BRB No. 11-0212 BLA

SHIRLEY WELLS (Widow of RONALD J. WELLS)	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY, LLC	)	DATE ISSUED: 09/29/2011
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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 (08-BLA-5262) of Administrative Law Judge Joseph E. Kane (the administrative law judge) awarding benefits on a survivor's claim filed pursuant to the provisions of Title IV 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). The administrative law judge credited the miner with 20 years of coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. After finding that claimant[1] established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), 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) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut such presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the Board should hold the case in abeyance, pending a resolution of the constitutionality of the Patient Protection and Affordable Care Act (PPACA) and the severability of non-health care provisions by the federal courts. Employer also challenges the administrative law judge's finding that employer failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by establishing that the miner did not have legal pneumoconiosis or that the miner's death was not 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 filed a limited response, urging the Board to reject employer's argument that this case should be held in abeyance because the legality of the PPACA is allegedly in doubt. The Director also disagrees with employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Repsher and Fino.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the

[1] Claimant is the widow of the miner. The miner filed a claim on August 16, 1991, which was finally denied by the Department of Labor on February 17, 1992. He died on October 4, 2006. Director's Exhibit 11. Claimant filed her survivor's claim on February 26, 2007. Director's Exhibit 2.

[2] Employer has filed briefs in reply to the response briefs of claimant and the Director, Office of Workers' Compensation Programs (the Director), reiterating its prior contentions.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993).

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. 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's death was due to pneumoconiosis in cases where the claimant has established that the miner had fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).

Initially, we will address employer's contention that the Board should hold the case in abeyance, pending a resolution of the constitutionality of the PPACA and the severability of non-health care provisions by the federal courts. Claimant and the Director argue that this contention should be rejected. We agree. In *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), the Board denied employer's request to hold the case in abeyance pending resolution of the legal challenges to Public Law No. 111-148. Employer's allegation is nearly identical to the allegation that the Board rejected in *Fairman*. We, therefore, reject employer's allegation in this case for the reasons articulated in *Fairman*, 24 BLR at 1-229.

Next, we address employer's contentions on the merits of entitlement.[4] Employer contends that the administrative law judge erred in finding that it failed to establish that the miner did not have legal pneumoconiosis and, thus, that it failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). After considering the opinions of Drs. Fino, Repsher, Houser, and Rasmussen,[5] the

[4] The administrative law judge found no clinical pneumoconiosis.

[5] Dr. Fino opined that the miner's respiratory impairment was caused by cigarette smoking, and not coal dust exposure. Employer's Exhibit 4. Dr. Repsher opined that the miner's chronic obstructive pulmonary disease (COPD) was related to cigarette smoking, and not coal dust exposure. Employer's Exhibit 3. By contrast, Dr. Houser opined that the miner's chronic bronchitis and COPD were related to coal dust exposure and cigarette smoking. Director's Exhibit 14; Employer's Exhibit 1. Similarly, Dr. Rasmussen opined that the miner's chronic lung disease was related to coal dust exposure and cigarette smoking. Claimant's Exhibit 1.

administrative law judge stated that "[t]he only two medical opinions that potentially support rebuttal are the opinions of Drs. Fino and Repsher." Decision and Order at 19. The administrative law judge found that the opinions of Drs. Houser and Rasmussen were entitled to probative weight because they were well-documented and well-reasoned.[6] In addition, the administrative law judge found that Dr. Houser's opinion was entitled to probative weight because of Dr. Houser's status as the miner's treating physician. Conversely, the administrative law judge found that the opinions of Drs. Fino and Repsher were entitled to less weight, because they were poorly reasoned and inconsistent with the definition of legal pneumoconiosis accepted by the Department of Labor (the Department). Hence, based on his reliance on the opinions of Drs. Houser and Rasmussen, the administrative law judge found that the medical opinion evidence did not establish that the miner did not have legal pneumoconiosis.

Employer asserts that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by relying on the preamble to the amended regulations, when weighing the medical opinion evidence relevant to the issue of legal pneumoconiosis because, employer alleges, unlike the regulations, the preamble was not subject to notice and comment, and it is not binding on the Department. We hold that employer's assertion is without merit. The preamble to the amended regulations sets forth the Department's resolution of questions of scientific fact relevant to the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the Department's discussion of sound medical science in the preamble. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], F. 3d , BLR 2- , 2011 WL 1366355 (3rd Cir. 2011). Thus, we reject employer's assertion that the administrative law judge violated the APA by relying on the preamble to the amended regulations, when weighing the medical opinion evidence relevant to the issue of legal pneumoconiosis.

Employer also asserts that the administrative law judge erred in applying the preamble to the amended regulations as a presumption that the miner's coal dust

[6] The administrative law judge noted that Dr. Rasmussen relied on the opinion of Dr. Popa, which was not admitted into the record. Decision and Order at 22. Nevertheless, based on his determination that Dr. Popa's opinion was consistent with Dr. Houser's opinion, which was admitted into the record, the administrative law judge found that the weight of Dr. Rasmussen's opinion was not affected by the doctor's reliance on this inadmissible evidence. *Id*.

exposure caused his obstructive lung disease. Contrary to employer's assertion, the administrative law judge did not treat the preamble as a presumption that all obstructive lung disease is legal pneumoconiosis. Rather, the administrative law judge reasonably consulted the preamble as an authoritative statement of medical principles accepted by the Department, when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Obush*, 24 BLR at 1-125-26. Thus, we reject employer's assertion that the administrative law judge erred in applying the preamble to the amended regulations as a presumption that the miner's coal dust exposure caused his obstructive lung disease.

Employer further asserts that the administrative law judge erred in finding that the opinions of Drs. Fino and Repsher were inconsistent with the preamble to the amended regulations, because they believed that it was possible to differentiate the effects of coal dust exposure from the effects of cigarette smoking. We disagree. Contrary to employer's assertion, the administrative law judge did not discredit the opinions of Drs. Fino and Repsher because they believed that it was possible to differentiate the effects of coal dust exposure from the effects of cigarette. Rather, in considering the opinions of Drs. Fino and Repsher, the administrative law judge stated, "[*a*]*lthough* both doctors believed that it is possible to differentiate the effects of obstructive lung disease caused by smoking from obstructive lung disease caused by coal dust, I find both opinions to be inconsistent with the Act and regulations." Decision and Order at 19 (emphasis added). The administrative law judge then found that Dr. Fino's opinion was inconsistent with the Department's view that coal dust exposure can cause obstructive lung disease.[7] Further,

[7] After noting that Dr. Fino concluded that the amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema in the lungs, the administrative law judge found that Dr. Fino's analysis conflated the issues of clinical pneumoconiosis and legal pneumoconiosis. The administrative law judge noted that clinical pneumoconiosis is characterized by the permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition, while legal pneumoconiosis does not necessarily involve the deposition of coal dust in the lungs. Decision and Order at 19. Further, the administrative law judge noted that, although Dr. Fino acknowledged an article that recognized that emphysema may be present without clinical pneumoconiosis, Dr. Fino also observed that the article did not find "clear-cut" evidence that emphysema or chronic bronchitis due to coal mine dust inhalation affected the rate of decline in lung function. The administrative law judge then stated that "[t]he Department has reviewed the medical literature on this issue and determined that, contrary to Dr. Fino's opinion, the 'overwhelming scientific and medical evidence demonstrate[s] that coal dust exposure can cause obstructive lung disease.'" *Id*. at 20. The administrative law judge therefore found that the basis for Dr. Fino's opinion, that the miner's obstructive lung disease was not caused by his coal dust exposure, was

the administrative law judge found that the opinions of Drs. Fino and Repsher were inconsistent with the Department's view that coal dust exposure can cause clinically significant obstructive lung disease. Thus, employer misconstrued the administrative law judge's analysis of the opinions of Drs. Fino and Repsher. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Consequently, we reject employer's assertion that the administrative law judge erred in finding that the opinions of Drs. Fino and Repsher were inconsistent with the preamble to the amended regulations because, employer alleges, they believed that it was possible to differentiate the effects of coal dust exposure from the effects of cigarette smoking.

Employer additionally asserts that the administrative law judge erred in finding that the opinions of Drs. Fino and Repsher were inconsistent with the preamble to the amended regulations. In considering Dr. Fino's views concerning whether coal mine dust exposure may cause a clinically significant reduction in FEV1 values, the administrative law judge stated that "[Dr. Fino] concluded that there is an average loss of FEV1 in almost all miners, but the average losses are only statistically measureable and not clinically important." Decision and Order at 20. The administrative law judge also stated that "Dr. Repsher made similar statements, specifically stating that average loss of FEV1 is so small that it is not detectable in an individual miner." *Id*. Thus, the administrative law judge stated that "[t]he reasoning provided by Drs. Fino and Repsher is clearly contrary to the Department's determination that 'nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners,' and that 'this causality is [not] merely rare.'" *Id*. at 21. The administrative law judge therefore found that the basis for the opinions of Drs. Fino and Repsher, that the miner's obstructive lung disease was not caused by his coal dust exposure, was not credible. Because the administrative law judge properly found that the opinions of Drs. Fino and Repsher were inconsistent with the preamble to the amended regulations, since they believed that coal dust exposure does not cause clinically significant obstructive lung disease, *Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. 79,940-1, 79,943 (Dec. 20, 2000), we reject employer's assertion that that the administrative law judge erred in discrediting the opinions of Drs. Fino and Repsher.

Employer also asserts that the administrative law judge mischaracterized Dr. Fino's opinion. Specifically, employer asserts that, "[a]ccording to [the administrative law judge], Dr. Fino expressed a view that coal dust exposure does not cause obstructive lung disease." Employer's Brief at 16. Because the administrative law judge provided a valid alternate basis for discrediting Dr. Fino's opinion, *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), namely, he properly found that Dr. Fino's opinion was inconsistent with the preamble to the amended regulations because Dr. Fino

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not credible.

expressed an opinion that coal dust exposure does not cause clinically significant obstructive lung disease, *Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. 79,940-1, 79,943 (Dec. 20, 2000), we hold that any error by the administrative law judge in characterizing Dr. Fino's report is harmless.[8] *Larioni v. Director, OWCP*, 6 BLR 1-1278 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis and, thus, that it failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Finally, employer contends that the administrative law judge erred in finding that employer failed to establish that the miner's death was not due to pneumoconiosis and, thus, that it failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge found that employer did not establish that coal dust played no part in the miner's death. In so finding, the administrative law judge considered a death certificate signed by Dr. White and the opinions of Drs. Fino, Repsher, Houser, and Rasmussen.[9] The administrative law judge stated that "[t]he death certificate in this case would not support rebuttal because it listed the cause (sic) of death as black lung and emphysema." Decision and Order at 23. Further, after noting that Drs. Fino and Repsher opined that coal mine dust exposure did not cause, contribute to, or hasten the miner's death, the administrative law judge stated, "I have already discussed the physician's (sic) reasons for attributing the etiology of the obstruction solely to smoking and found the opinions to be poorly reasoned and insufficient to support rebuttal." *Id*. In addition, the administrative law judge found that the opinions of Drs. Houser and Rasmussen, that the miner's death was the consequence of a chronic lung disease related to coal dust exposure and cigarette smoking, were

[8] Because the administrative law judge properly discredited the only medical opinions of record that could support a finding that the miner did not have legal pneumoconiosis, we need not address employer's contentions with regard to the opinions of Drs. Houser and Rasmussen.

[9] In the death certificate, Dr. White listed the immediate causes of the miner's death as black lung and emphysema. Director's Exhibit 11. With regard to the medical opinions, Dr. Fino opined that coal dust exposure did not cause, or contribute to, the miner's death. Employer's Exhibit 4. Dr. Repsher opined that the miner's death was not caused, contributed to, or hastened, by coal dust exposure. Employer's Exhibit 3. Dr. Houser opined that coal dust exposure hastened the miner's death. Director's Exhibit 14; Employer's Exhibit 1. Dr. Rasmussen opined that the miner's death was a consequence of chronic lung disease related to coal dust exposure and cigarette smoking. Claimant's Exhibit 1.

credible and entitled to probative weight, based on the reasons already discussed. The administrative law judge then stated that "their opinions do not establish that coal dust played no part in the miner's death." *Id*. at 24. The administrative law judge therefore found that "[e]mployer has not established that the miner's death did not arise, in whole or in part, out of coal dust exposure in the miner's coal mine employment." *Id*.

Employer asserts that because the reasons that the administrative law judge gave for discrediting the opinions of Drs. Fino and Repsher, that the miner did not have legal pneumoconiosis, are invalid, the administrative law judge's discrediting of the physicians' opinions, that the miner's death was not due to pneumoconiosis, is also invalid. We disagree. Contrary to employer's assertion, as discussed *supra*, the administrative law judge provided a valid basis for discrediting the opinions of Drs. Fino and Repsher, that the miner did not have legal pneumoconiosis, namely, that he properly found that their opinions were inconsistent with the preamble to the amended regulations because they believed that coal dust exposure does not cause clinically significant obstructive lung disease. *Barrett*, 478 F.3d at 355, 23 BLR at 2-482; *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. 79,940-1, 79,943 (Dec. 20, 2000). Employer raises no additional challenge to the administrative law judge's weighing of the evidence. We, therefore, affirm the administrative law judge's finding that employer failed to establish that the miner's death was not due to pneumoconiosis and, thus, that it failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

In sum, because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by establishing either that the miner did not have legal pneumoconiosis or that the miner's death was not due to pneumoconiosis, we affirm the administrative law judge's award of 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