BRB No. 12-0237 BLA

VIRGINIA TACKETT (Widow of DANNY TACKETT) Claimant-Respondent v. WEST VIRGINIA SOLID ENERGY, INCORPORATED and AMERICAN BUSINESS AND MERCANTILE INSURANCE MUTUAL Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/31/2013 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

J. Logan Griffith and Clayton D. Scott (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for claimant.

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

Richard A. Seid (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05096) of Administrative Law Judge John P. Sellers, III, with respect to a survivor's claim filed on December 21, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge determined that employer was the properly designated responsible operator and that the miner had at least twenty-five years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and, therefore, invoked the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that, if the miner's work as a federal mine inspector qualifies as coal mine employment, the administrative law judge erred in finding that it was the proper responsible operator. Employer also challenges the administrative law judge's determination that the miner had at least twenty-five years of underground coal mine employment. Further, employer alleges that the administrative law judge did not

[1] Claimant is the widow of the miner, Danny Tackett, who died on November 20, 2007. Director's Exhibit 13. The miner did not file a claim for benefits prior to his death.

[2] On March 23, 2010, Congress adopted amendments to the Act, that affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In pertinent part, the amendments reinstated Section 411(c)(4), 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had fifteen or more years of underground, or substantially similar, coal mine employment. 30 U.S.C. §921(c)(4).

properly weigh the evidence relevant to rebuttal of the amended Section 411(c)(4) presumption.[3]

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief in which he urges the Board to hold that employer is the properly designated responsible operator and that substantial evidence supports the administrative law judge's coal mine employment findings.[4]

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.[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).

I. Responsible Operator

The administrative law judge determined that employer is the properly designated responsible operator, as it was the last coal mine operator for which the miner worked for a cumulative period of one year. Decision and Order at 5. Employer contends that because the Department of Labor (DOL) employed the miner in a job that qualified as coal mine employment for at least one year after he worked for employer, and has sufficient assets to pay any award of benefits, liability should be transferred to the Black Lung Disability Trust Fund. In addition, employer argues that its due process rights were violated because it did not have an "opportunity to develop a defense at a meaningful time" to the survivor's claim. Employer's Brief at 14. Employer's contentions are without merit.

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[3] Employer's request to hold the case in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

The regulations provide that "[t]he operator responsible for the payment of benefits in a claim adjudicated under this part (the 'responsible operator') shall be the potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). However, "[n]either the United States, nor any State, nor any instrumentality or agency of the United States or any States, shall be considered an operator." 20 C.F.R. §725.491(f). Because the DOL cannot be designated an "operator" under the regulations, it cannot be considered a "potentially liable operator" at risk for a claim. 20 C.F.R. §725.494. We agree with the Director, therefore, that the DOL's employment of the miner "does not affect [employer's] last-in-time status as the most recent *operator* that employed him." Director's Brief at 3; 20 C.F.R. §725.495(a)(1).

Employer's due process argument is also without merit. Employer maintains that it did not have an opportunity to develop evidence in opposition to the survivor's claim because "the first diagnosis of pneumoconiosis came long after [the miner's] employment with [employer] ended" and the miner died before employer had any notice that it might be held liable for benefits. Due process requires that employer be able to mount a meaningful defense by being timely informed of the claim and being given the opportunity to develop evidence in response to it. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *North Am. Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). In the current case, employer received timely notice of the claim and was able to develop and submit CT reports, physicians' reports, and pathology reports. We hold, therefore, that employer has not established that it was deprived of an opportunity to mount a meaningful defense to the present claim. *See Holdman*, 202 F.3d at 883-84, 22 BLR at 2-32. Accordingly, we affirm the administrative law judge's determination that employer is the properly designated responsible operator.[6]

II. Length of Coal Mine Employment

The record contains a statement, prepared by the miner, indicating that he worked at National Mine Corporation from May 1975 to June 1979, Wolf Pen Coal Company from June 1979 to June 1981, West Virginia Solid Energy from June 1981 to November 1986, and with the Mine Safety and Health Administration of the DOL, beginning in

[6] Employer also contends that the administrative law judge did not consider "whether the evidence established that [the miner's] pneumoconiosis, if he had it, did not arise out of his employment with [employer]." Employer's Brief at 14. We reject this argument, as employer has not identified any evidence rebutting the presumption that the miner's death was "caused, contributed to or aggravated" by his employment with employer. 20 C.F.R. §725.494(a).

1987, as "an underground inspector." Director's Exhibit 3-3. Form CM-911a, prepared by claimant, reflects the same employment history with the addition of an unspecified amount of time with Bill G. Coal Company. Director's Exhibit 3-1. The form also contains a notation that the miner was a coal mine inspector for underground and surface mines. *Id*. The record contains in addition statements from two co-workers of the miner, W-2 forms, and the Social Security Administration's (SSA) Itemized Statement of Earnings. Director's Exhibits 4-6, 9. Claimant testified at the hearing that she met the miner in October 1980 and that, to her knowledge, all of the miner's work was underground. Hearing Transcript at 16, 18. Concerning the miner's employment as a federal mine inspector, claimant testified that the miner worked underground "sometimes, not all the time" and that "[s]ometimes he'd come home . . . dirty, and then sometimes . . . he wouldn't. It was just according to . . . what kind of job he had for that day." Hearing Transcript at 24.

The administrative law judge rendered findings regarding the length of claimant's underground coal mine employment in two separate sections of his Decision and Order. Decision and Order at 3-5, 25-26. Initially, the administrative law judge determined that the work histories prepared by the miner and claimant were credible and corroborated by the miner's SSA records. *Id*. at 4. Based on this evidence, the administrative law judge credited the miner with eleven years and six months of underground coal mine employment. *Id*. The administrative law judge also determined that the miner's work as a federal coal mine inspector for fourteen years was underground. *Id*. The administrative law judge concluded that the miner had at least twenty-five years of qualifying coal mine employment for the purposes of amended Section 411(c)(4). *Id*. at 5.

In considering the applicability of amended Section 411(c)(4), the administrative law judge elaborated on his earlier finding as to the length of the miner's qualifying coal mine employment, explaining that he did not find claimant's testimony, that the miner only worked underground, or occasionally came home dirty, to be inconsistent with a finding that the miner worked underground as a mine inspector. Decision and Order at 26. The administrative law judge stated, "obviously even an underground mine inspector would not be constantly underground, nor would he constantly be exposed to dust as part of his inspection duties while underground." *Id*. at 26. The administrative law judge further noted that the Board "has held that so long as a miner worked at an underground mine, regardless of whether he worked above ground or below ground, he need not show that the dust conditions he worked in were substantially similar to those of an underground mine." *Id*., *citing Alexander v. Freeman United Coal Mining*, 2 BLR 1-497 (1979). The administrative law judge concluded that the miner had at least twenty-five years of underground coal mine employment. Decision and Order at 26.

Employer asserts that there are no standards in the statute or regulations governing proof of comparability between surface mine employment and underground conditions

and, to the extent that there is case law addressing this issue, the administrative law judge did not comply with the holdings contained therein. Further, employer contends that regardless of the standard, the administrative law judge failed to independently consider the evidence regarding the miner's coal mine employment, but merely accepted claimant's statement that the miner worked aboveground and underground and that "[s]ometimes he'd come home . . . dirty, and then sometimes . . . he wouldn't." Hearing Transcript at 24; *see* Employer's Brief at 22. Employer states that the Board's holding in *Alexander* does not set forth an objective standard and does not comply with the Administrative Procedure Act, 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), which requires that the proponent of a rule or order bear the burden of proof.

Employer is correct in asserting that claimant bears the burden of establishing comparable conditions between surface and underground mining. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988)[7]; 20 C.F.R. §725.103. However, the Board recently reaffirmed its holding in *Alexander*, that a surface worker at an underground mine site is not required to establish the comparability of the conditions, as the regulatory definition of an underground coal mine, set forth in 20 C.F.R. 725.101(a)(30), encompasses not only the underground mine shaft, but also all land, buildings and equipment. *Muncy v. Elkay Mining Co.*, 25 BLR 1-23, 1-29 (2011).

In the present case, we affirm, as unchallenged on appeal, the administrative law judge's finding that, prior to the miner's tenure as a federal mine inspector, he worked for eleven and one-half years at underground mines. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Regarding the miner's work as a mine inspector, the administrative law judge acted within his discretion as fact-finder in determining that claimant's testimony was not inconsistent with a finding that this work took place at underground mine sites. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Based upon claimant's testimony, and the miner's identification of his job title as "underground inspector," the administrative law judge rationally concluded that the miner's fourteen-year tenure in this position constituted underground coal mine employment. Director's Exhibit 3-1; *see Jericol Mining, Inc. v.*

[7] The Sixth Circuit has not addressed the proof required to establish comparable dust conditions between underground and surface coal mine employment. However, the Board has applied *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988), in cases arising outside of the United States Court of Appeals for the Seventh Circuit as a valid standard. *See Harris v. Cannelton Industries*, 24 BLR 1-217 (2011); *Hansbury v. Reading Anthracite Co.*, BRB No. 11-0236 BLA (Nov. 29, 2011)(unpub.); *Prater v. Bevens Branch Resources, Inc.*, BRB Nos. 10-0667 BLA & 10-0668 BLA (Aug. 26, 2011)(unpub.).

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). We affirm, therefore, the administrative law judge's finding that that the miner had at least fifteen years of coal mine employment at underground mine sites. In light of this permissible finding, the administrative law judge stated correctly that he was not required to determine whether any work that the miner performed on the surface had been in conditions comparable to those found in underground mining.[8] *See Muncy*, 25 BLR at 1-29. We further affirm, therefore, the administrative law judge's finding that claimant invoked the rebuttable presumption at amended Section 411(c)(4).

III. Rebuttal of the Presumption

A. Disproving the Existence of Pneumoconiosis

The administrative law judge found that employer failed to rebut the presumption at amended Section 411(c)(4) by establishing that the miner did not have clinical or legal pneumoconiosis,[9] based on the x-ray, CT scan, and the medical opinion evidence. Decision and Order at 29-38. In addition, the administrative law judge determined that employer did not rebut the presumption by establishing that there was no causal relationship between the miner's legal pneumoconiosis and his death. *Id*. at 38-40.

Employer asserts that the administrative law judge did not provide valid rationales for discrediting the opinions in which Drs. Jarboe and Oesterling ruled out the existence of both clinical and legal pneumoconiosis. Employer maintains that, when weighing these opinions, the administrative law judge erroneously relied on unpublished Board precedent and the preamble to the regulations. These allegations are without merit.

As an initial matter, we reject employer's assertion that the administrative law judge erred in relying on the preamble to the amended regulations. The preamble sets

[8] Employer does not challenge the administrative law judge's finding that the miner's inspection work constitutes coal mine employment under the Act. Accordingly, we affirm this finding. *See Skrack*, 6 BLR at 1-711.

[9] Clinical pneumoconiosis consists of "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

forth the DOL's resolution of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

Regarding the administrative law judge's use of the preamble when weighing Dr. Jarboe's opinion, Dr. Jarboe indicated that coal dust inhalation did not contribute to the miner's respiratory impairment because he had a well-preserved FVC and a significantly reduced FEV1 and "it has consistently been shown that there is a decline both in FEV1 and FVC in relation to indices of dust exposure," while "[a] disproportionate reduction of FEV1 compared to FVC is the hallmark of the functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." Employer's Exhibit 11. In the preamble to the amended definition of legal pneumoconiosis, the DOL stated, "epidemiological studies have shown that coal miners have an increased risk of developing [chronic obstructive pulmonary disease (COPD)]. COPD may be detected from decrements in certain measures of lung function, *especially FEV_1 and the ratio of FEV_1/FVC*." 65 Fed. Reg. 79,943 (Dec. 20, 2000) (emphasis added). Thus, the administrative law judge properly found that Dr. Jarboe's requirement, that there be a *proportionate* reduction in the FEV1 and FVC values, is inconsistent with broader premises underling the regulations, regarding the significance of the FEV1 and FVC values in diagnosing coal dust-related COPD.[10] *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *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); Decision and Order at 31.

In addition, contrary to employer's contention, the administrative law judge did not find that the preamble created a presumption that the miner's impairment must be due, in part, to coal dust exposure. Rather, the administrative law judge rationally determined that, given the DOL's recognition that coal dust and cigarette smoke can have

[10] Dr. Jarboe stated, "[coal workers'] pneumoconiosis can present as only a restrictive disease (with low FVC), only as an obstructive disease (with low FEV1) or a combination of the two. I would simply point out that the spirometric pattern of preservation of the FVC vis-a-vis the FEV1 is one of the findings that one can use to attempt to separate causation from coal dust inhalation as opposed to cigarette smoking." Employer's Exhibit 5.

an additive effect, Dr. Jarboe did not adequately explain why coal dust could not have at least contributed to the miner's impairment. *See* 65 Fed. Reg. at 79,940-43; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7; *Obush*, 24 BLR at 1-125-26; Decision and Order at 32. Furthermore the ALJ properly discredited Dr. Jarboe's opinion, as his reliance on the absence of radiological evidence of fibrosis to rule out coal dust exposure as a cause of claimant's emphysema is contrary to the preamble to the amended regulations. As the administrative law judge noted, the DOL has stated that sound medical science establishes that emphysema due to coal dust exposure can occur independently of clinical coal workers' pneumoconiosis. Decision and Order at 32, *citing* 65 Fed Reg. 79,939, 79,971 (Dec. 20, 2000). Moreover, the administrative law judge did not, contrary to employer's contention, rely on the preamble to resolve "the question of whether coal dust exposure causes a particular claimant's emphysema." Employer's Brief at 29. Rather, the administrative law judge relied on the preamble, as well as the Board's holdings in previous cases, to aid in his evaluation of Dr. Jarboe's opinion in the instant case. Decision and Order at 32-33.

Further, the administrative law judge rationally determined that the opinions of Drs. Jarboe and Oesterling, that the miner had bronchiolitis associated with cigarette smoking, did not rule out a contribution to the miner's impairment from coal dust exposure. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-32; Decision and Order at 34-35. Contrary to employer's contention, the administrative law judge's finding is distinguishable from *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), a decision in which the Sixth Circuit held that it was error for an administrative law judge to rely on a physicians' "failure to explain why the [miner's] years of coal mine employment had 'nothing to do with his lung condition,'" to find that "the [miner's] work 'must have caused his lung impairment.'"[11] Employer's Brief at 33, *quoting Williams*, 338 F.3d at 515, 22 BLR at 2-651. Rather, the administrative law judge acted within his discretion in finding that Drs. Jarboe and Oesterling did not adequately explain why a diagnosis of bronchiolitis due to cigarette smoking necessarily excluded any contribution to the miner's impairment from his twenty-five years of coal dust exposure. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-32; Decision and Order at 34-35.

Finally, contrary to employer's assertion, the administrative law judge did not base his conclusions solely on the holdings of the Board in other cases. Rather, he properly evaluated the physicians' opinions based on the facts in this case and permissibly cited to *Y.D.* [*Dyke*] *v. Diamond May Coal Co.*, BRB No. 08-0176 BLA (Nov. 26, 2008)(unpub.) and *M.A.* [*Amburgey*] *v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16,

[11] Employer also cited *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992) and *Old Ben Coal Co. v. Director, OWCP* [*Mitchell*], 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995), for the same proposition.

2009)(unpub.), as support for his credibility determination. We also reject employer's related contention that the administrative law judge erred in citing to unpublished decisions in reaching his credibility findings. *See Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 929 (6th Cir. 2000) (holding that the court is permitted to consider the persuasive reasoning of unpublished opinions).

Consequently, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption by establishing that the miner did not have legal pneumoconiosis. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011). Based on this holding, it is not necessary to address employer's arguments concerning the rebuttal of the presumed existence of clinical pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

B. Disproving Death Due to Pneumoconiosis

Regarding the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption by proving that the miner's death was unrelated to his coal mine employment, employer indicated that the errors in the administrative law judge's findings on the issue of the existence of legal pneumoconiosis rendered his findings on the issue of death causation invalid. Employer's Brief at 23. Because we have affirmed the administrative law judge's determination that employer failed to affirmatively prove that the miner did not have legal pneumoconiosis, we also affirm his determination that employer did not rebut the amended Section 411(c)(4) presumption by affirmatively proving that the miner's death did not arise out of, or in connection with his coal mine employment. 30 U.S.C. §921(c)(4); *Morrison*, 644 F.2d at 479, 25 BLR at 2-8; Decision and Order at 38-40. We affirm, therefore, the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

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