BRB No. 12-0317 BLA

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| JUDITH E. FIELDS<br>(Widow of DOYLE FIELDS)<br><br>Claimant-Petitioner<br><br>v.<br><br>CUMBERLAND RIVER COAL COMPANY<br><br>and<br><br>ARCH COAL, INCORPORATED<br><br>Employer/Carrier-<br>Respondents<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 03/21/2013<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Remand Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Judith E. Fields, Cawood, Kentucky, *pro se*.

Ronald E. Gilbertson (Husch Blackwell, LLP), Washington, DC, for employer.

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

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel,[2] the Decision and Order on Remand Denying Benefits (2007-BLA-05062) of Administrative Law Judge Joseph E. Kane, rendered on a survivor's claim filed on October 19, 2005, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The relevant procedural history of the case is as follows. On March 13, 2009, the administrative law judge denied survivor's benefits, finding that the evidence was insufficient to establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that his death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Claimant appealed, and while the case was pending before the Board, amendments to the Act, contained in Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), were enacted, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010. In relevant part, amended Section 411(c)(4), 30 U.S.C. §921(c)(4), provides that if a miner worked at least fifteen years in underground coal mine employment, or in conditions that are substantially similar to those found in an underground mine, and the miner also had a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. The Board vacated the administrative law judge's denial of benefits and remanded the claim for consideration under amended Section 411(c)(4).[3] *Fields v. Cumberland River Coal Co.*, BRB No. 09-0517 BLA (May 28, 2010) (unpub.). The Board instructed the administrative law judge on remand to reopen the record in order to give the parties the opportunity to submit additional evidence relevant to the change in the law, in compliance with the evidentiary limitations at 20 C.F.R. §725.414. *Id*.

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[1] Doyle Fields (the miner) filed a claim for benefits on March 22, 1999, which was denied by the district director. Director's Exhibit 1. The miner died on May 27, 2005, and claimant, his surviving spouse, filed her application for survivor's benefits on October 19, 2005. Director's Exhibit 3.

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

[3] As set forth in the Board's prior decision, claimant is not eligible for benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), as the miner's claim was denied. *See Fields v. Cumberland River Coal Co.*, BRB No. 09-0517 BLA, slip op. at 4 n.6 (May 28, 2010) (unpub.).

By Order dated January 3, 2012, the administrative law judge gave the parties the opportunity to supplement the record but neither claimant nor employer submitted additional evidence. On February 14, 2012, the administrative law judge issued a Decision and Order on Remand Denying Benefits, which is the subject of this appeal. Based on the factual findings and evidentiary summaries set forth in his March 13, 2009 decision, the administrative law judge credited the miner with sixteen years of underground coal mine employment, but found that claimant failed to prove that the miner had a totally disabling respiratory impairment under 20 C.F.R. §718.204(b). Thus, the administrative law judge determined that claimant was unable to invoke the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4). In considering the survivor's claim under 20 C.F.R. Part 718, the administrative law judge reinstated his prior findings that claimant failed to prove that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, thus, failed to establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Accordingly, survivor's benefits were denied.

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

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

## I. Amended Section 411(c)(4) Presumption

The administrative law judge determined that claimant was unable to invoke the amended Section 411(c)(4) presumption because the evidence failed to establish that the miner was totally disabled. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the three pulmonary function studies contained in the miner's

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

treatment records.[5] Decision and Order on Remand 4-5; *see* Director's Exhibit 26, Employer's Exhibit 1. The administrative law judge observed that the height of the miner was listed as "unknown" on the April 6, 2001 study, while the May 14, 2003 study listed the miner's height as 68 inches, and the April 29, 2005 study listed the miner's height as 67 inches. Decision and Order on Remand at 5. The administrative law judge permissibly relied on the miner's age at the time of each test and the "average reported height" of 67.5 inches in considering whether the pulmonary function studies were qualifying under the regulations.[6] Decision and Order on Remand at 5; *see Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-80-81 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). The administrative law judge properly determined that "[n]one of the pulmonary function studies [was] qualifying based on the FEV1 values." Decision and Order on Remand at 5; *see* 20 C.F.R. §718.204(b)(2)(i); Appendix B to 20 C.F.R. Part 718. We therefore affirm the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Remand at 5-6.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that the miner's treatment records contained twenty-four arterial blood gas studies dating from January 2005 to April 2005.[7] Decision and Order on Remand at 6-7; Director's Exhibits 23, 25; Employer's Exhibit 1. The administrative law judge found that, while none of the arterial blood gas studies reported the altitude at which they were performed, "three are qualifying for any altitude, eighteen are non-qualifying for any altitude, and three might be qualifying depending on the altitude at which they were performed." Decision and Order on Remand at 7. The administrative law judge permissibly concluded that, because a preponderance of the arterial blood gas study evidence was non-qualifying, total disability was not established pursuant to 20 C.F.R.

[5] The parties did not designate any pulmonary function studies or arterial blood gas studies as evidence pursuant to 20 C.F.R. §725.414(a).

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] The administrative law judge permissibly gave no weight to the arterial blood gas studies performed during the miner's final hospitalization from May 25-26, 2005, as those studies were not accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. *See* 20 C.F.R. §718.105(d); Decision and Order on Remand at 7.

§718.204(b)(2)(ii).[8] *Id.*; s*ee Schetroma v. Director, OWCP*, 18 BLR 1-17 (1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). In addition, because the record does not contain any evidence of cor pulmonale, we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order on Remand at 7.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that claimant submitted a report and affidavit from Dr. Appakondu, the miner's treating physician, and an affidavit from Dr. Echeverria, a physician who assisted in the miner's treatment, in which they opined that pneumoconiosis was a substantially contributing cause of the miner's death but did not address the issue of total disability. Decision and Order on Remand at 9; Director's Exhibits 17, 18, 28; Claimant's Exhibit 3. The administrative law judge further found that employer submitted the medical opinions of Drs. Jarboe and Dahhan, who specifically opined that the miner had no respiratory or pulmonary impairment prior to his death. Decision and Order on Remand at 9; *see* Employer's Exhibits 2, 3, 5.

Because the administrative law judge correctly found that claimant "has not offered any medical opinion finding that the [m]iner was totally disabled from a respiratory standpoint," we affirm the administrative law judge's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 9. We further affirm, as supported by substantial evidence, the administrative law judge's determination, based on his weighing of all of the evidence together, that the miner was not totally disabled. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order on Remand at 10. As claimant failed to establish that the miner had a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant is unable to invoke the presumption of death due to pneumoconiosis under amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4).

## II. Entitlement Under 20 C.F.R. Part 718

In order to establish entitlement to survivor's benefits, without benefit of the amended Section 411(c)(4) presumption, claimant must establish that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to

[8] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

pneumoconiosis.[9] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 302, 24 BLR 2-255, 2-264 (6th Cir. 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered five readings of three x-rays dated December 10, 2004, March 10, 2005, and May 20, 2005, as well as x-ray interpretations contained in the miner's treatment records. 2009 Decision and Order at 3-6, 12. The December 10, 2004 x-ray was read by Dr. Alexander, dually-qualified as a Board-certified radiologist and B reader, as positive for pneumoconiosis, while Dr. Wiot, also dually-qualified, read the x-ray as negative. Claimant's Exhibit 1; Employer's Exhibit 6. The administrative law judge permissibly determined this x-ray is inconclusive as to the presence or absence of pneumoconiosis, based on the conflicting readings by equally-qualified physicians. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); 2009 Decision and Order at 12.

The March 10, 2005 film was read as positive by Dr. Alexander, but read as negative by Dr. Dahhan, a B reader. *See* 2009 Decision and Order at 12; Claimant's Exhibit 2; Director's Exhibit 29. The administrative law judge rationally found this x-ray to be positive for pneumoconiosis, "based on Dr. Alexander's superior qualifications." 2009 Decision and Order at 12; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87.

The May 20, 2005 x-ray was read as negative by Dr. Wiot. Director's Exhibit 31. The administrative law judge determined incorrectly that "the poor quality of the film entitles this reading to less weight," as an administrative law judge may not accord a reading, properly classified for the presence or absence of pneumoconiosis, less weight because he finds it compromised, based on its quality reading. *See* 20 C.F.R. §718.102(a); *Auxier v. Director, OWCP*, 8 BLR 1-109 (1985); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). This error is harmless, however, because the administrative law judge permissibly found that the May 20, 2005 x-ray is negative for pneumoconiosis and, therefore, does not assist claimant in satisfying her burden at 20 C.F.R.

[9] On remand, the administrative law judge affirmed the determination in his 2009 Decision and Order that claimant did not establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order on Remand at 10; 2009 Decision and Order at 12-19. Accordingly, we will review the findings set forth in the 2009 Decision and Order on the issue of existence of pneumoconiosis to determine whether they are rational and supported by substantial evidence. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

§718.202(a)(1). 2009 Decision and Order at 12; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

Regarding "the thirty or more x-ray readings in the treatment record," the administrative law judge found that they "span several years [from 2002-2005] and consistently diagnose cardiomegaly, pulmonary congestion, pulmonary edema, and/or infiltrates, and several state that *no other disease process is present*." 2009 Decision and Order at 12 (emphasis added). The administrative law judge acted within his discretion, as fact-finder, in determining that the treatment x-rays do not establish the existence of pneumoconiosis, as none of the x-rays was read as positive and two of the x-rays were specifically read by Dr. Dahhan, a B reader, as negative. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); 2009 Decision and Order at 12.

The administrative law judge concluded that the x-ray evidence, "as a whole," was negative for pneumoconiosis.[10] 2009 Decision and Order at 12. We affirm the administrative law judge's determination as it is supported by his permissible findings that the ILO classified x-rays do not establish the existence of pneumoconiosis and that the treatment x-rays do not include a diagnose of pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Accordingly, we further affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

With respect to 20 C.F.R. §718.202(a)(2), the administrative law judge found correctly that the record does not contain any biopsy or autopsy evidence. 2009 Decision and Order at 13. At 20 C.F.R. §718.202(a)(3), the administrative law judge properly found that claimant is not eligible for any of the statutory presumptions available to establish that the miner had pneumoconiosis. *Id*.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge determined that the opinion in which Dr. Echeverria diagnosed pneumoconiosis was outweighed by

[10] In weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge further discussed the x-ray evidence in this case and reiterated that "not one of the over thirty x-ray interpretations in the [m]iner's treatment records mention [sic] pneumoconiosis, and the x-rays that were later read by consulting physicians are inconclusive." 2009 Decision and Order at 18; s*ee generally Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

the contrary opinions of Drs. Jarboe and Dahhan.[11] 2009 Decision and Order at 14-18. The administrative law judge noted that, although Dr. Echeverria provided a "fairly comprehensive summary of the [m]iner's medical history," he did not consider Dr. Echeverria's diagnosis of pneumoconiosis to be reasoned and documented. Specifically, the administrative law judge noted that while Dr. Echeverria stated that the miner had a "well-documented history" of "severe coal workers' pneumoconiosis," as evidenced by the miner's x-rays, "none of the thirty x-ray interpretations in the [m]iner's treatment records mentions pneumoconiosis." 2009 Decision and Order at 18. The administrative law judge further found that Dr. Echeverria did "not explain why the miner's symptoms of shortness of breath, wheezing, and coughing establish a diagnosis of pneumoconiosis." *Id*. In addition, the administrative law judge found that while Dr. Echeverria indicated that the miner was also being treated for exacerbations of chronic obstructive pulmonary disease, "the treatment records indicate that [the miner] was being treated primarily, if not exclusively, for heart disease and related complications." *Id*.

The determination of whether a medical opinion is adequately reasoned is a credibility finding reserved to the discretion of the administrative law judge as fact-finder. *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); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Because the administrative law judge permissibly determined that Dr. Echeverria's opinion was not well-reasoned or well-documented, he rationally concluded that it was not entitled to additional weight based on Dr. Echeverria's status as the miner's treating physician. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; 2009 Decision and Order at 18.

[11] The administrative law judge also reviewed the opinion of Dr. Appakondu at 20 C.F.R. §718.202(a)(4). Dr. Appakondu submitted a July 7, 2005 affidavit, stating that the miner had pneumoconiosis, which was a significant contributing factor to his death. Director's Exhibit 17. During a deposition conducted on November 10, 2006, Dr. Appakondu reviewed additional evidence, including pulmonary function tests conducted in 1993, when the miner stopped working in the mines. Employer's Exhibit 4. Dr. Appakondu indicated that the additional evidence called into question his diagnosis of pneumoconiosis and led him to conclude that pneumoconiosis was not a contributing factor in the miner's death. *Id*. The administrative law judge acted within his discretion in concluding that Dr. Appakondu's opinion does not support a finding of pneumoconiosis. *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); 2009 Decision and Order at 16, 18.

Furthermore, the administrative law judge acted within his discretion in according greatest weight to the opinions of Drs. Jarboe and Dahhan, that the miner did not have pneumoconiosis, based on their qualifications[12] and the fact that their opinions are better supported by the objective evidence of record. *See Jericol*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103 (6th Cir. 1983); 2009 Decision and Order at 18. The administrative law judge reasonably found Dr. Dahhan's opinion to be "very persuasive," noting that Dr. Dahhan: treated the miner for congestive heart failure and cardiomegaly until February or March of 2005; personally reviewed the miner's x-rays; and "persuasively explain[ed] how the [m]iner's medical course was not consistent with a diagnosis of pneumoconiosis." 2009 Decision and Order at 18 n.9; *see Jericol*, 301 F.3d at 713-14, 22 BLR at 2-553; *Williams*, 338 F.3d at 513, 22 BLR at 2-647. We affirm, therefore, the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis based on the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).

Finally, the administrative law judge considered whether the four interpretations of the three CT scans contained in the treatment records were sufficient to establish the existence of pneumoconiosis. The administrative law judge correctly determined that "the CT scan evidence did not yield a finding of pneumoconiosis," as Dr. Tiu, who read all three CT scans, did not "identify pneumoconiosis as a possible diagnosis" and Dr. Wiot, who read the scan dated April 25, 2005, "expressly stated" that the changes he viewed "are not indicative of coal workers' pneumoconiosis." 2009 Decision and Order at 19; Director's Exhibits 24, 30; Employer's Exhibit 1. Thus, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under any of the methods available to her. 2009 Decision and Order at 19; Decision and Order on Remand at 10.

Inasmuch as claimant has failed to establish that the miner had pneumoconiosis, a requisite element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's finding that an award of survivor's benefits is precluded. *See* 20 C.F.R. §718.202(a); 728.205(c); *Brown*, 996 F.2d at 817, 17 BLR at 2-140; Trent *v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[12] The administrative law judge noted that Drs. Jarboe and Dahhan are Board-certified in pulmonary disease. 2009 Decision and Order at 14. In contrast, the administrative law judge noted that Dr. Echeverria completed his internship and residency in internal medicine but his "Board certifications, if any could not be ascertained." *Id*.

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

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge