

BRB No. 12-0584 BLA

JUDY K. NOYES)
(Widow of JAMES S. NOYES))
)
Claimant-Respondent)
)
v.) DATE ISSUED: 06/27/2013
)
CONSOLIDATION COAL COMPANY)
)
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 Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, 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 Remand (10-BLA-5042) of Administrative Law Judge Richard K. Malamphy awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (Supp. 2011)(the Act). This case, involving a survivor's claim¹ filed on December 17, 2008, is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with twenty-two years of coal mine employment,² and found that the autopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). However, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board held that the administrative law judge erred in not considering whether claimant could establish invocation of the amended Section 411(c)(4) presumption.³ *Noyes v. Consolidation Coal Co.*, BRB No. 11-0405 BLA (Feb. 27, 2012) (unpub.). The Board, therefore, remanded the case to the administrative law judge for consideration of whether claimant was entitled to invocation of the amended Section 411(c)(4) presumption. *Id.*

¹ Claimant is the widow of the miner, who died on February 11, 2008. Director's Exhibit 9.

² The record reflects that the miner's coal mine employment was in Utah. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

³ 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), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

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 benefits. *Noyes v. Consolidation Coal Co.*, BRB No. 11-0405 BLA (Feb. 27, 2012) (unpub.), slip op. at 2 n.2.

Applying Section 411(c)(4) on remand, the administrative law judge determined that claimant invoked the rebuttable presumption of death due to pneumoconiosis. 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. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contention that the administrative law judge applied an improper rebuttal standard. In separate reply briefs, employer reiterates its previous contentions.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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's death did not arise from his coal mine employment. 30 U.S.C. §921(c)(4); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305).

Initially, we note that, contrary to employer's contention, invocation of the Section 411(c)(4) presumption provides claimant with a presumption of both clinical and legal pneumoconiosis.⁵ *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-

⁴ 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).

⁵ "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 tissue 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).

66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Consequently, in order to rebut the Section 411(c)(4) presumption, employer must disprove the existence of both clinical and legal pneumoconiosis. As employer has conceded that the miner suffered from clinical pneumoconiosis, Decision and Order on Remand at 2; Employer' Brief at 5, it cannot rebut the presumption by disproving the existence of pneumoconiosis.

Therefore, in order to establish rebuttal of the Section 411(c)(4) presumption, it is employer's burden to prove that that the miner's death did not arise out of his coal mine employment. In addressing whether employer satisfied its obligation to prove that the miner's death did not arise out of his coal mine employment, the administrative law judge considered Dr. Oesterling's opinion. After reviewing the miner's autopsy slides and the medical evidence, Dr. Oesterling opined that the miner's death was due to squamous cell carcinoma, complicated by pneumonia. Director's Exhibit 21; Employer's Exhibit 1 at 20-21. Dr. Oesterling further opined that the miner's significant emphysema also contributed to the miner's death. *Id.* at 24. Dr. Oesterling attributed the miner's squamous cell carcinoma and emphysema to cigarette smoking, not coal mine dust exposure. Director's Exhibit 21; Employer's Exhibit 1 at 28-29. Although Dr. Oesterling diagnosed very mild clinical pneumoconiosis, he opined that it did not in any way contribute to the miner's death. Employer's Exhibit 7. Dr. Oesterling further opined that the miner's coal dust exposure did not cause, or contribute to, the miner's death.⁶ Employer's Exhibit 1 at 28.

⁶ In addressing whether employer established rebuttal, the administrative law judge also considered Dr. Perper's opinion. Dr. Perper reviewed the miner's autopsy slides and other medical evidence. Dr. Perper diagnosed squamous cell carcinoma, emphysema, clinical pneumoconiosis, and pneumonia. Claimant's Exhibit 1. Dr. Perper opined that the miner's lung cancer and emphysema were due to both coal mine dust exposure and cigarette smoking. *Id.* Dr. Perper attributed the miner's death to his coal mine dust exposure, opining that:

The cause of death of [the miner] was pulmonary failure on the background of coal workers' pneumoconiosis and associated pulmonary cancer and COPD. Both emphysema and pulmonary cancer were joint complications of a long standing occupational exposure to coal mine dust and coal workers' pneumoconiosis.

Claimant's Exhibit 1.

The record reflects that Dr. Hardy, the autopsy prosector, also addressed the cause of the miner's death. Dr. Hardy opined that the immediate cause of the miner's death was extensive metastatic squamous cell carcinoma, of probable pulmonary origin, with

The administrative law judge found that Dr. Oesterling's opinion could not establish rebuttal because it was based upon a faulty premise, namely, that the miner did not suffer from legal pneumoconiosis. Decision and Order on Remand at 3. The administrative law judge also found that Dr. Oesterling's opinion "is, at least arguably, hostile to the Act because the Act recognizes that emphysema can be caused by coal dust exposure." *Id.*

Employer contends that the administrative law judge erred in his consideration of Dr. Oesterling's opinion. We agree. Although employer conceded that the evidence established the existence of clinical pneumoconiosis, employer did not concede that the evidence established the existence of legal pneumoconiosis. Although claimant, by invoking the Section 411(c)(4) presumption, is entitled to a presumption that the miner suffered from legal pneumoconiosis, *i.e.*, that the miner's chronic lung diseases arose out of coal mine employment, it is a rebuttable presumption. Consequently, the administrative law judge erred in discrediting Dr. Oesterling opinion based upon his failure to diagnose legal pneumoconiosis, without first providing employer with an opportunity to disprove the existence of legal pneumoconiosis. Moreover, the administrative law judge failed to provide an adequate explanation, or support, for his finding that Dr. Oesterling's opinion was, "at least arguably," hostile to the Act. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In light of these errors, we vacate the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption. On remand, the administrative law judge must reconsider whether employer has established rebuttal of the Section 411(c)(4) presumption by proving that the miner's death did not arise from his coal mine employment. 30 U.S.C. §921(c)(4); *Copley*, 25 BLR at 1-89.

Finally, on September 5, 2012, claimant's counsel filed an attorney fee application, requesting a fee for services performed during claimant's previous appeal to the Board pursuant to 20 C.F.R. §802.203. We decline to consider claimant's counsel's request for legal fees at this time. Claimant's counsel is entitled to fees for services rendered while the case was pending before the Board only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). In light of our decision to vacate the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim. If, on remand, the administrative law judge again awards benefits, claimant may submit a revised fee petition for attorney's fees for work performed before the Board in both appeals. 20 C.F.R. §802.203(c).

superimposed acute right pneumonia, probable terminal sepsis, and disseminated intravascular coagulation. Director's Exhibit 10. Dr. Hardy also indicated that severe emphysema and cor pulmonale were "underlying contributing factors to the miner's death." *Id.*

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration 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