

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB Nos. 17-0276 BLA  
17-0276 BLA-A  
17-0341 BLA

BEATRICE JAYNE WHITE )  
(o/b/o and Widow of CARMEL G. WHITE) )

Claimant-Respondent )  
Cross-Petitioner )

v. )

CAYMEN COAL, INCORPORATED )

Employer-Petitioner )  
Cross-Respondent )

DATE ISSUED: 03/30/2018

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 Awarding Benefits and the Decision and Order Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Kate S. O’Scannlain, Solicitor of Labor; Maia S. Fisher, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2012-BLA-05751) and the Decision and Order Awarding Benefits (2013-BLA-05892) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a miner’s claim and a survivor’s claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant<sup>1</sup> cross-appeals the Decision and Order on Remand Awarding Benefits in the miner’s claim. This case involves a miner’s subsequent claim<sup>2</sup> filed on January 24, 2011, which is before the Board for the second time, and a survivor’s claim dated April 29, 2013.<sup>3</sup>

In the initial decision in the miner’s claim, the administrative law judge credited the miner with at least twenty years of coal mine employment. He found, however, that because the miner had fewer than fifteen years of underground coal mine employment or employment in substantially similar conditions, he was not entitled to the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)

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<sup>1</sup> Claimant is the widow of the miner, who died on April 1, 2013. Claimant’s Exhibit 6. In addition to her claim for survivor’s benefits, claimant is pursuing the miner’s claim on behalf of his estate. Hearing Transcript at 4.

<sup>2</sup> This is the miner’s third claim for benefits. The miner’s most recent prior claim, filed on January 24, 2008, was denied by Administrative Law Judge Richard A. Morgan on January 5, 2010, because the miner did not establish any element of entitlement. Director’s Exhibit 3.

<sup>3</sup> Employer’s appeal in the miner’s claim was assigned BRB No. 17-0276 BLA, and its appeal in the survivor’s claim was assigned BRB No. 17-0341 BLA. Claimant’s cross-appeal in the miner’s claim was assigned BRB No. 17-0276 BLA-A. By Order dated September 18, 2017, the Board consolidated these appeals for purposes of decision only.

(2012).<sup>4</sup> Addressing whether claimant could establish entitlement without the presumption, the administrative law judge found that claimant established that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish that the miner's total respiratory or pulmonary disability was caused by his legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). He therefore denied benefits.

On appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that the miner had a totally disabling respiratory or pulmonary impairment, as well as his crediting of Dr. Rasmussen's opinion over those of Drs. Zaldivar and Basheda to find that the miner had legal pneumoconiosis<sup>5</sup> in the form of emphysema due to coal dust exposure.<sup>6</sup> The Board vacated the administrative law judge's finding that claimant failed to establish disability causation, however, as he did not set forth a rationale for his differing findings as to the probative value of Dr. Rasmussen's opinion on the issues of legal pneumoconiosis and disability causation, and did not resolve the conflict in the opinions of Drs. Rasmussen, Zaldivar, and Basheda.

The Board further affirmed the administrative law judge's finding that claimant failed to establish that the miner's years of surface coal mine employment were in conditions substantially similar to those in an underground mine, but held that he did not adequately explain his determination that the miner's underground employment at Westmoreland Coal Company (Westmoreland) ended in 1969. The Board therefore vacated his finding of four years of underground coal mine employment at Westmoreland and remanded the case for him to reevaluate the evidence and to reconsider whether claimant established the fifteen years of underground coal mine employment necessary to invoke the Section 411(c)(4) presumption.

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<sup>4</sup> Pursuant to Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he 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 also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

<sup>5</sup> "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).

<sup>6</sup> The Board also affirmed the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

If the administrative law judge determined that claimant was entitled to the presumption on remand, the Board instructed him to reconsider the evidence relevant to rebuttal of the presumption, with the burden of proof on employer. Based on its affirmance of the finding that claimant's emphysema was legal pneumoconiosis, the Board held that employer was precluded from establishing rebuttal by disproving the existence of pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). Nevertheless, the Board instructed the administrative law judge to determine whether employer established that the miner's interstitial pulmonary fibrosis was not significantly related to, or substantially aggravated by, his coal dust exposure. The Board also instructed the administrative law judge to determine whether employer affirmatively established that the miner did not have clinical pneumoconiosis,<sup>7</sup> because that finding was necessary to consider whether employer satisfied its burden of establishing that no part of the miner's respiratory or pulmonary total disability was caused by clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). With respect to disability causation, the Board instructed the administrative law judge to specifically assess whether employer established that clinical pneumoconiosis and legal pneumoconiosis in the form of bullous emphysema and/or interstitial pulmonary fibrosis played no part in the miner's respiratory or pulmonary total disability.

If invocation of the Section 411(c)(4) presumption was not established on remand, however, the Board instructed the administrative law judge to reassess the evidence relevant to disability causation at 20 C.F.R. §718.204(c), with the burden of proof on claimant to establish that pneumoconiosis was a substantially contributing cause of the miner's disability. *White v. Caymen Coal, Inc.*, BRB Nos. 15-0336 BLA and 15-0336 BLA-A (June 22, 2016) (unpub.).

In his Decision and Order dated January 27, 2017, which is the subject of the current appeal in the miner's claim, the administrative law judge credited the miner with 18.74 years of underground coal mine employment and found that claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. He further found that the miner's interstitial pulmonary fibrosis was not due to coal dust exposure, and also found that employer disproved the presumed existence of clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(B). The administrative law judge concluded, however, that employer failed to rebut the presumption by proving either that

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<sup>7</sup> "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).

the miner's bullous emphysema was not legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), or that it played no part in the miner's disability at 20 C.F.R. §718.305(d)(1)(ii), and he awarded benefits in the miner's claim accordingly.

In a separate Decision and Order in the survivor's claim issued on February 28, 2017, the administrative law judge found that claimant was automatically entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), based on the award of benefits in the miner's claim.<sup>8</sup>

In the present appeal in the miner's claim, employer contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits, and cross-appeals, contending that if the award of benefits is vacated the administrative law judge should reconsider whether employer disproved the existence of clinical pneumoconiosis. Employer did not file a response to claimant's cross-appeal. The Director, Office of Workers' Compensation Programs (the Director), did not file a response brief in either appeal of the miner's claim.<sup>9</sup>

On appeal in the survivor's claim, employer argues that the administrative law judge erred in awarding benefits under Section 932(*l*) before the award of benefits in the miner's claim became final. Employer disagrees with the Board's decision in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014), and asks the Board to reconsider its decision therein. Claimant responds in support of the award of benefits. The Director filed a response brief, urging the Board to reject employer's argument that Section 932(*l*) is inapplicable.

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.<sup>10</sup> 33 U.S.C. §921(b)(3), as incorporated by 30

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<sup>8</sup> Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

<sup>9</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least fifteen years of qualifying coal mine employment, and that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>10</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 5.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

### **The Miner’s Claim**

Because claimant invoked the Section 411(c)(4) presumption and the Board previously affirmed the finding that the miner’s bullous emphysema was legal pneumoconiosis, the only relevant issue to be resolved is whether employer disproved disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii). Employer therefore has the burden to establish that no part of the miner’s respiratory or pulmonary total disability was caused by his legal pneumoconiosis/bullous emphysema.

Employer challenges the administrative law judge’s evaluation of the medical opinion evidence in finding that it failed to rebut the presumed fact that the miner’s disability was due to pneumoconiosis. As the administrative law judge found that the miner’s reduced diffusing capacity was the primary basis for his finding of total disability, Decision and Order on Remand at 16, employer argues that the administrative law judge erred in crediting Dr. Rasmussen’s opinion over those of Drs. Zaldivar and Basheda regarding the etiology of the miner’s reduced diffusing capacity. Employer asserts that Dr. Rasmussen’s opinion is not sufficient to support an award of benefits, and that the administrative law judge’s analysis of the opinion is confusing, contradictory, and in violation of the Administrative Procedure Act.<sup>11</sup> Employer further maintains that the administrative law judge failed to provide a valid basis for rejecting the opinions of Drs. Zaldivar and Basheda, and failed to comply with the Board’s remand instructions.<sup>12</sup> Employer’s Brief at 10-24. We disagree.

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<sup>11</sup> The Administrative Procedure Act 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).

<sup>12</sup> The Board previously affirmed the administrative law judge’s finding that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a) by proving that coal dust exposure was a significant cause of the miner’s emphysema. To the extent that employer challenges this finding, we decline to address employer’s arguments. The Board’s holding on this issue constitutes the law of the case, and employer has not shown that an exception to the doctrine applies here. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting).

As noted, *supra*, the Board previously affirmed the administrative law judge's basis for discrediting the opinions of Drs. Zaldivar and Basheda that the miner's emphysema was due solely to smoking, because they did not adequately explain why coal dust was not an aggravating factor in the miner's emphysema. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); 20 C.F.R. §718.201(a), (b); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353-54 (4th Cir. 2013); Decision and Order at 26-27. The administrative law judge rationally determined, therefore, that the physicians' failure to diagnose legal pneumoconiosis undermined their opinions that the miner's disabling diffusing capacity impairment was unrelated to legal pneumoconiosis.<sup>13</sup> *See* 20 C.F.R. §718.305(d)(1)(ii); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 25 BLR 2-713 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order on Remand at 17-18. Because the administrative law judge permissibly discredited the only opinions supportive of employer's burden, we affirm his finding that employer failed to prove that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).<sup>14</sup> We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and we affirm the award of benefits in the miner's claim.<sup>15</sup> 30 U.S.C. §921(c)(4) (2012).

### **The Survivor's Claim**

The administrative law judge determined that claimant is automatically entitled to survivor's benefits under Section 932(l). Employer contends that the administrative law judge's application of Section 932(l) was error because the miner's award was not yet final. Employer's Brief (Survivor's Claim) at 3-10. As employer recognizes, however, the Board

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<sup>13</sup> Moreover, although the burden is not on claimant to establish disability causation, the administrative law judge permissibly gave greater weight to Dr. Rasmussen's opinion that the miner's reduced diffusion capacity impairment was due in part to legal pneumoconiosis/emphysema. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). He found that Dr. Rasmussen credibly testified at deposition that emphysema and interstitial fibrosis can each cause the type of reduction in diffusing capacity without obstruction found in the miner, especially when both conditions are present as in the miner's case. Decision and Order on Remand at 16; Claimant's Exhibit 2 at 24-25. As substantial evidence supports the administrative law judge's credibility determination, it is affirmed. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

<sup>15</sup> Because we have affirmed the award of benefits, we need not address claimant's cross-appeal contending that the administrative law judge erred in finding that employer rebutted the presumption of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

has rejected that argument and held that an award of benefits in a miner's claim need not be final for a claimant to receive benefits under Section 932(l). *Rothwell*, 25 BLR at 1-145-47. We decline employer's request to reconsider the Board's holding in *Rothwell* and, therefore, affirm the award of benefits to claimant in the survivor's claim. 30 U.S.C. §932(l).

Accordingly, the Decision and Order on Remand Awarding Benefits and the Decision and Order Awarding Benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge