



BRB No. 14-0230 BLA

ROBERTA G. LUSK )  
(Widow of WILLIAM P. LUSK) )

Claimant-Respondent )

v. )

SHANNON POCAHONTAS MINING )  
COMPANY )

and )

A.T. MASSEY c/o WELLS FARGO )  
DISABILITY MANAGEMENT )

Employer/Carrier- )  
Petitioners )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )

Party-in-Interest )

DATE ISSUED: 02/03/2015

DECISION and ORDER

Appeal of the Decision and Order of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Kevin T. Gillen and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (10-BLA-5336) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on December 10, 2008.

After crediting the miner with at least thirty years of qualifying coal mine employment,<sup>1</sup> the administrative law judge found that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant<sup>2</sup> invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.<sup>3</sup> 30 U.S.C. §921(c)(4).<sup>4</sup> The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.<sup>5</sup>

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<sup>1</sup> The miner's coal mine employment was in West Virginia. Hearing Transcript at 25. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>2</sup> Claimant is the surviving spouse of the miner, who died on January 27, 2008. Director's Exhibit 9.

<sup>3</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

<sup>4</sup> The amendments also revived Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l). Claimant cannot benefit from this provision, as the miner's claim for benefits was denied. *Lusk v. Shannon-Pocahontas Mining Co.*, BRB No. 91-0599 BLA (Aug. 13, 1992) (unpub.).

<sup>5</sup> Employer does not challenge the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4). This finding is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on survivors’ claims when the miner’s death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner’s death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner’s death, pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis set forth at 20 C.F.R. §718.304 is applicable, or the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4).

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis, or by establishing that no part of the miner’s death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer does not challenge the administrative law judge’s determination that employer failed to disprove the existence of clinical pneumoconiosis. This finding is, therefore, affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer, however, contends that the administrative law judge erred in finding that employer failed to establish that no part of the miner’s death was caused by pneumoconiosis. In evaluating whether employer established that no part of the miner’s death was caused by pneumoconiosis, the administrative law judge considered the opinions of Drs. Castle, Rosenberg, and Basheda.

Although Dr. Castle diagnosed clinical pneumoconiosis, he did not relate the miner’s death to the disease. Employer’s Exhibit 5. Dr. Castle noted that the miner underwent a left pneumonectomy in August of 1988. *Id.* Dr. Castle further noted that, prior to the pneumonectomy, the miner’s pulmonary function study results were “entirely normal showing no evidence of obstruction, restriction, or diffusion abnormality.” *Id.* However, Dr. Castle noted that the miner subsequently developed a restrictive ventilatory impairment. *Id.* Dr. Castle attributed this impairment to the left pneumonectomy, and complications from Parkinson’s disease, with an additional possible contribution from congestive heart failure. *Id.* Dr. Castle opined that the miner’s clinical pneumoconiosis was not a cause of the restrictive impairment:

[P]rior to having the pneumonectomy [the miner] also had coal workers' pneumoconiosis of the same severity and he had no restriction at all. He had no obstruction, restriction or diffusion abnormality. So prior to removing the lung he had coal workers' pneumoconiosis which was there at the time and with that degree of severity of pneumoconiosis, he had nothing to indicate any abnormalities related to that. Then you remove the lung and now he has some restriction and then you give him another disease such as Parkinson's disease, which causes muscle stiffness and rigidity and limits the expansion of the chest and you further cause restriction, then you would expect to see that. You then add onto that congestive heart failure which limits the expansion of the chest because of stiffness in the lung due to excess blood and fluid there, all causing an increase in the restriction.

Employer's Exhibit 7 at 16-17.

Dr. Castle opined that the miner's death was due to complications from Parkinson's disease. *Id.* at 21. Dr. Castle further opined that the miner's clinical pneumoconiosis was not a factor in his death. *Id.*

Although Dr. Rosenberg diagnosed clinical pneumoconiosis, he similarly opined that the miner's death was not related to the disease. Employer's Exhibit 6. Dr. Rosenberg, like Dr. Castle, noted that the miner's pulmonary function study results prior to his 1988 pneumonectomy were "totally normal." Employer's Exhibit 10 at 19. Dr. Rosenberg observed that, by 2003, the miner's pulmonary function study results revealed a disabling pulmonary impairment. *Id.* at 17. Noting that there was no evidence that the miner's clinical pneumoconiosis had progressed, Dr. Rosenberg stated that there was "no real objective reason why [the miner's pneumoconiosis] would have deteriorated to cause those kind of lung functions." *Id.* at 19-20. Although Dr. Rosenberg acknowledged that clinical pneumoconiosis can be "latent and progressive," he explained that the only types of medical conditions that were getting worse were conditions that were unrelated to coal mine dust exposure. *Id.* at 20. Dr. Rosenberg attributed the miner's worsening pulmonary function to respiratory failure caused by an all-terrain vehicle accident and congestive heart failure. *Id.* at 17-18. Dr. Rosenberg attributed the miner's death to a "deteriorating health state" related primarily to his altered mental status and dementia:

[The miner] developed increasing difficulties towards the end of his life surrounding his Parkinson's disease and dementia. He developed increasing congestive heart failure, he had valvular heart disease and coronary disease and renal failure. And he just deteriorated. He was getting increasing respiratory difficulties and just bodily dysfunction. And it was elected to make him a do not resuscitate Hospice situation and – comfort measures – and he subsequently [died].

Employer's Exhibits 6, 10 at 8-9.

Dr. Basheda assumed that the miner suffered from clinical pneumoconiosis at the time of his death. Employer's Exhibit 9. Dr. Basheda attributed the miner's death to "multisystem organ failure" caused by complications of Parkinson's disease and dementia. *Id.* Dr. Basheda further opined that he could not exclude a "cardiac event" as the cause of the miner's death. *Id.* Although Dr. Basheda found it "difficult to quantitate" the level of pulmonary impairment evidenced by the miner's 2003 pulmonary function study results, he opined that the "reduction in the FEV1 and FVC [could] be explained by his previous pneumonectomy." *Id.*

The administrative law judge discredited the opinions of Drs. Castle, Rosenberg, and Basheda because he found that the physicians did not adequately explain how they determined that the miner's clinical pneumoconiosis could not have progressed from the time of the miner's pneumonectomy (1988) to the time of his death (2008). Decision and Order at 34. The administrative law judge further found that Drs. Castle, Rosenberg, and Basheda, in attributing the miner's declining pulmonary function to other conditions, failed to persuasively explain why the miner's clinical pneumoconiosis could not have also contributed, along with these other conditions, to the miner's respiratory impairment and death. *Id.*

Employer contends that the administrative law judge erred in his consideration of the opinions of Drs. Castle, Rosenberg, and Basheda. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Castle, Rosenberg, and Basheda, that the miner's death was not due to his clinical pneumoconiosis, because they failed to adequately explain (1) how they determined that the miner's clinical pneumoconiosis had not progressed in the twenty years since the miner's pneumonectomy; and (2) how they eliminated the miner's clinical pneumoconiosis as a contributor to his respiratory impairment and death.<sup>6</sup> See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19

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<sup>6</sup> Employer argues that the administrative law judge improperly substituted her opinion for that of the physicians in stating that, because the miner was not impaired immediately after his pneumonectomy, his respiratory impairment "was not fully due to the loss of his left lung." Employer's Brief at 8, quoting Decision and Order at 34. We disagree. Taken in its proper context, the administrative law judge's statement is merely a recognition that other factors, besides the pneumonectomy, contributed to the miner's respiratory impairment. Indeed, Drs. Castle, Rosenberg, and Basheda each attributed the miner's respiratory impairment to multiple causes.

BLR 2-61, 2-67 (4th Cir. 1995). The administrative law judge, therefore, properly discounted the opinions of Drs. Castle, Rosenberg, and Basheda. *Id.*

In light of the foregoing, we affirm the administrative law judge's finding that employer failed to establish that no part of the miner's death was caused by clinical pneumoconiosis.<sup>7</sup> We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>7</sup> In light of our affirmance of the administrative law judge's finding that employer failed to establish that no part of the miner's death was caused by clinical pneumoconiosis, we need not address employer's contention that the administrative law judge erred in considering rebuttal of the presumption of the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).