BRB No. 11-0645 BLA

REBECCA A. WAYNE (Widow of DANNY W. MAYNOR)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 06/22/2012
MAPLE MEADOW MINING COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Rebecca A. Wayne, Summersville, West Virginia, *pro se*.[1]

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand (06-BLA-6028) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits

[1] M. Seth O'Quinn, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. O'Quinn is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a survivor's claim filed on November 1, 2005,[2] and is before the Board for the second time.

In the initial decision, the administrative law judge found that the evidence did not establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits. Claimant filed an appeal with the Board.

While claimant's claim was pending before the Board, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. 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. 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a claimant establishes that a 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). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption.[3] *Id.*

By Decision and Order dated October 22, 2010, the Board vacated the administrative law judge's denial of benefits, and remanded the case to the administrative law judge for consideration of whether claimant was entitled to benefits pursuant to amended Section 411(c)(4). *Maynor v. Maple Meadow Mining, Co.*, BRB No. 10-0135 BLA (Oct. 22, 2010) (unpub.).

Applying amended Section 411(c)(4),[4] the administrative law judge credited the

[2] Claimant, Rebecca A. Wayne, is the remarried widow of the miner, Danny W. Maynor, who died on December 1, 1998. Director's Exhibits 2, 12.

[3] Section 1556 of Public Law No. 111-148 also amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), to provide that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner never filed a claim for federal black lung benefits.

[4] In light of the applicability of amended Section 411(c)(4), the administrative law judge reopened the record on remand, and allowed the parties an opportunity to submit additional evidence. In response, claimant submitted Dr. Patel's March 17, 2000 report, and employer submitted supplemental 2011 depositions from Drs. Bush and Zaldivar, all

miner with at least seventeen years of qualifying coal mine employment,[5] and determined that the medical evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis. The administrative law judge, however, found that employer established that the miner did not have pneumoconiosis. The administrative law judge, therefore, found that employer rebutted the Section 411(c)(4) presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

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

Because claimant invoked the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal. Decision and Order on Remand at 8. The administrative law judge accurately noted that employer could rebut the presumption by disproving the existence of both clinical and legal pneumoconiosis.[6] 30 U.S.C. §921(c)(4); Decision and Order on Remand at 8.

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of which the administrative law judge admitted into evidence. Decision and Order on Remand at 2; Claimant's Exhibit 1; Employer's Exhibits 6, 7.

[5] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. 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 (1989) (en banc).

[6] "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

Clinical Pneumoconiosis

In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered the x-ray evidence. The record contains interpretations of twenty-eight x-rays taken from December 16, 1985 through December 1, 1998. Director's Exhibit 13. Dr. Bassali interpreted the miner's December 16, 1985 and February 22, 1989 x-rays as revealing chronic interstitial lung disease "presumably due to pneumoconiosis." *Id.* Although the administrative law judge considered these interpretations as positive for clinical pneumoconiosis, Decision and Order on Remand at 12, Dr. Bassali did not provide an ILO classification for these x-rays. Section 718.102(b) provides that a chest x-ray shall be classified according to ILO classification for it to establish the existence of pneumoconiosis. 20 C.F.R. §718.102(b). Consequently, Dr. Bassali's interpretations of these x-rays do not constitute evidence of the presence of clinical pneumoconiosis. 20 C.F.R. §718.102(e).

None of the remaining x-ray interpretations mention the existence of pneumoconiosis. In *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-29 (1984), the Board held that "x-ray interpretations that contain no mention of pneumoconiosis will support an inference that the miner did not, or does not, have pneumoconiosis." While the Board acknowledged in *Marra* that "an administrative law judge may generally assume that if the physician reading the x-ray does not mention pneumoconiosis, then pneumoconiosis is not present," there is no requirement that x-rays containing no mention of pneumoconiosis be automatically deemed negative for pneumoconiosis. *Marra*, 7 BLR at 1-218-19. Rather, the issue is a question of fact to be resolved by the administrative law judge, who may "consider, in his discretion, whether an inference that the x-rays establish the absence of pneumoconiosis is warranted." *Marra*, 7 BLR at 1-219.

Because the physicians who interpreted the miner's November 23, 1997 and September 16, 1998 x-rays noted "chronic changes," the administrative law judge permissibly found that these x-rays are "inconclusive" for the existence of pneumoconiosis. Decision and Order on Remand at 12; Director's Exhibit 13. The administrative law judge, however, permissibly found that the remaining twenty-four x-rays, since they do not mention pneumoconiosis, are negative for the disease. *Marra*, 7 BLR at 218-19; Decision and Order on Remand at 12; Director's Exhibit 13. Because it is based on substantial evidence, we affirm the administrative law judge's finding that the

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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).

x-ray evidence established that the miner did not suffer from clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1).

In considering whether the autopsy evidence disproved the existence of clinical pneumoconiosis, the administrative law judge considered the reports of Drs. Koh, Naeye, and Bush. In his initial autopsy report, Dr. Koh, the prosector, diagnosed "macular pulmonary anthracosis," a diagnosis that, if credited, could support a finding of clinical pneumoconiosis. 20 C.F.R. §718.201(a)(1). However, in his autopsy report, and subsequent deposition, Dr. Koh explained that the dust macules in the miner's lung tissue, which he referred to as constituting macular pulmonary anthracosis, were not causing a "fibrous reaction." Director's Exhibit 14; Employer's Exhibit 5 at 29. Dr. Koh further found no fibrotic nodules associated with the miner's anthracotic deposits. Director's Exhibit 14; Employer's Exhibit 5 at 18. Dr. Koh explained that he could not "confirm or deny the presence of . . . coal workers' pneumoconiosis."[7] Employer's Exhibit 15 at 20.

Drs. Naeye and Bush reviewed the miner's autopsy slides and medical evidence. Dr. Naeye found "only a very small amount of anthracotic pigment" in the miner's lungs, opining that there were "no anthracotic macules or other gross or microscopic findings that suggest occupational exposure to coal mine dust." Director's Exhibit 15. Dr. Naeye, therefore, opined that "[n]one of the disorders that as a group constitute coal worker's pneumoconiosis are present in the [miner's] lungs." *Id.* Dr. Bush similarly found only "[a] scattering of dust pigment" in the miner's lungs, with "no fibrous reaction to this dust pigment." Director's Exhibit 15 at Dr. Bush, therefore, ruled out a diagnosis of coal workers' pneumoconiosis.[8] Director's Exhibit 15; Employer's Exhibit 4 at 21, 23; Employer's Exhibit 6 at 26-27.

The administrative law judge properly found that the physicians' descriptions of anthracotic pigmentation did not support a finding of clinical pneumoconiosis, since none of the physicians described a "fibrotic reaction" to that pigmentation in the miner's lungs. Decision and Order on Remand at 16; *see* 20 C.F.R. §718.202(a)(2);[9] *Hughes v.*

[7] Dr. Bush reasoned that Dr. Koh's diagnosis of "macular pulmonary anthracosis" must refer to "innocuous deposits of dust pigment," a finding that Dr. Bush noted was "not indicative of pneumoconiosis." Director's Exhibit 15.

[8] Dr. Naeye further noted that, after reviewing the lungs of more than 1000 coal miners, he could not recall "seeing tissues from a miner's lungs with less evidence of [having] been exposed to coal mine dust." Director's Exhibit 15.

[9] Section 718.202(a)(2) provides, in pertinent part, that a "finding in an autopsy or biopsy of anthracotic pigmentation . . . shall not be sufficient, by itself, to establish the

Clinchfield Coal Co., 21 BLR 1-134, 1-139 (1999) (en banc). Moreover, the administrative law judge accurately noted that Drs. Naeye and Bush each opined that the miner did not suffer from pneumoconiosis. Decision and Order on Remand at 15-16. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the autopsy evidence established that the miner did not suffer from clinical pneumoconiosis. 20 C.F.R. §718.202(a)(2).

The administrative law judge finally considered whether the medical opinion evidence disproved the existence of clinical pneumoconiosis. The administrative law judge considered the medical opinions of Drs. Oar, Patel, Zaldivar, and Bush. In connection with an emergency room visit, Dr. Oar completed a medical history, wherein he noted that the miner suffered from "black lung." Director's Exhibit 13. The administrative law judge, however, permissibly found that Dr. Oar's opinion was not well-reasoned, noting that the doctor provided no explanation for his diagnosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 29.

Dr. Patel diagnosed "diffuse pulmonary fibrosis" due to coal mine dust exposure, based upon a 1985 x-ray, and the miner's autopsy findings. Claimant's Exhibit 1. The administrative law judge found that Dr. Patel's diagnosis was entitled to less weight because it was based upon an x-ray interpretation that is not in the record. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting); Decision and Order on Remand at 28. The administrative law judge also permissibly questioned Dr. Patel's diagnosis because it was inconsistent with the weight of the x-ray evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order on Remand at 28. Moreover, the administrative law judge permissibly found that the autopsy evidence, that Dr. Patel found supportive of a finding of pneumoconiosis, disproved the existence of pneumoconiosis, thus calling into question the reliability of Dr. Patel's diagnosis.[10] *See generally Arnoni v. Director,*

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existence of pneumoconiosis." 29 C.F.R. §718.202(a)(2).

[10] Dr. Patel also diagnosed complicated pneumoconiosis based upon an x-ray "which was done in 1985." Claimant's Exhibit 1. The administrative law judge permissibly found that Dr. Patel's diagnosis was not entitled to any "probative value" because it was based upon an x-ray interpretation that is not in the record. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting); Decision and Order on Remand at 4, n.12, 28. The administrative law judge further accurately noted that there was no x-ray or autopsy evidence in the record supportive of a finding complicated pneumoconiosis. Because the administrative law

OWCP, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order on Remand at 28.

Conversely, the administrative law judge found that the opinions of Drs. Zaldivar and Bush, that the miner did not suffer from clinical pneumoconiosis, were well-reasoned and consistent with the x-ray and autopsy evidence. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order on Remand at 28. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established that the miner did not suffer from clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Legal Pneumoconiosis

The administrative law judge finally considered whether the medical opinion evidence disproved the existence of legal pneumoconiosis. Although Dr. Bush opined that the miner suffered from emphysema, he concluded that the disease was due to the miner's heavy cigarette smoking,[11] and was unrelated to the miner's coal mine dust exposure. Director's Exhibit 15; Employer's Exhibit 6 at 17-18. Dr. Bush, therefore, opined that the miner did not suffer from legal pneumoconiosis. Employer's Exhibit 6 at 17. The administrative law judge accurately noted that Dr. Bush ruled out coal dust exposure as a cause of the miner's emphysema, because he found that it was not associated with the coal mine dust deposits in the miner's lungs. Decision and Order on Remand at 28; Employer's Exhibit 6 at 21-22. The administrative law judge, therefore, permissibly found that Dr. Bush's opinion, regarding the etiology of the miner's emphysema, was reasoned and probative.[12] *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order on Remand at 28-29.

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judge appropriately found that the evidence of record does not establish the existence of complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant is not entitled to the Section 718.304 presumption. *See* 20 C.F.R. §718.304.

[11] Dr. Bush noted that the miner had a forty-five pack year smoking history. Director's Exhibit 15; Employer's Exhibit 4 at 16-17.

[12] The administrative law judge noted that "Dr. Bush also reasonably concluded [the miner's] bronchitis was not legal pneumoconiosis since the mucous produced by the bronchitis was likewise not associated with coal mine dust deposits." Decision and Order on Remand at 28. The record discloses that while Dr. Bush initially noted that the miner may have suffered from chronic bronchitis, Director's Exhibit 15, the doctor subsequently testified that a diagnosis of chronic bronchitis could not be made in light of the miner's clinical presentation. Employer's Exhibit 6 at 23.

There is no medical opinion evidence attributing the miner's emphysema to his coal mine dust exposure.[13] Because it is based upon substantial evidence, we affirm the administrative law judge's finding that Dr. Bush's opinion was well-reasoned and documented, and sufficient to carry employer's burden to demonstrate that the miner did not have legal pneumoconiosis. *See 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 light of our affirmance of the administrative law judge's finding that employer disproved the existence of clinical and legal pneumoconiosis, we affirm the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[13] Dr. Zaldivar also opined that the miner did not suffer from legal pneumoconiosis. However, the administrative law judge accorded less weight to Dr. Zaldivar's opinion because he found that the doctor's opinion was inconsistent with the latent and progressive nature of pneumoconiosis. Decision and Order on Remand at 28-29.