifying, whereas the December 24, 1993 blood gas study was nonqualifying.[5] *Id*. Relying on the 2002 blood gas study as the most recent objective evidence of the miner's condition, the administrative law judge found that the blood gas study evidence established total disability. *Id*. at 18.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Taylor, Selby and Houser. Director's Exhibit 22; Claimant's Exhibit 1; Employer's Exhibits 1, 2. Dr. Taylor, the miner's treating physician,[6] completed a questionnaire on June 13, 2005, and testified at a deposition on August 22, 2006. Dr. Taylor opined that the miner suffered from chronic obstructive pulmonary disease (COPD), asthma, and bronchitis, all of which were aggravated by coal

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

[6] The record indicates that Dr. Taylor treated the miner from January of 1980 until May of 2005. Claimant's Exhibit 1 at 6.

mine dust exposure. Director's Exhibit 22; Claimant's Exhibit 1 at 21. Dr. Taylor further indicated that the miner had a breathing impairment and a significant respiratory problem that had worsened over the course of his treatment of the miner. *Id*. The administrative law judge found, however, that Dr. Taylor did not express an opinion regarding whether the miner's impairment precluded him from performing his coal mining job. Decision and Order on Second Remand at 18. Dr. Selby opined that the miner did not suffer from coal workers' pneumoconiosis or any respiratory or pulmonary defect or condition due to coal mine dust exposure. Employer's Exhibit 1. The administrative law judge gave Dr. Selby's opinion no weight because it was not clear whether Dr. Selby opined that the miner was not disabled or that his disability was not due to coal dust exposure. Decision and Order on Second Remand at 18. With respect to Dr. Houser's opinion, the administrative law judge noted that he opined that there was insufficient evidence upon which to base a finding of total disability. *Id*.; Employer's Exhibit 2. The administrative law judge accorded "little weight" to Dr. Houser's disability opinion after concluding that the doctor's rationales were not credible. Decision and Order on Second Remand at 18-19. The administrative law judge concluded that "total disability is neither established nor refuted by the medical opinion evidence." *Id*. at 19.

The administrative law judge then stated, "weighing all of the evidence together, as I must, I find that evidence supports a finding of a totally disabling impairment." Decision and Order on Second Remand at 19. The administrative law judge further cited the February 26, 2002 blood gas study, claimant's testimony as to the miner's extreme shortness of breath and inability to do household chores, and the treatment record comments by Dr. Alexander, who performed a pre-employment physical on the miner, indicating that the miner had difficulty performing his usual coal mine work. *Id*.

Employer contends that the administrative law judge erred in finding that the miner's February 26, 2002 blood gas study supported a finding of total disability when it was performed during the miner's hospitalization for an acute respiratory illness and, therefore, violated the regulatory prohibition on performing a blood gas study "during or soon after an acute respiratory or cardiac illness." Employer's Brief at 7, quoting Appendix C to 20 C.F.R. Part 718. Employer further argues that, even if the quality standards do not apply to the February 26, 2002 study, the administrative law judge erroneously relied on his own medical conclusion in determining that it was a reliable indicator of the existence of a totally disabling respiratory impairment. Employer's Brief at 8-9. Claimant responds that the administrative law judge acted within his discretion as fact-finder in considering the non-conforming study and "found correctly that the 2002 qualifying values on the arterial blood gas studies were credible and reliable." Claimant's Brief at 4.

We hold that employer's allegations of error have merit, in part. Contrary to employer's argument, the February 26, 2002 blood gas study is not subject to the quality standards set forth in 20 C.F.R. Part 718, as it was not generated in connection with a claim for benefits.[7] *See* 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Rather, as the administrative law judge noted, the issue before him was whether the February 26, 2002 blood gas study was sufficiently reliable, despite the inapplicability of the quality standards.[8] Decision and Order on Second Remand at 17. In determining that this study was reliable, however, the administrative law judge did not set forth a valid rationale in support of his finding. The administrative law judge based his conclusion on his view that, although the February 26, 2002 study was performed while the miner was hospitalized for treatment of acute bronchitis, "the illness[] and the tests results were not as extreme" as those seen on the 1996 studies, which the administrative law judge deemed unreliable. *Id*. The administrative law judge did not explain, however, how he determined that the miner's acute respiratory illness did not render the 2002 test unreliable, regardless of how the values compared to those reported in the 1996 studies. More importantly, in assessing whether the miner's arterial blood gas values were skewed by his acute bronchitis, the administrative law judge improperly substituted his medical judgment for that of a medical expert. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984).

Accordingly, we vacate the administrative law judge's findings that the February 26, 2002 blood gas study was a reliable indicator of a totally disabling respiratory or pulmonary impairment and that claimant established total disability pursuant to 20 C.F.R.

---

[7] The record reflects that the 2002 blood gas study was performed as part of a series of tests conducted at the Trover Foundation Regional Medical Center during the miner's hospitalization for shortness of breath. Director's Exhibit 26.

[8] The Department of Labor explained in the comments to the 2001 revised regulations that evidence that is not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by 20 C.F.R. [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

§718.204(b). We further vacate, therefore, the administrative law judge's finding that claimant established invocation of the amended Section 411(c)(4) presumption.

On remand, the administrative law judge must reconsider his finding that the February 26, 2002 blood gas study is reliable and determine whether there is adequate medical evidence in the record to persuade him of the study's reliability as an indicator of a totally disabling impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See* 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). Based on the administrative law judge's resolution of the latter issue, he must also reconsider his determination that the evidence of record, when considered as a whole, is sufficient to total disability at 20 C.F.R. §718.204(b)(2). In so doing, the administrative law judge must be mindful that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the presence in the record of "medical evidence on the issue of disability due to a respiratory or pulmonary impairment" precludes the use of lay testimony to invoke the presumption of death due to pneumoconiosis.[9] *Coleman v. Director, OWCP*, 829 F.2d 3, 5, 10 BLR 2-287, 2-290 (6th Cir. 1987); *see also Sword v. G.&E. Coal Co.*, BLR , BRB No. 13-0235 BLA (Jan. 27, 2014). If the administrative law judge finds that claimant cannot establish total disability at 20 C.F.R. §718.204(b)(2), invocation of the amended Section 411(c)(4) presumption is precluded and he must consider whether claimant can establish entitlement, without benefit of the presumption.

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

In the interest of judicial economy, we will address employer's allegations of error regarding the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption. Upon invocation of the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish

[9] While the instant case is governed by the regulation set forth in 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(b)(4)), which became effective on October 25, 2013, *Coleman* was decided under an analogous lay testimony provision set forth in 20 C.F.R. §727.203(a)(5). *Coleman v. Director, OWCP*, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987).

rebuttal by disproving the existence of both legal and clinical pneumoconiosis,[10] or by proving that the miner's death was not caused by pneumoconiosis. *See* 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(2)); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

With respect to whether employer could disprove the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Taylor, Selby and Houser, all of whom diagnosed the miner with asthma and COPD. Dr. Taylor opined that coal dust exposure was a substantial contributing cause of these conditions. Director's Exhibit 22; Claimant's Exhibit 1. Drs. Selby and Houser opined that the miner's COPD resulted from asthma and cigarette smoking, and was not the result of coal mining. Employer's Exhibits 1, 2.

Employer contends that the administrative law judge erred in finding that the opinions of Drs. Selby and Houser were insufficient to establish the absence of legal pneumoconiosis. Employer's allegation of error is without merit. The administrative law judge rationally accorded less weight to the opinions of Drs. Selby and Houser, because neither physician adequately explained, based on the specific facts of this case, why the miner's thirty-three years of coal dust exposure did not contribute to his COPD. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge also reasonably found that Dr. Selby's statement, that coal mine employment "was protective from lung disease such that [the miner] was unable to smoke underground[,] thus helping to avoid emphysema or COPD or exacerbating asthma," was unpersuasive because the doctor relied on an assumption that is contrary to the regulations and the medical science credited by the Department of Labor, which recognizes that coal mine dust can cause clinically significant obstructive lung disease and that smoking and coal dust exposure cause pulmonary impairment by the same mechanism. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR

[10] The administrative law judge determined that employer established the absence of clinical pneumoconiosis, which is defined as "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); Decision and Order on Second Remand at 23. "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).

2-135, 2-151 (6th Cir. 2012); Decision and Order on Second Remand at 23, *citing* 65 Fed. Reg. 79,939 (Dec. 21, 2000). Therefore, contrary to employer's contentions, the administrative law judge's decision to discount the opinions of Drs. Selby and Houser was rational and supported by substantial evidence.[11] *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). We affirm, therefore, the administrative law judge's finding that employer could not rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. *See Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9; *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

In considering whether employer proved that the miner's death was not caused by pneumoconiosis, the administrative law judge again weighed the opinions of Drs. Selby and Houser, who attributed the miner's death to cardiac causes. Decision and Order on Second Remand at 25; Employer's Exhibits 1, 2. The administrative law judge found that their opinions were insufficient to establish that legal pneumoconiosis played no role in the miner's death, for the same reasons he gave when declining to credit the opinions of Drs. Selby and Houser on the issue of the existence of legal pneumoconiosis. Decision and Order on Second Remand at 25. Thus, the administrative law judge found that employer did not rebut the Section 411(c)(4) presumption by proving that the miner's death did not arise out of coal mine employment. *Id*.

Employer argues that the administrative law judge erred in failing to find that Drs. Selby and Houser ruled out the possibility that the miner's death was due to pneumoconiosis. Employer's Brief at 15-16. Employer's contention is without merit. The administrative law judge acted rationally in discounting the opinions of Drs. Selby and Houser, as neither physician "ruled out the [m]iner's substantial COPD as a contributing factor in his demise" and neither physician believed that the miner's COPD was related to his coal mine dust exposure, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation 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); *Adams v. Director, OWCP*, 886 F.2d 818, 825-26, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008). Consequently, we affirm the administrative law judge's finding that employer could not rebut the Section 411(c)(4) presumption by establishing that the miner's death did not arise out of,

[11] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Selby and Houser, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

or in connection with, coal mine employment. *See Copley*, 25 BLR at 1-89. Thus, if the administrative law judge determines, on remand, that claimant has invoked the amended Section 411(c)(4) presumption, he can reinstate the award of benefits, based on his rational finding that employer has not rebutted the amended Section 411(c)(4) presumption.

Commencement of Benefits

In the interest of judicial economy, we also address employer's contention that the administrative law judge erred in awarding benefits from May 2005, the month in which the miner died. Employer's Brief at 17. Employer states that, assuming *arguendo* that an award is appropriate, benefits cannot commence prior to the effective date of amended Section 411(c)(4). *Id*. The Director and claimant respond and maintain that the administrative law judge properly determined the commencement date. We agree with the position taken by claimant and the Director, that survivor's benefits are payable from the month of the miner's death, as provided in 20 C.F.R. §725.503(c). Thus, the administrative law judge designation of May 2005 as the date from which an award of benefits should commence is appropriate, regardless of whether the award is based upon application of the amended Section 411(c)(4) presumption. *See Ives v. Jeddo Highland Coal Co.*, 9 BLR 1-167, 1-169 n.2 (1986); *Mihalek v. Director, OWCP*, 9 BLR 1-157, 1-158 (1986); Decision and Order on Second Remand at 25; Director's Exhibits 2, 18.

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge