BRB No. 12-0387 BLA

JUDITH E. TABOR (Widow of CLAXTON D. TABOR) Claimant-Respondent v. WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND, as carrier for POSTAR COAL COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/20/2013 DECISION and ORDER

Appeal of the Decision and Order of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Kathy L. Snyder and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Michelle S. Gerdano (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/carrier (employer) appeals the Decision and Order awarding benefits (2006-BLA-05841) of Administrative Law Judge Robert B. Rae, rendered 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 involves a survivor's claim filed on September 21, 2005. Director's Exhibit 2.

In his Decision and Order, the administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Section 1556 of Public Law No. 111-148 reinstated the Section 411(c)(4) rebuttable presumption. 30 U.S.C. §921(c)(4). Relevant to this survivor's claim, under Section 411(c)(4), if a claimant establishes that the 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 he or she had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis.[1] 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge credited the miner with at least twenty-two years of qualifying coal mine employment,[2] and further found that claimant established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[1] 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 was determined to be eligible to receive 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.

[2] 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, 1-202 (1989) (en banc).

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer argues further that the administrative law judge erred in finding that employer failed to rebut the presumption that the miner's death was due to pneumoconiosis.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments that amended Section 411(c)(4) may not be applied to this case.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 47-55. In addition, employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 43-44. The arguments employer makes are virtually identical to those the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011). We, therefore, reject them here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4-5; *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

We also reject employer's assertion that the application of amended Section 411(c)(4) to this case was premature, because the Department of Labor has yet to promulgate implementing regulations. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Therefore, the administrative

[3] The administrative law judge's findings, that the evidence established at least twenty-two years of qualifying coal mine employment, a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and the existence of clinical pneumoconiosis, are unchallenged on appeal. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

law judge did not err in considering the present claim pursuant to amended Section 411(c)(4).[4]

Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. Because we have affirmed the administrative law judge's findings that claimant established that the miner worked for more than fifteen years in qualifying coal mine employment, and that the miner had a totally disabling respiratory impairment, we further affirm the administrative law judge's determination that claimant invoked the presumption that the miner's death was due to pneumoconiosis at amended Section 411(c)(4).

In order to rebut the amended Section 411(c)(4) presumption, the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment. *See 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). Because employer stipulated to the existence of clinical pneumoconiosis,[5] it cannot rebut the presumption by disproving the existence of pneumoconiosis. Hearing Tr. at 9-10. Therefore, the administrative law judge properly noted that the burden of proof shifted to employer to rebut the presumption by establishing that the miner's death did not arise from his coal mine employment. 30 U.S.C. §921(c)(4); *see Copley*, 25 BLR at 1-89; Decision and Order at 4, 31-33. Accordingly, we reject employer's argument that the administrative law judge failed to apply the proper rebuttal standard. Employer's Brief at 37-41.

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[4] We further reject employer's argument that the administrative law judge erred in failing to provide the parties with notice of the rebuttal standard to be applied, thus depriving employer of the opportunity to develop evidence relevant to the new standard. Employer's Brief at 38-39. The hearing in this case was held on September 22, 2010, well after passage of the recent amendments to the Act. Moreover, at the hearing, the parties acknowledged that the applicability of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), was at issue in this claim. Hearing Tr. at 9. Therefore, as employer had ample opportunity to request additional time to develop evidence in light of the recent amendments, employer has failed to show how it was prejudiced by any delay in notification.

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

Relevant to the issue of whether employer rebutted the amended Section 411(c)(4) presumption, the record contains the miner's death certificate and the medical opinions of Drs. Perper, Oesterling, Bush, Rosenberg, and Beaver. The miner's death certificate, completed by Dr. Radha Krishnan, who attended the miner during his last hospital admission, lists the miner's cause of death as acute respiratory failure and multi-system organ failure caused by pulmonary sepsis, adult respiratory distress syndrome, pulmonary fibrosis, chronic obstructive pulmonary disease (COPD), and coal workers' pneumoconiosis. Director's Exhibit 7. Dr. Perper diagnosed interstitial pulmonary fibrosis (IPF), causally related to the miner's pneumoconiosis, and opined that "coal workers' pneumoconiosis was a [contributing] cause of death and a hastening factor in death both directly through pulmonary destructive involvement and indirectly through the complicating terminal pulmonary embolism." Claimant's Exhibit 1 at 25. In contrast, Drs. Oesterling, Bush, and Rosenberg agreed that the miner suffered from IPF and coal workers' pneumoconiosis, but opined that the IPF was unrelated to coal mine dust exposure, and that the miner's pneumoconiosis was too minimal to have contributed to his death. Employer's Exhibits 10, 11, 13, 16-18, 23, 24. Finally, Dr. Beaver, the autopsy prosector, diagnosed IPF and "anthracosis," but did not directly address whether coal workers' pneumoconiosis contributed to the miner's death. Director's Exhibit 8; Employer's Exhibit 3.

In evaluating the medical evidence, the administrative law judge discounted the opinions of Drs. Oesterling, Bush and Rosenberg, and credited the opinions of Drs. Beaver and Perper. Specifically, the administrative law judge found that the opinions of Drs. Oesterling, Bush, and Rosenberg were "insufficient to prove that the miner's death was not in any way hastened by his pneumoconiosis," and that the opinions of Drs. Oesterling and Bush, as to the severity of the miner's pneumoconiosis, were "vague, equivocal and unpersuasive."[6] Decision and Order at 32, 34. The administrative law judge also found that Dr. Bush's statement, that clinical pneumoconiosis involved no more than one percent of the miner's lung, was "not supported by any evidence whatsoever." Decision and Order at 32-33. In addition, the administrative law judge noted that Drs. Oesterling and Bush are retired from the active practice of medicine, and are not Board-certified in Forensic Pathology, unlike Drs. Beaver and Perper. Decision and Order at 32. In contrast, the administrative law judge found that the opinions of Drs. Beaver and Perper "most convincingly support a finding that the miner's [coal workers' pneumoconiosis] was a significant factor in his death and that it hastened his death,"

[6] The administrative law judge further found that Dr. Oesterling's opinion that a one centimeter nodule could not cause a significant functional change in the miner's lungs "seems close to being 'hostile to the Act.'" Decision and Order at 32. The administrative law judge did not elaborate on this statement, or specifically indicate that he gave less weight to Dr. Oesterling's opinion because it was hostile to the Act.

noting that, in addition to the physicians' qualifications and credentials, Dr. Beaver "was able to address all of the findings more clearly" and that Dr. Perper "provided a thorough analysis of the medical evidence . . . ." Decision and Order at 31 n.20, 32, 34. Finally, noting that the miner's death certificate also supported a finding that pneumoconiosis hastened the miner's death, the administrative law judge concluded that employer failed to establish that the miner's death did not arise from his coal mine employment. Decision and Order at 34.

Employer argues that the administrative law judge erred in finding that it did not establish that the miner's death was unrelated to his pneumoconiosis. Specifically, employer contends that the administrative law judge erred in his treatment of the opinions of Drs. Oesterling, Bush, and Rosenberg. Employer's Brief at 22-25. We agree. While the administrative law judge stated that he discounted the opinions of Drs. Oesterling, Bush, and Rosenberg because their opinions were "insufficient to prove that the miner's death was not in any way hastened by his pneumoconiosis," the administrative law judge did not explain why their opinions were insufficient, or explain what aspects of the opinions of Drs. Oesterling and Bush were vague, equivocal, and unpersuasive. Decision and Order at 32-34. We conclude, therefore, that the administrative law judge's summary findings fail to satisfy the requirements of the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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). Therefore, we must vacate the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, and remand this case for further consideration of the medical opinion evidence relevant to the cause of the miner's death. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

We further agree with employer that, to the extent the administrative law judge discounted the opinions of Drs. Oesterling and Bush because they are retired from the active practice of medicine, and are not Board-certified in Forensic Pathology, unlike Drs. Beaver and Perper, the administrative law judge's determination again lacks sufficient explanation. Decision and Order at 32. Although Drs. Oesterling and Bush retired from active practice in 2008 and 1998, respectively, each maintained an active medical license and consultative practice. Employer's Exhibits 12, 23. Furthermore, both Drs. Oesterling and Bush are Board-certified in Anatomical and Clinical Pathology, and both documented extensive experience in the area of coal workers' pneumoconiosis. Employer's Exhibit 12. On remand, the administrative law judge must explain, pursuant to the APA, why he found the credentials of Drs. Oesterling and Bush to be inferior to those of Drs. Beaver and Perper, based on the status of the physicians' medical practices

at the time they rendered their opinions in this case. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Furthermore, the administrative law judge must explain why the qualifications of Drs. Oesterling and Bush render them less qualified to proffer an opinion as to the cause of the miner's death than Drs. Beaver and Perper. In reconsidering the qualifications of the physicians on remand, the administrative law judge must explain his determinations to credit or discredit the physicians' expertise as it relates to the cause of the miner's death.

Employer additionally argues that the administrative law judge erred in analyzing the opinions of Drs. Beaver and Perper. Employer's Brief at 6-22. The administrative law judge found that the opinions of Drs. Beaver and Perper "most convincingly" supported a finding that the miner's death was due to pneumoconiosis. Decision and Order at 34. However, the administrative law judge did not discuss how Dr. Beaver's, opinion could be construed as a conclusion that the miner died due to pneumoconiosis.[7] Nor did the administrative law judge explain why Dr. Perper's opinion is more convincing than the opinions of Drs. Oesterling, Bush, and Rosenberg. Therefore, on remand, the administrative law judge must explain why he found the opinions of Drs. Beaver and Perper to be well-reasoned and documented, on the issue of death due to pneumoconiosis, and why their opinions were more credible and persuasive than those of Drs. Oesterling, Bush, and Rosenberg. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR 1-162.

Finally, we agree with employer that the administrative law judge failed to provide adequate rationale for his conclusion that "the [miner's]death certificate supports the fact that [the miner's] pneumoconiosis, at the very least, hastened his death." Decision and Order at 34; Employer's Brief at 19-22. Dr. Krishnan completed the miner's death certificate, and attributed the miner's death to acute respiratory failure and multi-system organ failure caused by pulmonary sepsis, adult respiratory distress syndrome, pulmonary fibrosis, COPD, and coal workers' pneumoconiosis. Director's Exhibit 7. Dr. Krishnan, however, provided no explanation for his findings on the miner's death certificate. Although Dr. Krishnan attended the miner during his terminal hospitalization, Dr. Krishnan's treatment notes do not address what role, if any, pneumoconiosis played in the miner's death. Director's Exhibit 15. The United States Court of Appeals for the

[7] During his deposition, Dr. Beaver testified that the autopsy was "limited," that he had "limited knowledge of [the miner's] medical history," and that he "was never asked to [determine] a cause of death" for the purposes of the autopsy. Employer's Exhibit 3 at 33. Dr. Beaver further stated that the miner had "an acute pulmonary embolus," and "that's maybe his cause of death." Employer's Exhibit 3 at 33. Dr. Beaver added that coal workers' pneumoconiosis would not have been "a direct cause and effect" of the miner's pulmonary embolus. Employer's Exhibit 3 at 37.

Fourth Circuit, within whose jurisdiction this case arises, has held that a physician's statement that pneumoconiosis hastened a miner's death, without any additional support or explanation of that conclusion, is insufficient as a basis for such a finding. *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 192, 22 BLR 2-251, 2-264 (4th Cir. 2000). Although the administrative law judge noted that Dr. Krishnan was the miner's attending physician during his last hospitalization, the administrative law judge did not address the reasoning underlying Dr. Krishnan's death certificate findings. Because Dr. Krishnan provided no basis for his findings on the miner's death certificate, we hold that the miner's death certificate is insufficient, standing alone, to support the administrative law judge's conclusion that "pneumoconiosis, at the very least, hastened [the miner's] death." *See Sparks*, 213 F.3d at 192, 22 BLR at 2-264; *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *see also Addison v. Director, OWCP*, 11 BLR 1-68 (1988). Therefore, on remand, the administrative law judge must reconsider what weight to accord to Dr. Krishnan's statements on the death certificate. *See* 5 U.S.C. §557(c)(3)(a); *Wojtowicz*, 12 BLR at 1-165

In light of the above, we affirm the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption, but vacate the administrative law judge's finding that employer did not establish rebuttal of that presumption. On remand, in reconsidering whether the opinions of Drs. Oesterling, Bush, and Rosenberg are sufficient to establish rebuttal, the administrative law judge must consider the credibility of the physicians' explanations, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335 *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Accordingly, the administrative law judge's Decision and Order 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.

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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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BETTY JEAN HALL
Administrative Appeals Judge