BRB No. 11-0526 BLA

ZOYA TARASUK (Widow of CHARLEY TARASUK) Claimant-Petitioner v. EASTERN ASSOCIATED COAL CORPORATION and PEABODY INVESTMENT, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/02/2012 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Zoya Tarasuk, Farmersville, Texas, *pro se*.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order Denying Benefits of Administrative Law Judge Lee J. Romero, Jr., rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Claimant filed her claim on September 11, 2009. Director's Exhibit 2. The administrative law judge credited the miner with at least fifteen years of underground coal mine employment, and properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of qualifying coal mine employment, and that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be 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.[2] 30 U.S.C. §921(c)(4). Applying amended Section 411(c)(4), the administrative law judge found invocation of the rebuttable presumption established. However, the administrative law judge found that, because claimant failed to establish the existence of pneumoconiosis, employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that she is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.[3]

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[1] Claimant is the widow of the miner, who died on January 30, 2009. Director's Exhibit 8.

[2] 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 filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, because the miner's claim for benefits was denied. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)); Decision and Order at 4; Director's Exhibit 1.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established thirty-nine years of coal mine employment, with at least fifteen years underground, and that claimant established the existence of a totally

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[4] 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 established invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal. Decision and Order at 34. The administrative law judge further noted that, one method by which employer could establish rebuttal was to establish that the miner did not suffer from pneumoconiosis. Decision and Order at 34. Despite articulating the rebuttal standard, however, the administrative law judge failed to hold employer to that burden. Instead, in weighing the evidence as to the existence of pneumoconiosis, the administrative law judge observed that "claimant has not established" the existence of clinical pneumoconiosis by chest x-ray or biopsy, and that "legal pneumoconiosis is not demonstrated in the instant record," because "the miner's treating physicians . . . never related or associated the Miner's chronic obstructive pulmonary disease and emphysema to coal mine dust exposure." Decision and Order at 14, 19, 32-34. Moreover, the administrative law judge referenced his conclusion that "*claimant failed to establish* by a preponderance of the chest x-rays, biopsy evidence or medical opinions that the Miner suffered from clinical or legal pneumoconiosis," in concluding that "employer . . . has rebutted the presumption . . . in view of the lack of a preponderance of the evidence supporting a contrary conclusion." Decision and Order at 33, 34 (emphasis added). Such a weighing of the evidence is a misallocation of the burden of proof, despite the administrative law judge's conclusion that employer rebutted the presumption. Decision and Order at 34.

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disabling respiratory impairment, and, thus, established invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The miner's last coal mine employment was in West Virginia. Director's Exhibits 3-5. Accordingly, the Board will apply the law 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).

We, therefore, hold that the administrative law judge erred in failing to impose on employer the burden of establishing rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80 (6th Cir. 2011). A finding that claimant failed to establish the existence of pneumoconiosis does not preclude claimant's entitlement to an award of benefits. Because claimant established invocation of the Section 411(c)(4) presumption, it is presumed that the miner had pneumoconiosis and died due to the disease. It becomes employer's affirmative burden to rebut the presumption. 30 U.S.C. §921(c)(4). The administrative law judge's failure to properly apply the Section 411(c)(4) presumption compels us to remand this case. *See Barber*, 43 F.3d at 900, 19 BLR at 2-65. Therefore, we 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. *See Barber*, 43 F.3d at 900, 19 BLR at 2-65; *Rose*, 614 F.2d at 939, 2 BLR at 2-43.

On remand, when considering whether the employer has established rebuttal of the Section 411(c)(4) presumption, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004). Further, in order to avoid the repetition of error on remand, the administrative law judge must clarify his findings regarding the x-ray and biopsy evidence of record. The administrative law judge initially noted, correctly, that the record contains one x-ray that was interpreted as positive for pneumoconiosis, and one x-ray that was interpreted as negative for the disease. Decision and Order at 12. Without explanation, however, the administrative law judge concluded that "a preponderance of the x-ray findings were interpreted as not demonstrating pneumoconiosis." *Id*. at 14. Later, however, the administrative law judge stated that the x-ray evidence was in equipoise. *Id*. at 32. Similarly, the administrative law judge initially found that the better-reasoned biopsy evidence was negative for the existence of pneumoconiosis, Decision and Order at 19, but later stated that the biopsy evidence was in equipoise as to the existence of the disease. *Id*. at 32. On remand, the administrative law judge must reweigh all of the evidence relevant to the existence of pneumoconiosis, and explain his findings in accordance with the requirements of the Administrative

Procedure Act (APA), 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).

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

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge