

BRB No. 10-0687 BLA

SANDRA A. RIFFE)	
(Widow of EDGAR RIFFE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ROCKY 1, INCORPORATED)	DATE ISSUED: 09/28/2011
)	
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 on Survivor's Claim Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Karin L. Weingart (Spillman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

Paul L. Edenfield (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.

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

PER CURIAM:

Employer appeals the Decision and Order on Survivor's Claim Awarding Benefits (2008-BLA-06018) of Administrative Law Judge Robert B. Rae, issued 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 administrative law judge determined that the miner worked for sixteen years in coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge also determined that claimant was entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as the miner had more than fifteen years of coal mine employment, the survivor's claim was filed after January 1, 2005, and was pending on March 23, 2010, and the evidence established that the miner suffered from a totally disabling respiratory impairment prior to his death. The administrative law judge further found that employer failed to establish rebuttal of the presumption by proving that the miner did not suffer from either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that the miner's death was not hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge awarded benefits, commencing May 2007, the month in which the miner died.

On appeal, employer contends that the administrative law judge erred in failing to find that employer established rebuttal of the amended Section 411(c)(4) presumption. Employer specifically contends that the administrative law judge erred in giving controlling weight to the opinion of Dr. Dy, the autopsy prosector, that the miner's death was hastened by pneumoconiosis, over the contrary opinion of Dr. Tomashefski, that the miner's death was unrelated to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter brief, agreeing with employer that the administrative law judge erred in giving more weight to the opinion of the autopsy prosector, based solely on the fact that he performed a gross examination of the miner's lungs, while Dr. Tomashefski did not.

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.² 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).

In order to establish entitlement to survivor's benefits in a claim filed on or after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment, that the miner's death was due to pneumoconiosis,

¹ Claimant filed her survivor's claim on December 12, 2007. Director's Exhibit 2.

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 West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, or that the miner suffered from complicated pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 718.304; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner's death was due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The amendments also revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner, who was eligible to receive benefits at the time of his or her death, is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.³ 30 U.S.C. §932(l).

We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to invocation of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, we review the administrative law judge's findings with regard to rebuttal of the presumption. In order to meet its burden on rebuttal,⁴ employer must prove, by a preponderance of all relevant evidence: (1) that the miner had neither clinical nor legal pneumoconiosis; or (2) that the miner's death was unrelated to coal dust exposure in his coal mine employment. *See* 30 U.S.C. §921(c)(4).

³ The administrative law judge noted that the miner filed a claim for benefits on March 27, 2000, which was denied by Administrative Law Judge Edward Terhune on May 8, 2003, and that the miner took no action with regard to the denial of his claim. Decision and Order at 2. Thus, claimant is not eligible for automatic survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

⁴ Employer incorrectly states in its brief that claimant must show that the miner had pneumoconiosis and that his death was due to pneumoconiosis. Because claimant invoked the rebuttable presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §932(l), employer bears the burden to establish either that the miner did not have pneumoconiosis or that his death was not due to pneumoconiosis in order to rebut that presumption. *See* 30 U.S.C. §921(c)(4).

The miner in this case died on May 14, 2007, and the death certificate, completed by Dr. Abdul-Jalil, listed the immediate cause of death as asystole due to hypoxia and asphyxiation, secondary to air in the stomach and aspiration of gastric contents. Director's Exhibit 6. Other significant causes of death were listed as heart failure, edema, pulmonary congestion, seizure disorder, chronic lung disease and pneumonia. *Id.*

An autopsy was performed by Dr. Dy on May 15, 2007. Director's Exhibit 7. On gross examination of the miner's lungs, Dr. Dy noted "micromacular anthracotic pneumoconiosis" in the pulmonary parenchyma. *Id.* Under microscopic descriptions, Dr. Dy noted anthracotic dust in the upper lobe of the right lung and an even "greater extent of dust deposit" in the upper lobe of the left lung. *Id.* He indicated that the lower lobe of the left lung showed "confluent nodular fibrosis or a peribronchial lymph node." *Id.* The final pathologic diagnoses were listed as follows: 1) extensive bilateral bronchopneumonia, dependent portions, lower lobe of left lung and remainder of right lung; 2) micromacular anthracotic pneumoconiosis (simple pneumoconiosis) in the left lung and remaining portion of the right lung; 3) visceral pleural fibrosis and dispersed dust presence; and 4) scarring with dust presence, peribronchial lymph nodes. *Id.*

Dr. Tomaszewski reviewed the death certificate, the autopsy report of Dr. Dy and nine slides of lung tissue. Employer's Exhibit 8. He found a mild to moderate degree of centrilobular emphysema, and stated that the "most notable finding in the lung tissue [is] several areas of acute necrotizing hemorrhagic bronchopneumonia." *Id.* Dr. Tomaszewski further noted a "mild degree of black pigment distributed around blood vessels and bronchi, with "only one miniscule (sub-millimeter sized) peribronchiolar black pigment deposit that is possibly consistent with a coal macule." *Id.* Dr. Tomaszewski concluded:

[The miner] did not have coal workers' pneumoconiosis. Among all the slides of lung parenchyma I found only one sub-millimeter sized focus of black pigment which is equivocal for a coal macule. In my opinion, within reasonable medical certainty, this insignificant deposit of pigment, which represents much less than one percent of all the lung parenchyma sampled in this case, is not sufficient for a diagnosis of simple coal workers' pneumoconiosis. If, however, one were to interpret this single focus of pigment as simple coal workers' pneumoconiosis that, in my opinion, would not have caused any respiratory symptoms or respiratory impairment, and is neither a cause of, nor a contributory factor in, [the miner's] death. This minute area of black pigment is essentially an incidental finding at autopsy of no clinical or pathological consequence.

Id. Although Dr. Tomaszewski noted a few silicotic nodules in the juxtabronchial lymph nodes, he opined that the miner did not have silicosis because there were no silicotic nodules present in the lung parenchyma. *Id.* Dr. Tomaszewski further explained that

there was “no special association between the centrilobular emphysema and black pigment deposits or coal macules,” and opined that coal dust did not cause the miner’s emphysema, which he attributed to smoking. *Id.*

In weighing the conflicting evidence, the administrative law judge observed that the autopsy evidence, in comparison to the x-ray and medical opinion evidence,⁵ was the most reliable for determining the presence or absence of pneumoconiosis. Decision and Order at 18. He stated that Dr. Dy’s autopsy report was the most persuasive on the issue of the existence of pneumoconiosis “because it is based on the most complete portrayal of the physical condition of [the miner’s] chest – the entire chest was examined, rather than only a few randomly sampled tissue slides.”⁶ *Id.* In contrast, the administrative law judge found that while Dr. Tomashefski’s qualifications were “impressive,” his opinion was entitled to less weight as Dr. Tomashefski’s analysis “did not conclusively exclude the possibility that the miner suffered from pneumoconiosis.” *Id.* The administrative law judge therefore concluded that employer failed to satisfy its burden to disprove the existence of pneumoconiosis. *Id.* Furthermore, because the administrative law judge found that Dr. Tomashefski did not diagnose coal workers’ pneumoconiosis, he considered Dr. Tomashefski’s opinion, as to the cause of the miner’s death, to be less probative and insufficient to establish rebuttal of the presumption by showing that the miner’s death was unrelated to his coal mine employment. *Id.* at 19-20.

Employer contends on appeal that the administrative law judge mischaracterized Dr. Tomashefski’s opinion, as not ruling out the existence of pneumoconiosis. Employer also argues that the administrative law judge erred in crediting Dr. Dy’s opinion solely because Dr. Dy conducted a gross examination of the miner’s lungs. Employer’s assertions of error have merit. Contrary to the administrative law judge’s finding, that Dr. Tomashefski “did not exclude the possibility of pneumoconiosis,” a review of Dr. Tomashefski’s report reveals that he specifically opined that the miner did not have coal workers’ pneumoconiosis because there was “only one sub-millimeter sized” deposit of black pigment in the lung parenchyma that he considered to be “equivocal for a coal macule.” Employer’s Exhibit 8. Furthermore, after clearly stating that the miner did not have coal workers’ pneumoconiosis, Dr. Tomashefski observed only that if the miner’s

⁵ The record also includes two negative readings for pneumoconiosis of a chest x-ray dated October 28, 2002, a medical report by Dr. Castle, based on his examination of the miner on November 14, 2002, and a report by Dr. Morgan, dated December 2, 2003, based on his review of medical records. Director’s Exhibits 6, 31; Employer’s Exhibits 9, 10. Drs. Castle and Morgan each opined that the miner did not have pneumoconiosis. Employer’s Exhibits 9, 10.

⁶ The administrative law judge noted that the record did not indicate that the slides “were sampled with any apparent particularity or focus.” Decision and Order at 18 n.9.

autopsy results were interpreted to reveal pneumoconiosis, it would be a minimal form of simple pneumoconiosis that played no role in his death. *Id.* Because the administrative law judge has failed to properly characterize Tomashefski's opinion and explain why it is not credible, we vacate his finding that Dr. Tomashefski's opinion is insufficient to establish rebuttal. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984).

Furthermore, we agree with employer that the administrative law judge erred in automatically crediting the opinion of Dr. Dy over the opinion of Dr. Tomashefski as to the existence of pneumoconiosis. An administrative law judge may not credit the opinion of the autopsy prosector solely because the autopsy prosector was the only physician to conduct a gross examination of the body. *Sparks*, 213 F.3d at 191-92, 22 BLR at 2-262; *see also 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). Because the administrative law judge has not adequately explained why Dr. Dy's gross examination of the lung tissue gave him an advantage, over Dr. Tomashefski, in providing a more credible assessment regarding the existence of pneumoconiosis and the cause of the miner's death, we vacate the administrative law judge's finding that employer failed to rebut the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Thus, we vacate the administrative law judge's award of survivor's benefits.

On remand, the administrative law judge must determine whether employer has established rebuttal of the amended Section 411(c)(4) presumption by proving that the miner did not have either clinical or legal pneumoconiosis or, in the alternative, that the miner's death was unrelated to his coal mine employment. In so doing, the administrative law judge should consider all of the relevant evidence,⁷ and take into consideration the comparative credentials of the respective physicians, the explanations for their conclusions, and the documentation underlying their medical judgments, in determining whether the medical reports are sufficiently documented and reasoned. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). If the administrative law judge on remand decides to credit Dr. Dy's opinion, based upon his status as the autopsy prosector, he must provide an adequate rationale for concluding that Dr. Dy's gross examination provided him with an advantage over Dr. Tomashefski's autopsy slides review, under the particular facts of this case. *See Sparks*, 213 F.3d at 191-92, 22 BLR at 2-262. The administrative law judge must also explain the bases for

⁷ The administrative law judge should discuss, on remand, the weight he accords the death certificate and a report by the West Virginia Occupational Pneumoconiosis Board regarding the cause of the miner's death. Director's Exhibit 6; Employer's Exhibit 7.

his credibility determinations in accordance with the Administrative Procedure Act.⁸ *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order on Survivor's Claim Awarding Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁸ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented" 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).