BRB No. 13-0217 BLA

SHIRLEY AMBURGEY (Widow of OLIN AMBURGEY) Claimant-Respondent v. GUM BRANCH COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/14/2014 DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand – Award of Benefits (08-BLA-5990) of Administrative Law Judge Larry S. Merck rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2012)(the Act). This case involves a survivor's claim[1] filed on May 1, 2007, and is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with at least thirty years of underground coal mine employment,[2] and found that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable 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).[3] The administrative law judge then considered whether employer rebutted the presumption, by establishing that the miner did not suffer from either clinical or legal pneumoconiosis,[4] or by establishing that his death did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

[1] Claimant is the widow of the miner, who died on February 9, 2007. Director's Exhibit 8.

[2] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (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) (2012). The Department of Labor (DOL) revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[4] "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

The administrative law judge found that employer established that the miner did not have clinical pneumoconiosis, but failed to establish that he did not have legal pneumoconiosis. Specifically, the administrative law judge found that the medical opinions of Drs. Dahhan and Jarboe were not sufficiently reasoned to establish that the miner's chronic obstructive pulmonary disease (COPD) was unrelated to coal mine dust exposure. The administrative law judge therefore determined that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. However, the administrative law judge credited the opinions of Drs. Dahhan and Jarboe that the miner's death was unrelated to pneumoconiosis, but was due to cardiac arrest and respiratory failure caused by aspiration pneumonia. Employer's Exhibits 2-4, 6. The administrative law judge therefore found that employer rebutted the Section 411(c)(4) presumption by establishing that the miner's death did not arise from his coal mine employment. Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board vacated the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption. *Amburgey v. Gum Branch Coal Co.*, BRB No. 11-0231 BLA (Dec. 15, 2011)(unpub.). The Board held that the administrative law judge erred by failing to explain his basis for crediting the death causation opinions of Drs. Dahhan and Jarboe, when neither physician diagnosed the miner with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *Amburgey*, slip op. at 6, citing *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993). Further, the Board held that the administrative law judge failed to explain why he determined that the objective evidence of record supported the death causation opinions of Drs. Dahhan and Jarboe, or why he credited Dr. Jarboe's opinion, when he had specifically determined that Dr. Jarboe expressed views that were contrary to the scientific principles underlying the regulations. *Amburgey*, slip op. at 6. Therefore, the Board remanded the case for the administrative law judge to reconsider whether employer established rebuttal of the Section 411(c)(4) presumption, and to explain his findings.

On remand, the administrative law judge reiterated that the opinions of Drs. Dahhan and Jarboe were not sufficiently reasoned to establish that the miner's COPD was unrelated to his coal mine dust exposure. The administrative law judge therefore found that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. The administrative law judge then considered whether employer established "by a preponderance of the evidence that the [m]iner's death did

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lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

not arise in whole or in part out of dust exposure in [the] [m]iner's coal mine employment. [20 C.F.R.] § 718.305(d)."[5] Decision and Order on Remand at 11. On that issue, the administrative law judge discounted the death causation opinions of Drs. Dahhan and Jarboe, because neither physician diagnosed the miner with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. The administrative law judge therefore found that neither physician's opinion was well-reasoned as to whether pneumoconiosis contributed to the miner's death. Decision and Order on Remand at 13-15. Accordingly, the administrative law judge determined that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner's death was unrelated to dust exposure in coal mine employment, and he awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner's death was unrelated to pneumoconiosis.[6] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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).

[5] The administrative law judge quoted the former version of 20 C.F.R. §718.305. The implementing regulation that was promulgated after the administrative law judge issued his Decision and Order on Remand requires the party opposing entitlement in a survivor's claim to establish "that no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(ii); 78 Fed. Reg. at 59,115. The DOL explained that it revised 20 C.F.R. §718.305 to make the rebuttal standard clearer, not to change it. 78 Fed. Reg. at 59,107 ("The 'in no part' standard the Department has adopted . . . . is intended to simplify and clarify the 'in whole or in part' standard.").

[6] Employer does not challenge the administrative law judge's finding that, because the opinions of Drs. Dahhan and Jarboe were insufficiently reasoned on the issue of legal pneumoconiosis, employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Because claimant invoked the presumption of death 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 out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). To prove that the miner's death did not arise from his coal mine employment, employer had to establish "that no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(ii); 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013).

Employer contends that the administrative law judge erred by finding that it did not establish that the miner's death was unrelated to pneumoconiosis. Specifically, employer contends that the administrative law judge erred in discounting the death causation opinions of Drs. Dahhan and Jarboe because the physicians did not diagnose the miner with legal pneumoconiosis. Employer argues that, because the administrative law judge did not affirmatively find legal pneumoconiosis established, but merely presumed legal pneumoconiosis, he could not discount the opinions of Drs. Dahhan and Jarboe for failing to diagnose legal pneumoconiosis. Employer's Brief at 11-13. Employer's argument lacks merit.

The United States Court of Appeals for the Sixth Circuit rejected a substantially similar argument in a case involving an employer's failure to rebut the Section 411(c)(4) presumption in a miner's claim, by establishing that the miner's total disability was unrelated to pneumoconiosis. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013). In *Ogle*, the Sixth Circuit specifically held that an administrative law judge permissibly discounted the employer's disability causation opinions because its physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that the employer failed to disprove legal pneumoconiosis. *Ogle*, 737 F.3d at 1074 ("The [administrative law judge determined] that it was at least as likely as not that [claimant] suffered from legal pneumoconiosis. The [administrative law judge] did not err in using this determination to discredit the opinions of [employer's physicians], neither of whom diagnosed legal pneumoconiosis.").

For the reasons set forth in *Ogle*, we reject employer's argument. The administrative law judge permissibly discounted the death causation opinions of Drs. Dahhan and Jarboe because neither physician diagnosed the miner with legal pneumoconiosis, contrary to the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. *See Ogle*, 737 F.3d at 1074. The administrative law judge therefore found, as was within his discretion, that the opinions of Drs. Dahhan and Jarboe were not well-reasoned on the issue of whether legal pneumoconiosis contributed to the miner's death. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Employer argues that its physicians' opinions were, in fact, well-reasoned on that issue, Employer's Brief at 13-15, 18, but the

Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that employer failed to establish that the miner's death was unrelated to pneumoconiosis pursuant to Section 411(c)(4). We therefore affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge