BRB No. 13-0112 BLA

RITA VANCE (Widow of GERALD T. VANCE)	)	
Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 11/25/2013
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Richard A. Seid (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.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2011-05448) of Administrative Law Judge Alan L. Bergstrom rendered on both a miner's claim and a survivor's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as

[1] Claimant is the widow of the miner. The miner filed a claim on January 9, 2009. Director's Exhibit 2. On December 21, 2009, a claims examiner issued a Proposed

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge accepted the parties' stipulations to at least 23 years of coal mine employment, the existence of simple pneumoconiosis[2] arising out of coal mine employment and total respiratory disability, and adjudicated the claims pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725.[3] The administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found that claimant was derivatively entitled to survivor's benefits under amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

On appeal, employer challenges the administrative law judge's finding that it failed to rebut the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) by showing the absence of total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive brief in this appeal. However, the Director notes that the

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Decision and Order awarding benefits. Director's Exhibit 32. Employer, however, requested a hearing before the Office of Administrative Law Judges (OALJs) on December 30, 2009. Director's Exhibit 33. While his claim was pending before the OALJs, the miner died on February 26, 2010. Director's Exhibit 41. Claimant filed a survivor's claim on March 24, 2010. Director's Exhibit 57. She also filed a request for consolidation of the miner's claim and the survivor's claim on January 31, 2011. Director's Exhibit 54. The claims were subsequently consolidated. Director's Exhibit 55.

[2] The administrative law judge noted that "[t]he stipulation [that the miner had clinical pneumoconiosis] is also supported by the three autopsy reports submitted in [the miner's] claim, including the two submitted by the [e]mployer, as all three reporting doctors [Drs. Dennis, Swedarsky and Oesterling] diagnosed the [m]iner with simple coal workers' pneumoconiosis. (DX 53; EX 10; EX 11)." Decision and Order at 37.

[3] The Department of Labor (the Department) revised the regulations at 20 C.F.R. Parts 718 and 725 to implement 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*. Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

Board need not resolve employer's argument regarding the correct rebuttal standard for disproving disability causation under amended Section 411(c)(4) because the administrative law judge rejected the opinions of Drs. Castle and Tuteur on credibility grounds.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2013). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010). The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b) (2013), are established.

Initially, we affirm the administrative law judge's application of Section 1556 of the PPACA to the miner's claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. We also affirm the administrative law judge's unchallenged determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on his findings that the miner worked for more than 15 years in underground coal mine employment and had a totally disabling respiratory impairment.[5] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that the miner was employed in the coal mining industry in Virginia. Director's Exhibit 3. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[5] The administrative law judge's length of coal mine employment finding was

Next, we will address employer's assertion that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's assertion is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011*), aff'd sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013)(Niemeyer, J., concurring). Moreover, the Department of Labor (the Department) recently promulgated regulations implementing amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), that make clear that the rebuttal provisions apply to responsible operators. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d). Thus, we reject employer's assertion that the rebuttal provisions do not apply to the miner's claim against it.[6]

Further, we affirm the administrative law judge's unchallenged finding that employer failed to establish the absence of clinical pneumoconiosis.[7] *See Skrack*, 6 BLR at 1-711. Because employer could not prove that the miner did not have clinical pneumoconiosis, the administrative law judge was not required to consider whether employer established the absence of legal pneumoconiosis.[8] We, therefore, affirm the

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based on the parties' stipulation and the record. Decision and Order at 36. Further, the administrative law judge's finding that the miner suffered from a totally disabling respiratory or pulmonary impairment was based on the parties' stipulation and medical evidence. *Id*.

[6] After finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge stated that "the burden of proof shifts to the employer to establish either that the miner did not have pneumoconiosis or that his impairment did not arise out of, or in connection with, coal mine employment." Decision and Order at 37. Thus, in order to meet its rebuttal burden, employer must effectively rule out any contribution to the miner's respiratory impairment by coal mine dust exposure. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

[7] Clinical pneumoconiosis is defined as "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).

[8] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine

administrative law judge's finding that employer failed to rebut the presumption at amended Section 411(c)(4) by the first method of rebuttal.

Employer also contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) by showing the absence of total disability due to pneumoconiosis. The administrative law judge considered the reports of Drs. Castle, Tuteur, and Forehand.[9] The opinions of Drs. Castle and Tuteur, that the miner's disability was caused by cigarette smoke, and not coal dust exposure, are supportive of a finding of rebuttal of the presumption.[10] By contrast, Dr.

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employment." 20 C.F.R. §718.201(b).

[9] Employer asserts that the administrative law judge erred in failing to weigh the autopsy reports of Drs. Swedarsky and Oesterling. Employer maintains that "[the administrative law judge] neglects to meaningfully discuss their opinions in his decision analyzing the conflicting evidence." Employer's Brief at 9. Contrary to employer's assertion, the administrative law judge properly considered the autopsy reports of Drs. Swedarsky and Oesterling in weighing Dr. Forehand's disability causation opinion. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); Decision and Order at 40; Employer's Exhibits 10, 11, 13, 14. The administrative law judge specifically stated: "Drs. Swedarsky and Oesterling, the two pathologists who submitted autopsy reports on behalf of the [e]mployer, opined that the pneumoconiosis they observed in the tissue specimens was too mild to have clinically impacted the [m]iner's lung function. (EX 13 at 30-31; EX 14 at 31). However, both pathologists noted that it was difficult to draw meaningful conclusions about pulmonary function from the tissue specimens alone. (EX 13 at 27-28, 35-36; EX 11 at 5)." Decision and Order at 40. The administrative law judge reasonably found that the opinions of Drs. Swedarsky and Oesterling were speculative with regard to how the miner's pneumoconiosis would have affected pulmonary function. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-652-53 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we reject employer's assertion that the administrative law judge failed to properly consider the autopsy reports of Drs. Swedarsky and Oesterling.

[10] Dr. Castle opined that the miner was not totally disabled as a result of coal workers' pneumoconiosis or a coal mine dust-induced lung disease. Employer's Exhibits 1, 15. Rather, Dr. Castle opined that the miner was totally disabled as a result of a tobacco smoke-induced airway obstruction due to pulmonary emphysema. *Id*. Similarly, Dr. Tuteur opined that the miner's disability was due to severe chronic obstructive pulmonary disease related to the inhalation of tobacco smoke. Employer's Exhibit 8. Dr. Tuteur further opined that the miner's disability was not caused, in whole or in part, by pneumoconiosis or the inhalation of coal mine dust. *Id*.

Forehand's opinion, that coal mine dust exposure and cigarette smoke contributed to the miner's disability,[11] does not support rebuttal of the presumption. The administrative law judge gave "high" probative weight to Dr. Forehand's opinion "[b]ased on [the doctor's] credentials and his documented reasoning that is not hostile to the Act or inconsistent with the findings in this claim." Decision and Order at 40. Conversely, the administrative law judge gave "low" probative weight to the opinions of Drs. Castle and Tuteur because they relied on premises that were inconsistent with the preamble to the 2001 amended regulations and were not well-reasoned. The administrative law judge therefore found that employer failed to establish that the miner's respiratory impairment did not arise out of, or in connection with, employment in the coal mines. Consequently, the administrative law judge found that employer failed to rebut the presumption at amended Section 411(c)(4) by the second method of rebuttal.

Employer asserts that the administrative law judge erred in discounting the disability causation opinions of Drs. Castle and Tuteur. We disagree. The preamble to the 2001 amended regulations sets forth how the Department has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may, within his discretion, evaluate medical expert opinions in conjunction with the Department's discussion of sound medical science in the preamble to these regulations. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012). In this case, the administrative law judge permissibly discounted the disability causation opinions of Drs. Castle and Tuteur because they were inconsistent with the Department's definition of legal pneumoconiosis.[12] *See Looney*, 678 F.3d at 311-12, 25 BLR at 2-125; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Peabody Coal Co. v. Groves*, 277 F.3d

[11] Dr. Forehand opined that "[t]ogether the combination of the effects of coal mine dust exposure and cigarette smoke ha[d] totally and permanently disabled" the miner. Director's Exhibit 10.

[12] In considering Dr. Castle's opinion, the administrative law judge stated that "[Dr. Castle] noted that the pulmonary function tests showed airway obstruction without restriction." Decision and Order at 42. The administrative law judge also noted that "[Dr. Castle] opined that this pattern of impairment is not typically caused by pneumoconiosis and instead attributed it to tobacco-induced emphysema, stating, 'When coal workers' pneumoconiosis causes impairment, it generally does so by causing a mixed, irreversible obstructive and restrictive ventilatory defect.' (EX 1)." *Id*. Regarding Dr. Tuteur's opinion, the administrative law judge stated that, "[l]ike Dr. Castle, [Dr. Tuteur] based his opinion in part on a belief that pneumoconiosis normally causes a restrictive ventilatory defect manifested by reduced lung capacity and impairment of oxygen exchange." *Id*. at 43.

829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); 65 Fed. Reg. 79,938-79,944 (Dec. 20, 2000). The administrative law judge also permissibly discounted the disability causation opinions of Drs. Castle and Tuteur because they did not explain why the miner's coal dust exposure could not have contributed to his respiratory condition. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

In addition, the administrative law judge permissibly discounted Dr. Tuteur's disability causation opinion because Dr. Tuteur improperly focused on generalities and statistics, rather than the miner's specific condition. *See* 65 Fed. Reg. at 79,941 (Dec. 20, 2000); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Moreover, the administrative law judge permissibly discounted Dr. Tuteur's disability causation opinion because the doctor opined that the miner did not suffer from pneumoconiosis, contrary to the administrative law judge's finding on this issue. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Further, the administrative law judge permissibly discounted Dr. Castle's disability causation opinion because Dr. Castle did not adequately explain why partial reversibility in the results of a portion of the miner's pulmonary function studies necessarily eliminated a diagnosis of pneumoconiosis.[13] *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. Additionally, the administrative law judge permissibly discounted Dr. Castle's disability causation opinion because Dr. Castle failed to adequately explain why he believed that the fact that the

[13] The administrative law judge stated that "Dr. Castle also failed to adequately explain why he believed that the FVC reversibility, lung hyperinflation, reduction in diffusing capacity, and exercise-induced hypoxemia revealed by clinical testing were more consistent with tobacco-induced lung disease than pneumoconiosis, as defined by the Act." Decision and Order at 42. The administrative law judge further stated, "His interpretation of the FVC reversibility as inconsistent with pneumoconiosis accorded with his opinion that pneumoconiosis produces an irreversible defect, but he failed to account for the FEV1 data showing that the [m]iner did in fact suffer from an irreversible defect." *Id*.

miner's reduced diffusing capacity could not have been attributed to coal dust exposure necessarily ruled out that exposure as a contributing cause of impairment. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). Finally, the administrative law judge permissibly discounted Dr. Castle's disability causation opinion because it was not well-reasoned, as "Dr. Castle provides no support for his conclusion that the [m]iner's exercise-induced hypoxemia was caused by emphysema resulting from smoking." Decision and Order at 43; *see Clark*, 12 BLR at 1-155. Thus, we reject employer's assertion that the administrative law judge erred in discounting the disability causation opinions of Drs. Castle[14] and Tuteur.

We, therefore, affirm the administrative law judge's finding that employer failed to establish the absence of total disability due to pneumoconiosis.[15]

[14] Employer also asserts that the administrative law judge erred in discounting Dr. Castle's disability causation opinion on the ground that Dr. Castle did not diagnose pneumoconiosis. Because the administrative law judge provided a valid basis for discounting Dr. Castle's opinion, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983), we hold that any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As discussed *supra*, the administrative law judge permissibly discounted Dr. Castle's opinion because it is inconsistent with the Department's definition of legal pneumoconiosis, *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); 65 Fed. Reg. 79,938-79,944 (Dec. 20, 2000), and because it is not well-reasoned, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

[15] Employer additionally asserts that the administrative law judge erred in crediting Dr. Forehand's opinion that coal mine dust exposure and cigarette smoke contributed to the miner's disability. As discussed, *supra*, the administrative law judge permissibly discounted the opinions of Drs. Castle and Tuteur, that the miner's disability was caused by cigarette smoke, and not coal dust exposure. In view of our holding that the administrative law judge permissibly discounted the only opinions of record that could carry employer's burden on rebuttal, we need not address employer's assertion that the administrative law judge erred in crediting Dr. Forehand's opinion. *See Larioni*, 6 BLR at 1-1278.

Because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we affirm the administrative law judge's award of benefits in the miner's claim.

Furthermore, because claimant filed her survivor's claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death, we affirm the administrative law judge's finding that claimant is entitled to receive survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge