BRB No. 12-0231 BLA

LINDA SUE JAMES (Widow of JESSUP JAMES)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 01/14/2013
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Award of Benefits (2006-BLA-05791) of Administrative Law Judge Daniel F. Solomon, with respect to a survivor's claim filed on June 30, 2005, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] This case is

[1] Claimant is the surviving spouse of the miner, who died on November 27, 2004. Director's Exhibit 1. The miner filed three claims for black lung benefits, all of which were finally denied.

before the Board for a third time. Most recently, the Board vacated the administrative law judge's findings that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that legal pneumoconiosis hastened the miner's death at 20 C.F.R. §718.205(c).[2] *James v. Island Creek Coal Co.*, BRB No. 10-0497, slip op. at 7 (May 31, 2011)(unpub.). Consequently, the Board vacated the award of benefits and remanded the case for further consideration of the evidence relevant to the issues of the existence of legal pneumoconiosis and death causation. *Id*. The Board also instructed the administrative law judge to consider whether claimant established invocation of the rebuttable presumption of death due to pneumoconiosis under amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[3] *Id*. at 7-8.

On remand, the administrative law judge did not render a definitive finding as to whether claimant invoked the presumption at amended Section 411(c)(4), but determined that claimant established, by a preponderance of the evidence, that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that the miner's death was due, in part, to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge did not follow the Board's instructions on remand and erred in again finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and death causation at 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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[2] In the Board's initial decision, after noting that the parties had stipulated to the existence of clinical pneumoconiosis, the Board vacated the administrative law judge's findings that claimant established the existence of legal pneumoconiosis and death due to pneumoconiosis under 20 C.F.R. §§718.202(a)(4), 718.205(c), and the award of benefits. *L.S.J.* [*James*] *v. Island Creek Coal Co.*, BRB No. 08-0456 BLA (Mar. 31, 2009)(unpub.). The Board remanded the case to the administrative law judge for further consideration.

[3] Under amended Section 411(c)(4), if a claimant establishes that the miner had at least fifteen years of qualifying coal mine employment, and that he or she had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4). Thus, in its most recent decision, the Board noted that employer had stipulated to fourteen years of coal mine employment and directed the administrative law judge to make a finding as to the length of the miner's qualifying coal mine employment.

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, is rational, and is 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).

In order to establish entitlement to survivor's benefits, without benefit of the amended Section 411(c)(4) presumption, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). Death is considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Pneumoconiosis hastens death if it does so "through a specifically defined process that reduced the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003).

I. 20 C.F.R. §718.202(a)(4)

In considering whether claimant established the existence of legal pneumoconiosis[5] on remand, the administrative law judge reweighed the five medical opinions of Drs. Houser, Caffrey, Roggli, Jarboe, and Repsher. The administrative law judge credited Dr. Houser's opinion, that the miner had chronic obstructive pulmonary disease (COPD) caused, in part, by coal dust exposure, as being the only reasoned

[4] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. 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, 1-202 (1989)(en banc).

[5] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

medical opinion of record on this issue. Decision and Order on Second Remand at 12. The administrative law judge concluded, therefore, that Dr. Houser's opinion was entitled to greater weight than to the contrary opinions of Drs. Caffrey, Roggli, Jarboe, and Repsher and was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*.

Employer contends that the administrative law judge erred in shifting the burden of proof to employer to establish, as an affirmative defense, that the miner's respiratory impairment is due solely to smoking. In addition, employer argues that the administrative law judge erred in discrediting Dr. Jarboe's opinion because Dr. Jarboe did not consider, or adequately rebut, Dr. Houser's opinion. Employer also asserts that Dr. Jarboe's opinion, that the miner's cardiac issues were not caused by coal dust exposure, is not contrary to the law, despite the administrative law judge's finding. Additionally, employer argues that the administrative law judge erred in discrediting Dr. Repsher's opinion on the basis that it was inconsistent with the preamble to the regulations and was not supported by the facts. Further, employer contends that the administrative law judge's weighing of Dr. Houser's opinion was erroneous because Dr. Houser's determination that the miner's COPD arose out of coal dust exposure was based solely on the miner's coal mine employment history.

Although we agree with employer that the administrative law judge erred in determining that employer's "assertions on the smoking issue are affirmative defenses," which permit the burden of persuasion to be shifted to employer, the administrative law judge provided permissible, alternative reasons for discrediting the opinions of Drs. Roggli and Caffrey, that did not rely on shifting the burden to employer. Decision and Order on Second Remand at 5-6; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Specifically, the administrative law judge rationally found that Dr. Roggli did not adequately explain how he excluded coal dust as a cause of the miner's COPD, particularly when the Department of Labor (DOL) has determined that it is "a well-documented fact" that coal dust exposure can cause obstructive lung disease.[6] 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see A&E Coal Co. v. Adams*, 694 F.3d 798, BLR (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); Decision and Order on Second Remand at 7. The administrative law judge also rationally discredited Dr. Caffrey's opinion because he expressed views that are contrary to the DOL's findings

[6] Dr. Roggli indicated that "it's very uncommon for coal worker[s'] pneumoconiosis to be associated with chronic obstructive pulmonary disease (COPD), whereas it's very common for cigarette smoking to be associated with chronic obstructive pulmonary disease." Employer's Exhibit 10 at 15.

that smoking and coal dust can have an additive effect and that any impairment from coal dust may not appear until after the cessation of the individual's coal mine employment.[7] *See Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. at 79,971; Decision and Order on Second Remand at 6.

Additionally, administrative law judge noted correctly that Dr. Jarboe excluded coal dust as a causative factor for the miner's COPD, citing the fact that the miner had no respiratory impairment when he left the mines and there was insufficient evidence of dust deposition in the pulmonary tissues. The administrative law judge rationally rejected Dr. Jarboe's opinion because it is contrary to DOL's recognition that pneumoconiosis can be latent and progressive and that legal pneumoconiosis can be present regardless of the existence of clinical pneumoconiosis.[8] *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. at 79,971; Decision and Order on Second Remand at 8-9. Further, the administrative law judge permissibly gave less weight to Dr. Repsher's opinion because he did not adequately explain why coal dust exposure could not have at least contributed to the miner's COPD.[9] *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order on Second Remand at 9-10.

The administrative law judge also acted within his discretion in giving greatest weight to Dr. Houser's opinion, that the miner had legal pneumoconiosis, as the physician's conclusion was supported by the objective evidence and consistent with the definition of legal pneumoconiosis. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255,

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[7] Dr. Caffrey stated, "I think from a review of the report from Dr. Houser that a few years after [the miner] retired from the mines, he had . . . no pulmonary problems and later on his pulmonary problems developed because he continued to smoke, number one, and his COPD then developed and his cardiac disease worsened." Employer's Exhibit 8 at 18.

[8] Clinical pneumoconiosis 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).

[9] Dr. Repsher opined that "[a]lthough exposure to coal mine dust may cause COPD, this is so small in degree that it is only measureable in a statistical sense." Employer's Exhibit 2.

5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Second Remand at 4-5, 12. Contrary to employer's contention, the administrative law judge did not determine, prior to reviewing the evidence, that the miner's COPD was due to coal dust exposure. Rather, the administrative law judge considered all of the medical opinions and explained why he gave more or less weight to each opinion. *See* Decision and Order on Second Remand at 5-12. In addition, as the administrative law judge noted, Dr. Houser did not rely solely on the miner's coal mine employment history to diagnose legal pneumoconiosis but rather, further relied on his examination and treatment of the miner, blood gas and pulmonary function studies, and medical literature. *Id*. at 10-12; *see* Director's Exhibit 29; Claimant's Exhibit 1.

As the administrative law judge gave valid reasons for discrediting the opinions of Drs. Jarboe and Repsher, and provided permissible reasons for crediting Dr. Houser's opinion, we affirm the administrative law judge's determination that claimant established that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[10] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

II. 20 C.F.R. §718.205(c)

Regarding the issue of death causation, the administrative law judge determined that Dr. Houser offered a reasoned opinion that severe hypoxemia, caused by legal pneumoconiosis, hastened the miner's death from a heart attack. Decision and Order on Second Remand at 14. The administrative law judge noted that, while Dr. Roggli opined that the miner's death was due to heart disease, he also "testified that COPD could hasten death in the same manner as explained by Dr. Houser." *Id*. The administrative law judge specifically rejected the opinions of Drs. Caffrey and Repsher, that the miner's death was due entirely to heart disease, because they did not believe the miner had legal pneumoconiosis, contrary to the administrative law judge's finding. The administrative law judge also rejected Dr. Jarboe's opinion, that the miner had no evidence of hypoxemia, as it was in the minority and not supported by the miner's treatment records. *Id*. Therefore, based on Dr. Houser's opinion, the administrative law judge determined that claimant established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *Id*. at 15.

[10] We decline to address employer's additional arguments regarding the administrative law judge's weighing of the opinions of Drs. Jarboe and Repsher, as the administrative law judge provided valid rationales for discrediting their opinions. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Citing *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 24 BLR 2-257 (6th Cir. 2010), employer argues that Dr. Houser's opinion is insufficient to satisfy claimant's burden of proof because he did not explain how pneumoconiosis "expedited" the miner's death through a "specifically defined process." Employer's Brief at 30, *quoting Conley*, 595 F.3d at 303, 24 BLR at 2-266. In addition, employer argues that the administrative law judge erred in discrediting Dr. Jarboe's opinion without specifically addressing Dr. Jarboe's explanation that the treatment records reflected that the miner's hypoxia coincided with his periods of heart failure so the hypoxia did not cause permanent impairment. Employer states that the administrative law judge merely relied on Dr. Houser's opinion, without explaining why it was entitled to greater weight than the other opinions.

Upon review of the administrative law judge's weighing of the relevant medical opinions and employer's arguments on appeal, we affirm the administrative law judge's reliance on Dr. Houser's opinion to find that the miner's death was hastened by pneumoconiosis under 20 C.F.R. §718.205(c). The record reflects that Dr. Houser prepared the death certificate and identified anoxic encephalopathy, cardiac arrest, and arteriosclerotic heart disease as the immediate causes of the miner's death, with COPD being a significant contributing cause of death. Director's Exhibit 13. On a subsequent questionnaire, Dr. Houser agreed that pneumoconiosis played a hastening role in the miner's death and stated:

> I believe the pneumoconiosis (chronic bronchitis and COPD), contributed to the development of his cardiac arrhythmia and cardiac arrest, which contributed to the anoxic encephalopathy and subsequent death. The hypoxemia was caused by his chronic lung disease.

Director's Exhibit 29. Dr. Houser further indicated at his deposition that there was a direct link between legal pneumoconiosis and the miner's death, as COPD and chronic bronchitis caused the miner's hypoxemia which, in turn, led to cardiac arrhythmia and cardiac arrest, which resulted in anoxic encephalopathy and death. Claimant's Exhibit 1 at 19-20.

Pursuant to the Sixth Circuit's holding in *Napier*, assessing the credibility of a physician's opinion is committed to the discretion of the administrative law judge in his role as fact-finder, and the reviewing authority is required to defer to the administrative law judge's rational findings. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *see also Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Groves*, 277 F.3d at 836, 22 BLR at 2-325. In the present case, the administrative law judge discussed the Sixth Circuit's decision in *Conley* and acted within his discretion in finding that Dr. Houser provided a reasoned explanation as to how legal pneumoconiosis hastened the miner's death and that his opinion satisfied the

standard set forth in *Williams*. *See Conley*, 595 F.3d at 303, 24 BLR at 2-266; *Williams*, 338 F.3d at 518, 22 BLR at 2-655; Decision and Order on Second Remand at 14-15. Additionally, contrary to employer's argument, the administrative law judge permissibly discredited the opinions of Drs. Roggli, Caffrey, and Repsher as to death causation because they did not diagnose 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); Decision and Order on Second Remand at 13-15. We affirm, therefore, the administrative law judge's determination that claimant satisfied her burden under 20 C.F.R. §718.205(c), and further affirm the award of benefits.[11]

[11] In light of our affirmance of the administrative law judge's findings that claimant established the existence of legal pneumoconiosis and death due to legal pneumoconiosis under 20 C.F.R. §§718.202(a)(4), 718.205(c), the fact that the administrative law judge did not reach a definitive conclusion as to the applicability of the amended Section 411(c)(4) presumption does not constitute error requiring remand. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

Accordingly, the administrative law judge's Decision and Order on Second Remand Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge