BRB No. 14-0208 BLA

EDNA G. SAULS (Widow of DOUGLAS SAULS)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	
Employer-Petitioner	)	DATE ISSUED: 11/04/2014
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Award of Survivor Claim of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

John S. Honeycutt (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Award of Survivor's Claim[1] (11-BLA-6283) of Administrative Law Judge Richard T. Stansell-Gamm, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

[1] Claimant is the surviving spouse of the miner, who died on March 9, 2009. Director's Exhibit 11.

944 (2012) (the Act). This case involves a survivor's claim filed on August 2, 2010. Director's Exhibit 2.

After crediting the miner with more than twenty-five years of underground coal mine employment,[2] the administrative law judge found that the medical opinion evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[4]

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,

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[2] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 7.

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was 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). Qualifying coal mine employment is employment in underground coal mines, or in conditions "substantially similar to conditions in an underground mine." *Id*. The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable, or the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6).

Invocation of the Section 411(c)(4) Presumption-Total Disability

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] The administrative law judge considered the opinions of Drs. Perper, McSharry, and Caffrey.[6] Dr. Perper opined that the miner suffered from a totally disabling respiratory impairment prior to his death. Claimant's Exhibit 4 at 49. Dr. McSharry opined that the majority of the objective studies performed through 2008 did not establish the presence of a totally disabling respiratory impairment, and that while the miner's lung function may have worsened during the last fourteen months of his life, there was no objective evidence available from that period. Employer's Exhibits 4 at 2-3;

[5] The administrative law judge initially found that the pulmonary function and blood gas studies do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii). Decision and Order at 23. Moreover, because there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant could not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 22.

[6] The administrative law judge also considered the medical opinions of Drs. Gregorczk, Maran, Aguirre, Borsch, Morris, Byers, Davis, Moraes, Rosser, Robinette, Berry and Siddiqi, as well as the pathology opinions of Drs. Dennis and Bush. The administrative law judge found that these physicians did not offer an opinion as to whether the miner suffered from a totally disabling respiratory impairment prior to his death, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 38. As employer does not challenge this determination, it is affirmed. *Skrack*, 6 BLR at 1-711.

5 at 8-13. Dr. Caffrey opined that, from a pulmonary perspective, the miner "may well have been" totally disabled from a respiratory impairment before he died. Employer's Exhibit 6 at 27.

The administrative law judge discredited Dr. Perper's opinion as inadequately reasoned and based on a selective analysis of the objective evidence. Decision and Order at 39. The administrative law judge found that Dr. McSharry's opinion was inconclusive and entitled to little probative value. Decision and Order at 39-40. The administrative law judge credited the opinion of Dr. Caffrey as sufficient to establish that the miner was totally disabled prior to his death. Decision and Order at 40.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. McSharry and Caffrey. Specifically, employer asserts that, contrary to the administrative law judge's characterization, Dr. McSharry opined that the miner was not totally disabled. Employer's Brief at 10. We disagree. The administrative law judge found that Dr. McSharry highlighted most of the conflicting evidence regarding total disability, but did not actually reach a final conclusion as to whether the miner was totally disabled prior to his death. Decision and Order at 39. Specifically, the administrative law judge observed that while Dr. McSharry opined that the majority of the objective test results through January 2008 showed normal lung function and gas exchange, Employer's Exhibit 5 at 12-13, and that the miner was apparently not in respiratory distress during an emergency room visit the day before he died, the doctor also stated that the onset of pulmonary edema can be sudden, and that it was "difficult . . . to answer the question of whether the pulmonary symptoms [the miner] was having . . . were worsening over time" because he "[did not] have a lot of information in the last fourteen months of [the miner's] life." Employer's Exhibit 5 at 40. Thus, substantial evidence supports the administrative law judge's finding that, while Dr. McSharry stated that the tests he reviewed established that the miner was not totally disabled in January 2008, he did not reach a final conclusion regarding whether the miner was totally disabled by a respiratory impairment at the time of his death in March 2009. Therefore, we affirm the administrative law judge's determination that Dr. McSharry's opinion is of diminished probative value. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (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).

We further reject employer's contention that the administrative law judge erred in finding that Dr. Caffrey's opinion, that the miner "may well have been" totally disabled prior to death, is too equivocal to be credible. Employer's Brief at 11. The administrative law judge correctly noted that, like Dr. McSharry, Dr. Caffrey discussed all of the conflicting medical evidence of record, and noted that the objective test results

did not support total disability, yet he also agreed that the testing was conducted more than a year before the miner's death. Decision and Order at 40; Employer's Exhibit 6 at 30-31. However, unlike Dr. McSharry, Dr. Caffrey was specifically asked whether he "believ[ed] [the miner] was disabled by a respiratory impairment before he died," and Dr. Caffrey responded that "[h]e may well have been." Employer's Exhibit 6 at 27. A doctor's use of cautious language does not necessarily reflect equivocation; it is the administrative law judge's task to evaluate the strength of the doctor's opinion. *See Perry v. Mynu Coals, Inc*., 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999) (the meaning of an ambiguous word or phrase and the weight to give the testimony of an uncertain witness are questions for the trier of fact); Decision and Order at 39-40. Contrary to employer's contention, the administrative law judge properly considered the qualified nature of Dr. Caffrey's opinion. Decision and Order at 40 n.42; Employer's Brief at 11. The administrative law judge permissibly found that, in light of Dr. Caffrey's conclusions that the miner suffered from severe pulmonary edema and congestion, and ultimately suffered a pulmonary death, Dr. Caffrey's opinion was sufficient to establish that the miner was totally disabled from performing his usual coal mine work, involving heavy labor, before he died. *See Perry*, 469 F.3d at 366, 23 BLR at 2-386; *Mays*, 176 F.3d at 763-64, 21 BLR at 2-606 (an administrative law judge's reading of a physician's ambiguously expressed opinion cannot be overturned unless it can be said that no "reasonable mind" could have interpreted and credited the doctor's opinion as the administrative law judge did); Decision and Order at 40. Employer raises no other challenges to the administrative law judge's finding that Dr. Caffrey's opinion is sufficient to establish that the miner suffered from a totally disabling respiratory impairment. We, therefore, affirm the administrative law judge's findings regarding the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Moreover, as the administrative law judge properly considered the medical opinion evidence, in light of the pulmonary function and arterial blood gas study evidence, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 19-20.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of clinical and legal pneumoconiosis,[7] or by proving that the miner's death did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). To prove that the miner's death did not arise from his coal mine employment, employer had to establish "that no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii); 78 Fed. Reg. at 59,115. The administrative law judge found that employer did not establish rebuttal by either method. Decision and Order at 42-44.

Relevant to the existence of pneumoconiosis, the administrative law judge found, and employer does not dispute, that the pathology evidence unanimously established the existence of simple, clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 16, 20-21; Director's Exhibits 12, 20; Claimant's Exhibit 4; Employer's Exhibits 6, 2. Thus the administrative law judge found that employer failed to disprove the existence of clinical pneumoconiosis. Decision and Order at 42. Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that the miner did not suffer from pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Accordingly, as it is supported by substantial evidence and unchallenged on appeal, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997)**;** *Skrack*, 6 BLR at 1-711**;** Decision and Order at 42.

In evaluating whether employer established that no part of the miner's death was caused by pneumoconiosis, the administrative law judge considered the pathology opinions of Drs. Dennis, Perper, Bush, and Caffrey. The administrative law judge initially found that the medical evidence was in conflict regarding the severity of the miner's pneumoconiosis and its potential impact on the miner's lung function and,

[7] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

consequently, on his death. Decision and Order at 17, 42-43. The administrative law judge observed that, while Drs. Dennis and Perper diagnosed severe, even complicated, pneumoconiosis that was sufficient to cause respiratory dysfunction,[8] Drs. Bush and Caffrey opined that the miner did not suffer from complicated pneumoconiosis, and that his simple pneumoconiosis was too mild to have hastened his death.[9] Decision and Order at 43.

Considering the conflict in opinion, the administrative law judge initially found that while Dr. Dennis had conducted the autopsy and observed the miner's pulmonary system directly, Drs. Perper, Bush, and Caffrey had all reviewed Dr. Dennis' gross pathology findings, as well as his report. Decision and Order at 17. Thus the administrative law judge permissibly declined to accord greater probative weight to the opinion of Dr. Dennis, based on his status as the autopsy prosector. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992) (holding that the administrative law judge did not explain how the autopsy prosector's ability to conduct a gross examination gave him an advantage over reviewing pathologists); Decision and Order at 17. The administrative law judge further found that Drs. Dennis, Perper, Bush and Caffrey had all microscopically examined the same autopsy slides, had all prepared reasoned and documented opinions on this issue, and are equally well-qualified as Board-certified in Anatomic Pathology. Decision and Order at 17. Thus, the administrative law judge found that the probative consensus of Drs. Dennis and Perper, that the miner had complicated pneumoconiosis and severe simple pneumoconiosis, stood in equipoise with

[8] Dr. Dennis, the autopsy prosector, diagnosed moderate to severe pulmonary congestion and edema with chronic pneumonia; progressive massive fibrosis with extensive fibrosis, interstitial variety with black pigment deposition and silica particle impregnation; and emphysematous changes scattered throughout the entire architecture of the lungs. Director's Exhibit 12. Dr. Dennis concluded that the miner died as a result of underlying progressive massive fibrosis, also known as complicated pneumoconiosis. Director's Exhibit 12. Dr. Perper reviewed the autopsy slides and similarly concluded that the miner had complicated pneumoconiosis, on a background of "marked" simple pneumoconiosis, that hastened his death. Claimant's Exhibit 4 at 54.

[9] Dr. Bush opined that no more than three percent of the miner's lung tissue had been destroyed by his simple pneumoconiosis, and that the miner's death was due to chronic interstitial lung disease and subpleural changes characteristic of rheumatoid arthritis, with superimposed massive acute pulmonary edema. Employer's Exhibit 2. Dr. Caffrey opined that less than two percent of the lung tissue samples he saw were occupied by coal workers' pneumoconiosis, and that the miner's death was due to interstitial lung disease associated with the miner's long standing rheumatoid arthritis. Employer's Exhibit 6.

the contrary opinions of Drs. Bush and Caffrey, that the miner did not have complicated pneumoconiosis and had only mild simple pneumoconiosis. Finding that there was "little supportable basis for either discrediting, or giving greater probative value to, any particular report," the administrative law judge found that the pathology evidence is "inconclusive" regarding the existence of complicated pneumoconiosis,[10] and the severity of the miner's simple coal workers' pneumoconiosis. Decision and Order at 17-18. Because it is both within the administrative law judge's discretion and unchallenged on appeal, this finding is affirmed. *See Lane*, 105 F.2d at 174, 21 BLR at 2-48**;** *Skrack*, 6 BLR at 1-711**;** Decision and Order at 17.

Relevant to the cause of the miner's death, the administrative law judge found that all four physicians "principally relied on diverse pathology assessments" that are "inconsistent" with his own finding that the preponderance of the pathology evidence is inconclusive about the presence of complicated pneumoconiosis and the severity of the miner's simple pneumoconiosis. Decision and Order at 44. Thus, the administrative law judge found that the opinions of Drs. Dennis, Perper, Bush, and Caffrey, concerning the nature and circumstances of the miner's death, all have diminished probative value.[11] Therefore, the administrative law judge found that the opinions of Drs. Bush and Caffrey, that the miner's simple pneumoconiosis was too mild to have contributed to his death, were not sufficient to support employer's burden to establish rebuttal by showing that the miner's death was not due to pneumoconiosis. Decision and Order at 44.

Employer contends that the administrative law judge erred in declining to credit Dr. Caffrey's opinion. Employer asserts that, in contrast to the opinions of Drs. Dennis, Perper, and Bush, that were "appropriately discount[ed]" by the administrative law judge, Dr. Caffrey's opinion is reasoned and documented and, thus, is sufficient to establish

[10] Therefore, the administrative law judge found that claimant did not invoke the irrebuttable presumption of death due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 17.

[11] The administrative law judge also considered the medical opinion of Dr. Gregorczk, that pneumoconiosis and progressive massive fibrosis were underlying causes of the miner's death, and the contrary opinion of Dr. McSharry, that the miner did not have complicated pneumoconiosis and that his simple pneumoconiosis was too mild to affect his lung function. Decision and Order at 43-44; Director's Exhibit 11; Employer's Exhibit 4. The administrative law judge similarly discredited their opinions as contrary to his own findings that the evidence is inconclusive regarding the existence of complicated pneumoconiosis and the severity of the miner's simple pneumoconiosis. Decision and Order at 44. As these credibility determinations are unchallenged, they are affirmed. *Skrack*, 6 BLR at 1-711.

rebuttal.[12] Employer's Brief at 12-13. We disagree. Contrary to employer's argument, the administrative law judge permissibly discredited the opinion of Dr. Caffrey, that the miner did not have complicated pneumoconiosis and that his simple pneumoconiosis was too mild to have contributed to his death, as inconsistent with the conflicting pathology evidence regarding the severity of the miner's pneumoconiosis and its potential impact on the miner's lung 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; *Clark*,12 BLR at 1-155; Decision and Order at 44. In asserting that Dr. Caffrey offered a well-reasoned opinion as to the cause of the miner's death, Employer's Brief at 12-13, employer is asking the Board to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that employer failed to establish that no part of the miner's death was caused by pneumoconiosis pursuant to Section 411(c)(4).

Because claimant established invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge properly awarded benefits. 30 U.S.C. §921(c)(4).

[12] Based on employer's concession, we affirm the administrative law judge's discounting of the opinions of Drs. Dennis, Perper, and Bush. *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order-Award of Survivor Claim is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge