



BRB No. 15-0386 BLA

BEULAH MATNEY)
(Widow of DELFORD MATNEY))
))
Claimant-Respondent)
))
v.)
))
S & M COAL COMPANY,)
INCORPORATED)
))
and)
))
SUNCOKE ENERGY, INCORPORATED)
))
Employer/Carrier-)
Petitioners)
))
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
))
Party-in-Interest)

DATE ISSUED: 05/19/2016

DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Second Remand (09-BLA-5605) of Administrative Law Judge Pamela J. Lakes awarding 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 survivor's claim¹ filed on July 2, 2008, and is before the Board for the third time.²

In the Board's last decision, upon review of employer's appeal, the Board affirmed the administrative law judge's determination that claimant invoked the presumption that the miner's death was due to pneumoconiosis, set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).³ *Matney v. S & M Coal Co.*, BRB No. 13-0591 BLA, slip op. at 4-13 (Sept. 30, 2014)(unpub.). Moreover, because employer conceded that the miner had clinical pneumoconiosis, the Board noted that employer was precluded from rebutting the presumption by disproving the existence of pneumoconiosis. *Matney*, slip op. at 13 n.13; *see* 20 C.F.R. §718.305(d)(2)(i). However, the Board vacated the administrative law judge's finding that employer did not rebut the presumption by establishing that no part of the miner's death was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). Specifically, the Board remanded the case for the administrative law judge to reconsider the opinions of Drs. Caffrey, Oesterling, and Tuteur on the cause of the miner's death, and more fully explain her weighing of those opinions. *Id.* at 13-16.

¹ Claimant is the widow of the miner, who died on December 29, 2007. Director's Exhibit 8.

² The Board previously set forth the full procedural history of this case. *Matney v. S & M Coal Co.*, BRB No. 13-0591 BLA (Sept. 30, 2014)(unpub.); *Matney v. S & M Coal Co.*, BRB No. 12-0175 BLA (Jan. 22, 2013)(unpub.). In this decision we will focus on the procedural history relevant to the issues raised in the current appeal.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where the miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and had a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(l) of the Act provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l). Claimant cannot benefit from this provision, as the miner's lifetime claim for benefits was denied.

On remand, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption by proving that pneumoconiosis played no part in the miner's death. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer filed a reply brief, reiterating its contentions on appeal.

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.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 invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,⁵ or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(i),(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer failed to establish rebuttal by either method.

In determining whether employer established that no part of the miner's death was caused by pneumoconiosis, the administrative law judge reconsidered the opinions of Drs. Caffrey, Oesterling, and Tuteur. Dr. Caffrey reviewed the miner's autopsy report and slides, and his medical records, and diagnosed the miner with moderate to severe clinical pneumoconiosis, and with legal pneumoconiosis, in the form of moderate to severe emphysema that was due, in part, to coal mine dust exposure. Director's Exhibit

⁴ The miner's last coal mine employment was in Virginia. Director's Exhibit 4. 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).

⁵ "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).

21 (Dr. Caffrey's report at 4). Dr. Caffrey opined that the miner's clinical pneumoconiosis did not cause or hasten his death, and that his legal pneumoconiosis was not a "significant medical problem" or his "major problem." *Id.* at 5-7. Dr. Caffrey attributed the miner's death to renal artery stenosis, hypertension, cardiomegaly, and congestive heart failure (CHF), resulting in either a heart attack or a cerebral vascular accident. *Id.* at 6. Dr. Caffrey opined that the miner would have died when he did even if he had never worked in the coal mines, because coal dust exposure did not cause his renal artery stenosis, hypertension, cardiovascular disease, or CHF. *Id.* at 7.

Dr. Oesterling reviewed the miner's autopsy report and slides, and opined that the miner's clinical pneumoconiosis was "insufficient to alter function" and thus would not have "produced lifetime respiratory symptomatology" and "should not have contributed to" the miner's death. Employer's Exhibit 3 at 5. Dr. Oesterling also opined that the miner's mild to moderate emphysema was due, in part, to coal mine dust exposure but "appear[ed] insufficient to have produced significant alterations in pulmonary function." *Id.* Dr. Oesterling concluded that "coal dust inhalation in no way caused, contributed to or hastened [the miner's] demise." *Id.* at 6.

Dr. Tuteur reviewed the medical evidence of record and opined that the miner's clinical pneumoconiosis was insufficient to impair pulmonary function, or play a role in causing or hastening his death. Employer's Exhibit 1 at 7, 8. Dr. Tuteur did not diagnose legal pneumoconiosis, attributing the miner's emphysema solely to smoking. *Id.* at 6-7. Dr. Tuteur attributed the miner's death to "complications of persistent poorly controlled hypertension, its sequelae, and the side effects of its aggressive treatment."⁶ *Id.* at 6; Employer's Exhibit 4 at 3.

The administrative law judge began her analysis by noting that it was employer's burden to establish that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201, which "includes both clinical and legal pneumoconiosis." Decision and Order on Remand at 12. The administrative law judge found that the

⁶ Dr. Tuteur described the complications of the miner's hypertension, and other conditions leading to his death:

Worsening renal functional insufficiency complicated by episodes of acute more severe renal functional insufficiency, fluid overload, hypertensive heart disease, CHF, and pulmonary edema resulted in alteration of peripheral vascular and cerebral vascular beds, episodes of transient cerebral ischemia, and severe episodes of fluid overload with CHF, pulmonary edema, and respiratory failure.

Employer's Exhibit 1 at 6.

preponderance of the evidence established that the miner had legal pneumoconiosis, in addition to his clinical pneumoconiosis.⁷ *Id.* at 15.

The administrative law judge determined that the opinions of Drs. Caffrey, Oesterling, and Tuteur were not sufficiently reasoned to establish rebuttal. The administrative law judge found that Dr. Caffrey did not adequately explain his opinion, because he characterized the miner's clinical and legal pneumoconiosis as moderate to severe, but did not explain what effect that degree of pneumoconiosis had on the miner's condition. *Id.* at 14. Further, the administrative law judge found that Dr. Caffrey focused more on whether coal mine dust caused the miner's hypertension, renal artery disease, and heart disease, than on whether the miner's clinical and legal pneumoconiosis played a role in his death. With respect to Dr. Oesterling, the administrative law judge found that the physician did not adequately explain his opinion that the miner's legal pneumoconiosis was insufficient to have significantly affected the miner's respiratory function. *Id.* at 14. Turning to Dr. Tuteur's opinion, the administrative law judge found that, because Dr. Tuteur did not diagnose legal pneumoconiosis, "he was not in a position to determine whether it caused the miner's death." *Id.* at 15.

Employer argues that the administrative law judge failed to provide a valid reason for finding that the opinions of Drs. Caffrey, Oesterling, and Tuteur were not sufficiently reasoned to rebut the Section 411(c)(4) presumption.⁸ Employer's Brief at 6-21. We disagree.

Contrary to employer's arguments, the administrative law judge provided valid reasons for her credibility determinations. As the administrative law judge noted, employer must establish that "no part" of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). Given that Dr. Caffrey characterized the miner's clinical and legal pneumoconiosis as moderate to severe, the administrative law judge permissibly found that the physician did not adequately explain his opinion,

⁷ The finding that the evidence established that the miner had legal pneumoconiosis is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983).

⁸ We reject employer's argument that the administrative law judge was bound by her initial finding that the opinions of Drs. Caffrey, Oesterling, and Tuteur were documented and reasoned. Employer's Brief at 8, 12, 15. The Board vacated the administrative law judge's decision, in part, and instructed her to reconsider those opinions and more fully explain her analysis. The administrative law judge was not bound to reach the same conclusions on remand. *See Dale v. Wilder*, 8 BLR 1-119 (1985)(Order).

because “he did not explain the degree to which those [two] factors affected the [m]iner.” Decision and Order on Remand at 14; *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Further, substantial evidence supports the administrative law judge’s determination that Dr. Caffrey focused his reasoning more on whether coal mine dust exposure caused the miner’s hypertension, kidney disease, and heart problems than on whether the miner’s clinical and legal pneumoconiosis played a role in his death. *See* 20 C.F.R. §718.305(d)(2)(ii).

Contrary to employer’s additional contention, the administrative law judge acted within her discretion in finding that Dr. Oesterling did not adequately explain his opinion that the miner’s legal pneumoconiosis appeared insufficient to have significantly affected the miner’s pulmonary function. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31 (4th Cir. 1997). Further, because Dr. Tuteur did not diagnose the miner with legal pneumoconiosis, contrary to the administrative law judge’s finding, the administrative law judge rationally discounted his opinion on the cause of the miner’s death. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015).

The evaluation of whether a medical opinion is reasoned is for the factfinder to decide, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Substantial evidence supports the administrative law judge’s credibility determinations regarding the opinions of Drs. Caffrey, Oesterling, and Tuteur.⁹ Therefore, we reject employer’s allegations of error, and affirm the administrative law judge’s finding that employer failed to rebut the

⁹ We reject employer’s argument that the administrative law judge erred in failing to consider the opinions of Drs. Caffrey, Oesterling, and Tuteur in conjunction with treatment records contained in Director’s Exhibit 1, the record of the miner’s denied claim. Employer’s Brief at 8-12. Employer maintains that those records support its doctors’ opinions that the miner had multiple, long-standing medical problems. *Id.* The record, however, reflects that the medical evidence in the miner’s claim record was not admitted in the survivor’s claim unless the parties designated it as evidence, and no party did so. Hearing Tr. at 5-6; *see Keener v. Peerless Eagle Coal Corp.*, 23 BLR 1-229, 1-241-42 (2007)(en banc). Moreover, employer has not shown how it was prejudiced in this regard. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). The administrative law judge recognized “that the physicians [were] in agreement that the [m]iner had multiple significant health problems. . . .” Decision and Order on Remand at 13. As discussed above, however, the administrative law judge determined that the physician’s opinions were not sufficiently reasoned to rebut the Section 411(c)(4) presumption.

Section 411(c)(4) presumption by establishing that no part of the miner's death was caused by pneumoconiosis.¹⁰ See 20 C.F.R. §718.305(d)(2)(ii). We therefore affirm the award of benefits. 30 U.S.C. §921(c)(4).

We now address claimant's counsel's fee petition, filed in connection with services that were performed before the Board in the prior appeal, BRB No. 13-0591 BLA. See 20 C.F.R. §802.203. Claimant's counsel has filed a complete, itemized statement requesting a total fee of \$1,862.50, representing 1.75 hours of attorney services at \$300.00 per hour for Mr. Joseph E. Wolfe, .50 hours of attorney services at \$225.00 per hour for Mr. Ryan C. Gilligan, and 12.25 hours of legal assistant time at \$100.00 per hour. No objections to this fee petition were filed. Upon review of the fee petition, the Board finds the requested fee in BRB No. 13-0591 BLA to be reasonable in light of the necessary services performed, and approves a fee of \$1,862.50, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

¹⁰ Because the administrative law judge provided valid reasons for discounting the opinions of Drs. Caffrey, Oesterling, and Tuteur, we need not address employer's challenges to the administrative law judge's other reasons for her weighing of those opinions. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is affirmed, and claimant's counsel is awarded a fee of \$1,862.50.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge