BRB No. 11-0129 BLA

WANDA VANHOOSE (Widow of BRUCE VANHOOSE) Claimant-Respondent v. SHAMROCK PROCESSING COMPANY, INCORPORATED and EMPLOYERS INSURANCE OF WASAU Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/28/2011 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-5790) of Administrative Law Judge Joseph E. Kane 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). Subsequent to the hearing in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4). As claimant[1] filed her survivor's claim on September 14, 2006, the administrative law judge issued an order requesting that the parties file position statements regarding the applicability of amended Section 411(c)(4), and allowed time for the parties to submit supplemental evidence. Subsequently, claimant and the Director, Office of Workers' Compensation Programs (the Director), filed position statements, and employer filed a supplemental medical report.

The administrative law judge accepted the parties' stipulation that the miner had twenty-eight years of coal mine employment, and determined that the miner worked in coal preparation plants for more than fifteen years in conditions that were substantially similar to those in an underground mine. The administrative law judge found that the weight of the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, thus, claimant had successfully invoked the presumption pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the evidence relevant to rebuttal under amended Section 411(c)(4). Specifically, employer contends that the administrative law judge erred in crediting the earlier x-ray evidence and Dr. Myers' 1995 medical opinion, over the more recent evidence of record. Employer asserts that the CT scans and x-rays contained in the miner's treatment records for lung cancer immediately prior to death, and the opinions of Drs. Dahhan and Jarboe, who reviewed the medical records, are more probative and are sufficient to establish rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director has not filed a brief in this appeal.[2]

[1] Claimant is the widow of the miner, who died on August 22, 2006. Director's Exhibit 11.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings of at least fifteen years of qualifying coal mine employment, total respiratory disability

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge should have credited the CT scans and the 2003-2005 x-rays contained in the miner's treatment records, which showed lung cancer and emphysema but did not mention pneumoconiosis, over the earlier positive x-rays of record, to find rebuttal of the presumption of clinical pneumoconiosis established under amended Section 411(c)(4). Employer essentially seeks a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge determined that the CT scans were not verified as to their medical acceptability and relevance, and permissibly concluded that they "neither confirm nor rebut the existence of pneumoconiosis." Decision and Order at 23; *see Webber v. Peabody Coal Co*., 23 BLR 1-123, 135-136 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(*en banc*). After properly acknowledging that the unclassified x-rays contained in the miner's treatment records are admissible pursuant to 20 C.F.R. §725.414(a)(4) and need not comply with the quality standards, the administrative law judge determined that they "do not diagnose coal workers' pneumoconiosis." Decision and Order at 6. However, contrary to employer's suggestion, the administrative law judge was not required to consider x-rays that make no mention of pneumoconiosis as negative for pneumoconiosis; rather, such an inference is committed to the discretion of the administrative law judge. *See Marra v. Consolidation Coal Co.*, 7 BLR -216 (1984). As the administrative law judge determined that the conventional x-rays of record were both classified as positive for pneumoconiosis, and that the record contained no contrary readings, he rationally found that the overall x-ray evidence supported a finding of clinical pneumoconiosis, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), and did not establish rebuttal. Decision and Order at 5, 18, 23; Director's Exhibits 15-28, 16-10.

Employer next contends that the administrative law judge selectively analyzed the medical opinion evidence and provided no valid reason for crediting Dr. Myers' 1994

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pursuant to 20 C.F.R. §718.204(b), and invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[3] The administrative law judge found that the miner's most recent coal mine employment was in Kentucky. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 2 n.1; Director's Exhibit 3.

diagoses of clinical and legal pneumoconiosis, over the contrary opinions of Drs. Dahhan and Jarboe.[4] Employer maintains that Dr. Myers did not consider any of the medical records and diagnostic studies obtained within ten years of the miner's death, whereas Drs. Dahhan and Jarboe possess superior qualifications, reviewed extensive documentation, and found no evidence to support a diagnosis of clinical or legal pneumoconiosis. Thus, employer asserts that a preponderance of the well-reasoned and documented medical opinions of record supports a finding of rebuttal under amended Section 411(c)(4). Employer's arguments lack merit.

In evaluating the conflicting medical opinions of record, the administrative law judge accurately summarized the physicians' conclusions and underlying documentation, and acknowledged that Drs. Dahhan and Jarboe possess superior qualifications.[5]

[4] We reject employer's additional argument that the administrative law judge failed to properly weigh the opinion of Dr. Jurich, the miner's treating physician. Dr. Jurich's progress notes from 1999 to 2006 reported pulmonary symptoms, and the diagnosed conditions included chronic obstructive pulmonary disease (COPD), smoker's bronchitis, rheumatoid arthritis, anemia, lung cancer, and hypoxemia. Emphysema was also reported on CT scans. Director's Exhibit 14. In the discharge summary from the miner's final hospitalization, Dr. Jurich diagnosed black lung, coal workers' pneumoconiosis, pulmonary fibrosis, pneumonia, and hypokalemia. Dr. Jurich listed the causes of the miner's death as: cancer of the lung, lung abscess, "white out" of the lung, emphysema, bronchitis, bronchiolitis, and depression. Director's Exhibit 20 at 2, 4. The administrative law judge acknowledged that Dr. Jurich was the miner's treating physician for the last twenty years of his life and, as such, was familiar with the miner's pulmonary health. However, because the administrative law judge could not determine the basis for Dr. Jurich's diagnosis of clinical pneumoconiosis, he permissibly found that the opinion was entitled to little probative weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, because Dr. Jurich did not indicate whether any of the other diagnosed pulmonary conditions were significantly related to, or substantially aggravated by, dust exposure in coal mine employment, the administrative law judge properly concluded that the opinion was insufficient to establish rebuttal of the presumption of pneumoconiosis or death due to pneumoconiosis under amended Section 411(c)(4), 30 U.S.C. §921(c)(4). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011); Decision and Order at 19-20, 22, 25; Director's Exhibit 20.

[5] Dr. Dahhan found no "medical pneumoconiosis," based on negative x-ray evidence, and diagnosed severe obstructive lung disease caused by smoking. Dr. Dahhan opined that the miner's death was not related to his occupational exposure to coal dust, but was caused by lung cancer, a condition that is not caused by, contributed to, or hastened by the inhalation of coal dust or coal workers' pneumoconiosis. Decision and Order at 22; Employer's Exhibits 1 at 5, 3 at 5. Dr. Jarboe found no evidence of clinical or legal pneumoconiosis, and diagnosed significant pulmonary emphysema by x-ray, and

However, the administrative law judge determined that Dr. Dahhan's opinion "is based on evidence that was submitted in the miner's claim but not properly admitted as evidence in this survivor's claim." Decision and Order at 10, 22. In addressing the impact of 20 C.F.R. §725.414(a)(3)(i), the administrative law judge explained that, because he was unable to distinguish the parts of the report in which Dr. Dahhan considered inadmissible evidence from the parts in which the physician considered admissible evidence, he could not redact the objectionable content. Further, the administrative law judge could not determine the extent of Dr. Dahhan's reliance upon the inadmissible evidence, because the physician stated that his findings were "based on my review of this patient's medical records as described above." Employer's Exhibit 1; Decision and Order at 10. As exclusion of a report is not a favored option, the administrative law judge acted within his discretion in according Dr. Dahhan's opinion little weight. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*); *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004)(*en banc*).

Next, the administrative law judge permissibly discounted Dr. Jarboe's opinion, that there was no x-ray or CT scan evidence of clinical pneumoconiosis, because it conflicted with the administrative law judge's finding that the preponderance of the x-ray evidence supported a finding of clinical pneumoconiosis, and Dr. Jarboe did not review the positive x-ray evidence of record. Decision and Order at 8-9, 20-22; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge also identified various factors that detracted from the credibility of Dr. Jarboe's opinion that the medical evidence did not support a diagnosis of legal pneumoconiosis. Specifically, while the physician remarked that medical records from 1999 and 2000 showed that the miner did not complain of dyspnea on exertion six years after he left coal mine employment, the administrative law judge noted that more recent records reported dyspnea on exertion. As the regulations recognize pneumoconiosis as a latent and progressive disease, the administrative law judge rationally concluded that a diagnosis of legal pneumoconiosis was not precluded. Decision and Order at 22; *see* 20 C.F.R. §718.201(a)(2)(c); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003). Further, Dr. Jarboe stated that there was no pulmonary function study evidence available to confirm the presence of restriction or obstruction, when the administrative law judge determined that the record contained three pulmonary function studies, all producing qualifying values. Dr. Jarboe also noted x-ray evidence of significant pulmonary emphysema, but indicated that when the inhalation of coal dust causes emphysema, there is dust deposition in the lungs, and the presence of at least simple pneumoconiosis. The administrative law judge, however, found that simple pneumoconiosis was established, and noted that the Department of Labor has recognized that COPD and emphysema can be attributed to coal dust exposure even without x-ray

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reversible airways disease not attributable to coal dust exposure. Dr. Jarboe opined that the miner would have died from lung cancer, even if he had never worked as a coal miner. Decision and Order at 20-21; Employer's Exhibit 2.

evidence of clinical pneumoconiosis. Decision and Order at 8-9, 21-22; *see* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,939 (Dec. 20, 2000); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Additionally, Dr. Jarboe indicated that variability in the miner's test results demonstrated a reversible airways disease, and that coal dust exposure does not cause reversible airways disease, but did not explain why a diagnosis of legal pneumoconiosis was necessarily precluded. Decision and Order at 22; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483. In view of the foregoing, the administrative law judge reasonably found that Dr. Jarboe's opinion was "problematic" and entitled to little weight. Decision and Order at 22; *see Rowe v. Director, OWCP*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

By contrast, while the administrative law judge determined that the 1994 opinion of Dr. Myers was not relevant regarding the cause of the miner's death, he permissibly credited the physician's diagnosis of clinical and legal pneumoconiosis, as reasoned and documented, because he found that it was based on, and supported by, the miner's medical, smoking and employment histories, symptoms, examination findings, a positive x-ray, a pulmonary function study showing a moderately severe obstructive defect in ventilation with minimal improvement on bronchodilation, and a blood gas study showing hypoxemia. Decision and Order at 7-8, 20; Director's Exhibit 16; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-551 (6th Cir. 2002).

The determination of whether a physician's report is adequately reasoned and documented is essentially a credibility matter reserved to the discretion of the fact-finder. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the presumption of pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011).

Because Drs. Dahhan and Jarboe did not diagnose pneumoconiosis, the administrative law judge properly found that the record did not contain a reasoned medical opinion sufficient to establish rebuttal of the presumption of death due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and we affirm this finding, as supported by substantial evidence. Decision and Order at 26; *see Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-63 (6th Cir. 1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *see also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Consequently, we affirm the administrative law judge's award of survivor's benefits.

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