



BRB No. 15-0253 BLA

BETTY GREATHOUSE)
(o/b/o GARY D. GREATHOUSE, deceased))

Claimant-Petitioner)

v.)

OLD BEN COAL COMPANY)

and)

DATE ISSUED: 03/10/2016

TRAVELERS CASUALTY & SURETY)

Employer/Carrier-)
Respondents)

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 Pamela J. Lakes,
Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for
claimant.

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

Helen H. Cox (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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand (2009-BLA-5725) of Administrative Law Judge Pamela J. Lakes denying benefits 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 miner's subsequent claim filed on April 17, 2007,² and is before the Board for the second time.

In the initial decision, Administrative Law Judge Stephen M. Reilly credited the miner with twenty-five years of coal mine employment,³ and found that the new evidence did not establish the existence of clinical pneumoconiosis. Judge Reilly also found that the new medical opinion evidence did not establish the existence of legal pneumoconiosis. Judge Reilly, therefore, determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, Judge Reilly denied benefits.

Pursuant to claimant's appeal, the Board held that Judge Reilly erred in considering only whether claimant could establish the existence of pneumoconiosis in order to satisfy the requirements of 20 C.F.R. §725.309. *Greathouse v. Old Ben Coal Co.*, BRB No. 12-0252 BLA (Feb. 19, 2013) (unpub.). Because the miner's prior claim was denied based on his failure to establish any of the elements of entitlement, the Board noted that claimant could also establish a change in an applicable condition of entitlement by demonstrating, through new evidence, that the miner suffered from a totally disabling respiratory or pulmonary impairment. *Id.* The Board, therefore, vacated Judge Reilly's finding pursuant to 20 C.F.R. §725.309, and his denial of benefits. *Id.* The Board also instructed Judge Reilly, on remand, to determine whether claimant was entitled to

¹ Claimant is the surviving spouse of the miner, who died on November 14, 2007. Director's Exhibit 10. Claimant is pursuing the miner's claim. Director's Exhibit 19.

² The miner's initial claim, filed on December 11, 2000, was denied by the district director for failure to establish any of the elements of entitlement. Director's Exhibit 1.

³ The record reflects that the miner's last coal mine employment was in Colorado. Director's Exhibits 1, 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

invocation of the Section 411(c)(4) presumption,⁴ and if so, whether employer could establish rebuttal of the presumption. *Id.*

On remand, because Judge Reilly was unavailable, the case was reassigned, without objection, to Administrative Law Judge Pamela J. Lakes (the administrative law judge). In a Decision and Order on Remand dated March 25, 2015, the administrative law judge found that, because Judge Reilly implicitly found that the new evidence established that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order on Remand at 4. Moreover, because Judge Reilly also credited the miner with twenty-five years of underground coal mine employment, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption. *Id.* at 4-5. Next, despite acknowledging that Judge Reilly had applied an incorrect legal standard, the administrative law judge stated that “extended discussion [was] unnecessary” because Judge Reilly’s factual findings constituted a determination that employer rebutted the Section 411(c)(4) presumption. *Id.* at 4. Specifically, the administrative law judge noted her agreement with Judge Reilly’s finding that “a preponderance of the evidence established that the [m]iner did not suffer from either clinical or legal pneumoconiosis.” *Id.* at 5. The administrative law judge, therefore, found that employer rebutted the Section 411(c)(4) presumption. *Id.* Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), responds that the administrative law judge erred in relying upon Judge Reilly’s findings to support a finding of rebuttal of the Section 411(c)(4) presumption. Therefore, the Director requests that the case be remanded to the

⁴ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled 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); *see* 20 C.F.R. §718.305. In remanding the case, the Board noted that the parties had already been provided with the opportunity to submit additional evidence in light of the change in law that reinstated Section 411(c)(4). *Greathouse v. Old Ben Coal Co.*, BRB No. 12-0252 BLA, slip op. at 4 n.9 (Feb. 19, 2013) (unpub.).

administrative law judge for further consideration. In a reply to the Director's brief, employer reiterates its previous contentions.⁵

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).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,⁶ 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer established rebuttal by establishing that the miner did not have either legal or clinical pneumoconiosis.⁷

In finding that employer established that the miner did not have legal pneumoconiosis, the administrative law judge relied upon Judge Reilly's earlier assessment of the conflicting medical evidence. In the initial decision, Judge Reilly considered the medical opinions of Drs. Istanbuly, Perper, Caffrey, Rosenberg, and Tuteur. Decision and Order at 18. Drs. Istanbuly and Perper opined that the miner suffered from legal pneumoconiosis, in the form of chronic obstructive pulmonary

⁵ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established that the miner had twenty-five years of underground coal mine employment, that the new evidence established a totally disabling respiratory impairment and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2) and 725.309(c), and that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁶ "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). "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).

⁷ Claimant concedes that the miner did not suffer from clinical pneumoconiosis. Claimant's Brief at 5.

disease (COPD)/emphysema due to both coal mine dust exposure and cigarette smoking.⁸ Director's Exhibit 11; Claimant's Exhibits 2, 3, 9. Although Drs. Caffrey, Rosenberg, and Tuteur also diagnosed COPD/emphysema, they attributed the miner's lung disease solely to his cigarette smoking. Employer's Exhibits 1-3, 16, 18-19.

Judge Reilly found that the opinions of Drs. Caffrey, Rosenberg, and Tuteur were better reasoned than the opinions of Drs. Istanbuly and Perper. Decision and Order at 18. Judge Reilly further found that the opinions of Drs. Caffrey, Rosenberg, and Tuteur "support how [the miner's] smoking history caused his COPD." *Id.* Judge Reilly, therefore, found that the medical opinion evidence did not establish the existence of legal pneumoconiosis. *Id.*

Claimant contends that the administrative law judge erred in adopting Judge Reilly's reasoning to find that employer established that the miner did not have legal pneumoconiosis. Claimant's Brief at 8. The Director agrees, noting that Judge Reilly placed the burden on claimant to establish the existence of legal pneumoconiosis, whereas claimant's invocation of the Section 411(c)(4) presumption shifted the burden to employer to establish either that the miner did not have pneumoconiosis or that no part of his total disability was caused by pneumoconiosis. Director's Brief at 4. The Director argues that the administrative law judge adopted Judge Reilly's findings as her own rebuttal analysis without accounting for the changed burden of proof. *Id.* at 5. The Director argues further that, although Judge Reilly credited the opinions of Drs. Caffrey, Rosenberg, and Tuteur, that the miner's COPD and emphysema were unrelated to coal mine dust exposure, Judge Reilly's analysis of those opinions was too cursory to support a determination that the miner did not have legal pneumoconiosis. *Id.* at 4.

Employer replies that Judge Reilly adequately explained the bases for his findings, and that the current administrative law judge reasonably adopted Judge Reilly's determination that the better reasoned medical opinions established that the miner did not have legal pneumoconiosis. In arguing that it met its rebuttal burden, employer quotes Judge Reilly's affirmative finding that the miner's COPD and emphysema did not arise out of coal mine employment.⁹ Employer's Reply Brief at 3.

⁸ Dr. Perper also opined that the miner's lung cancer was attributable to his coal mine dust exposure. Claimant's Exhibits 2, 3.

⁹ Employer relies upon the following findings by Administrative Law Judge Stephen M. Reilly:

I give greater weight to the opinions of Dr. Caffrey, Dr. Rosenberg, and Dr. Tuteur, who explained why [the miner's] COPD and emphysema are related to his smoking history. Dr. Caffrey explained that . . . because he

Upon review, we agree with claimant and the Director that the administrative law judge erred in adopting Judge Reilly's findings as her rebuttal determination that the miner did not have legal pneumoconiosis. The administrative law judge stated that Judge Reilly "found that a preponderance of the evidence established that the [m]iner did not suffer from . . . legal pneumoconiosis . . ." Decision and Order on Remand at 5. Judge Reilly, however, did not state that "a preponderance of the evidence established" that the miner did not have pneumoconiosis. Judge Reilly placed the burden on claimant to establish the existence of pneumoconiosis, and he found that she did not meet that burden. Decision and Order at 15-16, 22. As the Director notes, "it does not necessarily follow that [Judge] Reilly's findings that the medical opinion evidence did not affirmatively establish legal pneumoconiosis are sufficient to establish rebuttal of the presumption by showing the absence of legal pneumoconiosis." Director's Brief at 4; *see Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1481, 13 BLR 2-196, 2-212 (10th Cir. 1989).¹⁰ Once the administrative law judge found that claimant invoked the Section 411(c)(4) presumption, claimant was entitled to a presumption that the miner's diagnosed lung conditions constituted legal pneumoconiosis, and employer bore the burden of rebutting it. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46, 25 BLR 2-549, 2-567-68 (10th Cir. 2014).

did not see enough coal dust present [on the miner's lung biopsy slides] to cause COPD, [the miner's] emphysema was related to his smoking history. Dr. Caffrey also noted that the most common cause of COPD [is] smoking. Dr. Rosenberg explained how [the miner] had the more diffuse form of emphysema associated with smoking and its submicron particles and free radicals. Dr. Tuteur cited [the miner's] improvement in spirometry after he quit smoking as being inconsistent with COPD related to smoking [sic] and cited statistics . . . that smoking miners get COPD more often than non-smoking miners. These well-reasoned opinions support how [the miner's] smoking history caused his COPD. The COPD therefore did not arise out of his coal mine employment and d[id] not constitute legal pneumoconiosis.

Employer's Reply Brief at 3, quoting Decision and Order at 18.

¹⁰ In *Bosco*, the Tenth Circuit held that "[i]t is absurd to conclude that [a miner's] failure to carry the burden of proof on [the issue of the existence of legal pneumoconiosis] renders harmless the failure to provide him with [the Section 411(c)(4)] presumption that would relieve him of that burden." *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1481, 13 BLR 2-196, 2-212 (10th Cir. 1989).

Employer argues that Judge Reilly affirmatively found that the miner's COPD and emphysema did not arise out of coal mine employment, and therefore did not constitute legal pneumoconiosis. Employer's Reply Brief at 3-4. Judge Reilly's analysis of the medical opinions of Drs. Caffrey, Rosenberg, and Tuteur, however, was not sufficient for us to determine that substantial evidence supports the current administrative law judge's finding that employer disproved legal pneumoconiosis. Specifically, although Judge Reilly found that the miner's COPD and emphysema did not arise out of coal mine employment, it is not clear that Judge Reilly applied the concept of "arising out of coal mine employment" when he weighed the medical opinions of Drs. Caffrey, Rosenberg, and Tuteur as to the existence of legal pneumoconiosis.

Specifically, in the definition of legal pneumoconiosis, "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment *significantly related to, or substantially aggravated by, dust exposure in coal mine employment.*" 20 C.F.R. §718.201(b) (emphasis added). A review of the findings quoted by employer, however, does not reflect that Judge Reilly considered whether Drs. Caffrey, Rosenberg, and Tuteur provided credible opinions that the miner's coal mine dust exposure did not contribute to, or aggravate his COPD or emphysema. For example, Judge Reilly indicated that he was persuaded by Dr. Caffrey's statements that not enough coal dust was present "to cause" the miner's COPD, and that smoking is "the most common cause" of COPD. Decision and Order at 18. Judge Reilly did not consider that neither of those statements is necessarily inconsistent with coal mine dust exposure having contributed to, or aggravated, the miner's COPD, along with his smoking. *See* 20 C.F.R. §718.201(b). Judge Reilly's findings with respect to the opinions of Drs. Rosenberg and Tuteur share the same failure by Judge Reilly to address whether coal mine dust exposure substantially aggravated the miner's COPD and emphysema, even if those diseases were also caused by smoking. *Id.* Therefore, the current administrative law judge erred in adopting Judge Reilly's factual findings as her determination that employer disproved legal pneumoconiosis.

The failure of the administrative law judge to properly apply the Section 411(c)(4) presumption compels a remand. Consequently, we must vacate the denial of benefits, and remand this case to the administrative law judge for reconsideration of whether employer has satisfied its burden to establish rebuttal of the Section 411(c)(4) presumption.

On remand, the administrative law judge must conduct an independent analysis of the evidence, and determine whether the opinions of Drs. Caffrey, Rosenberg, and Tuteur are reasoned and documented, and affirmatively establish that the miner did not have legal pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1). Because employer bears the burden of proof on rebuttal, the administrative law judge must determine whether the opinions of Drs. Caffrey,

Rosenberg, and Tuteur are credible,¹¹ regardless of the weight that she assigns to the opinions of Drs. Istanbuly and Perper. *See Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

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

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

¹¹ Claimant and the Director, Office of Workers' Compensation Programs, contend that the opinions of Drs. Caffrey, Rosenberg, and Tuteur are not sufficiently credible to establish that the miner did not suffer from legal pneumoconiosis. These arguments are for the administrative law judge to consider on remand.