

U.S. Department of Labor

Benefits Review Board  
P.O. Box 37601  
Washington, DC 20013-7601



BRB No. 15-0050 BLA

FLORENCE WARD	)	
(Widow of DAVID WARD)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 10/30/2015
	)	
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 on Remand of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Barnhill (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2011-BLA-05349) of Administrative Law Judge Christine L. Kirby, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on March 30, 2010, and is before the Board for the second time. In the administrative law judge's Decision and Order issued on November 20, 2012, she ruled that the depositions of Drs. Dennis, Oesterling, and Bush were not admissible under the evidentiary limitations at 20 C.F.R. §725.414. The administrative law judge then credited the miner with twenty-four years of coal mine employment, which included at least fifteen years of underground coal mine employment, and found that claimant 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 determined, therefore, that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to amended Section 411(c)(4), 30 U.S.C. §921(c)(4).<sup>1</sup> The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in determining that the depositions of Drs. Dennis, Oesterling, and Bush are inadmissible under the evidentiary limitations set forth at 20 C.F.R. §§725.414(a), (c) and 725.457(c). The Board also agreed that the administrative law judge erred in rendering her evidentiary ruling in her Decision and Order, thus depriving employer of the opportunity to establish good cause for the submission of the deposition testimony, pursuant to 20 C.F.R. §725.456, or to redesignate its evidence. Therefore, the Board vacated the administrative law judge's Decision and Order and remanded the case for the administrative law judge to allow the parties to submit medical evidence pursuant to the evidentiary limitations set forth in 20 C.F.R. §§725.414(a), (c) and 725.457(c).<sup>2</sup> The

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<sup>1</sup> Amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if it is established that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(1), (c)(2).

<sup>2</sup> The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to amended Section 411(c)(4), and that employer failed to rebut the presumption by disproving the existence of clinical pneumoconiosis. *Ward v. Island Creek Coal Co.*, BRB No. 13-0105 BLA, slip op. at 3 n.3 (Aug. 20, 2013) (unpub.)

Board instructed the administrative law judge that if, on remand, she admitted the deposition testimony of any of the three pathologists, the administrative law judge should consider the entirety of the physician's opinion, together with the other medical evidence of record, in determining "whether employer rebutted the amended Section 411(c)(4) presumption by proving that the miner's death did not arise out of, or in connection with, dust exposure in the miner's coal mine employment." *Ward v. Island Creek Coal Co.*, BRB No. 13-0105 BLA, slip op. at 7 (Aug. 20, 2013) (unpub.).

On remand, the administrative law judge permitted the parties to redesignate their evidence, subject to the evidentiary limitations at 20 C.F.R. §725.414.<sup>3</sup> Addressing the merits of entitlement in her Decision and Order issued on October 21, 2014, the administrative law judge determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to amended Section 411(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in her analysis of the evidence in finding that employer failed to rebut the amended Section 411(c)(4) presumption by proving that pneumoconiosis played no role in the miner's death. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not intend to participate in this appeal. Employer filed a reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order on Remand must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 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 that the miner's death was due to pneumoconiosis at amended Section 411(c)(4) in this survivor's claim, the burden of proof shifted to employer to establish rebuttal by disproving the existence of both legal

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<sup>3</sup> Employer elected to rely on the depositions of Drs. Oesterling and Bush as its two medical reports and to withdraw Dr. Lockey's previously submitted medical report. Decision and Order on Remand at 2; Employer's Exhibits 6, 7.

<sup>4</sup> The miner's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

and clinical pneumoconiosis,<sup>5</sup> or by proving that the no part of the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143, BLR (4th Cir. 2015). The administrative law judge found that employer did not establish rebuttal under either method. Decision and Order on Remand at 9-10. Employer contends that the administrative law judge erred in her evaluation of the opinions of Drs. Baker, Dennis, Oesterling, and Bush, and challenges the administrative law judge's finding that the opinions of Drs. Oesterling and Bush were insufficient to rebut the presumed fact that the miner's death was due to pneumoconiosis pursuant to amended Section 411(c)(4).

After consideration of the administrative law judge's findings, the arguments raised on appeal, and the evidence of record, we affirm the Decision and Order Awarding Benefits on Remand. The administrative law judge began by providing a comprehensive summary of the autopsy reports and deposition testimonies of Drs. Oesterling and Bush, fully delineating the bases supporting their conclusions that the miner did not have legal pneumoconiosis and that no form of pneumoconiosis contributed to, or hastened, the miner's death. Decision and Order on Remand at 4-5, 9-10; Director's Exhibit 11; Employer's Exhibits 1, 6, 7.

Dr. Oesterling opined that the miner had very mild pneumoconiosis, with no likely respiratory distress due to coal dust exposure, and that coal dust exposure would have in no way hastened, contributed to, or caused the miner's death. Director's Exhibit 11 at 4. He also found evidence of moderately severe emphysema and opined that the emphysematous changes were due solely to cigarette smoking, because he observed the presence of "smokers' macrophages." *Id.* He also opined that the miner's death was primarily caused by a pulmonary embolism. *Id.*; Employer's Exhibit 7. Similarly, Dr. Bush concluded that the miner had mild simple pneumoconiosis, as well as centrilobular emphysema, and that the mild degree of simple pneumoconiosis he saw on the tissue slides did not contribute to the miner's death. Employer's Exhibit 1 at 2. He further described the presence of a large pulmonary infarction and opined that it may have been the cause of death, while the miner's cardiac condition may have also played a role. Employer's Exhibit 6.

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<sup>5</sup> "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).

The administrative law judge correctly observed that Drs. Oesterling and Bush “agreed that the [m]iner had centrilobular emphysema, [and] opined that it could *only* have been due to his smoking and totally discounted any additive contribution by his 24 years of coal mine employment.” Decision and Order on Remand at 13. The administrative law judge then acted within her discretion as fact-finder in determining that Dr. Oesterling’s comment, that he ruled out coal dust inhalation as a cause of the miner’s emphysema based on the presence of smokers’ macrophages, did not constitute an adequate explanation for the exclusion of coal dust exposure as a contributing cause of the miner’s emphysema. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-258 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order on Remand at 13. Similarly, the administrative law judge rationally found that, although Dr. Bush “observed a brown pigment seen in smokers,” when viewing autopsy slides containing emphysematous tissue, “he did not fully explain why [the m]iner’s 24 years of coal dust exposure would not have been an additive factor” in causing his emphysema. Decision and Order on Remand at 13; *see Cochran*, 718 F.3d at 324, 25 BLR 2-258. We affirm, therefore, the administrative law judge’s finding that the opinions of Drs. Oesterling and Bush were insufficient to establish rebuttal of the presumed existence of legal pneumoconiosis because they were not adequately explained.<sup>6</sup> *See Bender*, 782 F.3d at 143; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998).

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<sup>6</sup> Because the administrative law judge provided a valid reason for discrediting the opinions of Drs. Oesterling and Bush, we decline to consider employer’s additional allegations of error regarding her weighing of these opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983). In addition, we need not address employer’s argument that the administrative law judge erred in crediting the opinions of Drs. Baker and Dennis that the miner had legal pneumoconiosis and that pneumoconiosis contributed to his death. Because employer bears the burden of rebutting the amended Section 411(c)(4) presumption, error, if any, in the administrative law judge’s weighing of these opinions is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988). Finally, in light of the administrative law judge’s permissible discrediting of the opinions of Drs. Oesterling and Bush as inadequately explained, employer could not establish rebuttal under any standard, although the appropriate standard is that established by the regulation. 20 C.F.R. §718.305(d)(2)(i), (ii); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). Consequently, it is unnecessary to address employer’s arguments regarding the administrative law judge’s failure to identify the standards she used when determining whether employer rebutted the amended Section 411(c)(4) presumption by the methods set forth in 20 C.F.R. §718.305(d)(2).

With respect to the second method of rebuttal available to employer, the administrative law judge permissibly found that the reasons she provided for discrediting the opinions of Drs. Oesterling and Bush on the issue of the existence of legal pneumoconiosis, also undermined their opinions that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. Decision and Order on Remand at 14; 20 C.F.R. §718.305(d)(2)(ii); *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013). Because the administrative law judge's findings were rational and supported by substantial evidence, we affirm her conclusion that the opinions of Drs. Oesterling and Bush were insufficient to establish rebuttal of the presumed fact of death causation. 20 C.F.R. §718.305(d)(2)(ii). We further affirm, therefore, the administrative law judge's determination that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(2)(i), (ii).

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

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge